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Gisela Färber (Hrsg.)

GOVERNING FROM THE CENTER: THE INFLUENCE OF THE FEDERAL/CENTRAL GOVERNMENT ON SUBNATIONAL GOVERNMENTS

Papers Presented at the Conference of the IACFS
September 29 – October 1, 2011 in Speyer

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Preface

In theory, federal states provide for a clear division of competences among the orders (or levels) of government. Federal constitutions determine the distribution of the various tasks as well as the most important institutions and the rules of cooperation among them. Both vertical and horizontal divisions of powers limit the overall power of the state. From the economic point of view, federal constitutions safeguard the efficiency of the supply of public goods by establishing institutionally preset conditions for making political decisions when regional preferences differ and by instituting a horizontal competition among jurisdictions.

In practice, however, federal arrangements in all countries depart from this clear separation of competences, with pervasive formal and informal cooperation in decision-making processes and in the production of public goods. The Federation or "central state" in particular routinely becomes involved in the provision of public goods by subnational governments, affecting their policy initiatives through a variety of federal institutions, measures, or processes. This may lead to a vertical imbalance within the federal system, because the subnational units do not have a similar influence on the policy initiatives of the Federation. The vertical influences tend to be rather indirect – for example, in the field of general economic policy affecting price level and inflation rate, interest rates, wages and the base of revenues and expenditures of the decentralised jurisdictions. They may also involve direct influences or even interventions when specific responsibilities are transferred and when the Federation regulates in detail the conditions for the supply of those public goods that fall within the responsibility of states, provinces, and communities. In some federal states – for example, in Canada – interventions by the Federation may affect local governments, overleaping the provincial/state level, with the Federation oftentimes using financial transfers to accomplish this. But in Germany, for example, the federal Constitution was amended to restrict such interventions by the Federation.

Some federal constitutions expressly introduce contain vertical interventions into their basic construction. One may think, for example, of executive federalism under which the powers of legislation and execution are systematically separated. These constitutional arrangements do not necessarily limit the advantages of the federal division of powers. Shifts in competencies that may be necessary as a result of changes in the economic and social environment are simpler to undertake than under other federal constitutions. But there is

also an inherent danger of over-centralization depending on how the "vertical channels" between the orders of government are understood.

Likewise important are unitary states that are involved in the process of regionalization or devolution. Here the long-standing vertical administrative structures remain alongside the new autonomous regional competences. Administrative tasks that are imposed by the central state "compete" with the regions' own administrative and financial responsibilities. The sub-national orders here are hybrids, combining imposed responsibilities and autonomous responsibilities in a single set of regional and local institutions.

There has been little systematic research into the forms and extent of vertical "interventions" in federal systems, into the reasons for such interventions, their legal base, the institutional patterns they assume, and their positive and negative consequences. The in this research report presented papers of the IACFS conference in Speyer, Germany, from September 29 to October 1, 2011 aim to fill the gap of mainly empirical examination of the topic, both country-specific and comparative.

The conference papers explore the direct and indirect influences of these vertical interventions and consider how such actions of the Federation affect the way in which subnational governments, regional and local, undertake their own responsibilities. The contributions come from various academic disciplines, including constitutional law, political science, administrative science, and public finance/fiscal federalism. They cover various countries, some of them 'real' federal states, other unitary countries with a however considerable degree of decentralisation of power under the label of regionalisation and devolution. They deal with the political institutions and legal rules as well as with the intergovernmental financial relations and therefore provide a very broad insight into the vertical dimension of multi-level 'game of political powers'.

I owe many thanks to all the contributors of the conference, especially to those who helped to intensify the diffusion and the understanding of the very complex formal and informal arrangements in federal and regionalised multilevel states. I also thank Dr. Jürgen Kühl, Minister of Finance of Rhineland-Palatinate, and Dr. Günter Hoos, director of the state vineyard in Neustadt-Mußbach, for the inspiring evening of the wine tasting. And last but not least, I owe infinite gratitude to my secretary Mareke Schröder who was the energetic and stable centre of the organisational part of the conference, and now provided the format and layout of this research report.

Speyer, July 2012 *Gisela Färber*

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What is the Federal Centre?

Michael Burgess and Frédéric Lépine

1. Introduction

One of the most important questions often overlooked in scholarly discourses on federalism and federation is that of the so-called "federal centre". Given the way that this subject is the victim of semantic confusion, it is hardly surprising if we tend to be somewhat complacent about its nature, purpose and meaning. Indeed, this is why we blithely assume that it is self-evident, requiring little explanation and no serious investigation. In general terms this oversight is probably because it is regarded at the outset as synonymous with the *national* or *central* government of the federation. The unconscious assumption is that every state, whether federal or non-federal, has a "centre", usually conceived as a singular political authority, which is usually legitimated by a written constitution and whose principal task is to govern, in different modes, the whole of the territorial state. Yet, as this short chapter will reveal, this is a lazy assumption and it is also a dangerous one because it has the possibility to mislead and confuse researchers who ignore both its theoretical and practical implications.

So when we refer to "governing from the centre" or the influence of "the central (federal) government" upon sub-national governments, which is the subject of the book, what do we mean? How is the phrase "the federal centre" being used? What conception of federal government is implied and what are its empirical and normative implications for the larger study of comparative federalism and federation? If it is meant simply to refer to the government of the whole federation as distinct from the governments of the constituent units that together comprise the federal state, our attention is drawn to the question: 'how is this "centre" organised'? What is its composition, what institutions exist and what actors are involved? This, in turn, propels us into some elemental questions and controversies about the institutional relationships involved, the nature, limits and possibilities of representation (who or what is represented?) and its 'representativeness', and ultimately the legitimacy of the federal government itself. Logically this leads us to see the federal government as a composite government that is an integral part of what is a compound democracy.

The chapter is structured around four short sections that are designed to be vehicles or instruments of exploration which are logically interrelated. These four sections are the following: the point of departure; the idea of the 'non-central' centre in Daniel Elazar's 'matrix model'; the notion of 'hollowing out' the centre in the current mainstream intellectual discourse on state structural reform; and, finally, the relationship between federal government and sub-national governments.

- The point of departure
- Elazar's matrix model of non-centralisation
- The hollowing out of the centre
- The role and position of sub-national governments

It is important to note at the outset that we have tried not to bring any intellectual or ideological presuppositions to the table of this discussion but the price to be paid for this catharsis is a return to some elemental questions. How, then, is the federal centre perceived? We will begin with the point of departure.

2. The Point of Departure

If we want to access the heart of the conceptual debate about the federal centre and its logical descriptive corollary, centralisation or centralising federalism, it is useful to return to the intellectual and practical roots of this question, namely, *The Federalist Papers*. Modern federalism was invented in the United States of America (USA) largely by accident. We must, in other words, resurrect the great constitutional and political debate about the nature of federal government in the late eighteenth century in the USA enshrined in the Philadelphia Convention (1787) and its immediate propaganda aftermath (1788). In short, we must briefly revisit the original conceptual arguments and rehearse some of the controversies about the 'federal centre' as our point of departure. These arguments and controversies, after all, continue to resonate today and they retain their contemporary significance precisely because they remain sources of both normative and empirical judgements.

The nature of the American predicament in the 1780s was the search for a more effective and enduring union of states which could reconcile liberty and autonomy with authority as expressed in notions of treaty, partnership, contract and the reconfiguration of sovereignty. In short, the point of departure was predicated upon the established independence of the original 13 American states which had just fought a war of independence. In consequence, any efforts at all to forge a union would involve what Preston King has called 'a

certain type of centralization'. (King: 24) The previous existence of the first federal union under the Articles of Confederation (1781-89) was treaty-based but had already raised the question of how strong or weak the Continental Congress should be in terms of its capacity to act on behalf of its constituent member states and the short-lived experience of this union seemed to some public men to be one of uncertainty, disunity and impotence.

The key question, then, was to decide whether or not to have a 'United States of America' as a much more binding perpetual union that went beyond mere treaty or simply to eschew union and preserve the hard-won independence of each state.

The drive for closer union between the 13 states so ably pursued by *The Federalist* was therefore a normative recommendation for greater centralisation than existed under the Articles. And in proposing to create a much stronger federal centre of political authority, it suggested something that was not there before. In the language of late eighteenth century political discourse and understanding, it proposed a new form of unitary state (also known as 'national government' but referred to in practice as the 'general government') which was called 'federal'. The narrative has been told and re-told many times and there is no need to provide a more detailed analysis here, but suffice it to note that this quandary lay at the very heart of the public debate between the so-called 'federalists' and the 'anti-federalists' in the quest to find a consensus on the nature of the new compound republic.

In retrospect, the nature of this novel entity evident in the 85 *Federalist Papers* (Hamilton, Jay and Madison) prompted the federalists to put the case for centralisation or a stronger federal centre that would be constrained by popular sovereignty. It is clear therefore that the whole thrust of *The Federalist* was to promote efficient and effective centralised government consistent with the preservation of local state identities. Indeed, the fear of the federalists was not of an overweening centre but on the contrary of a dominant periphery that would likely encroach on the national authorities. The experience of the Articles suggested to the federalists that a weak centre would be tantamount to a form of anarchy in which the states would pursue their own narrow interests at the expense of the larger union – or common – interests. Hamilton was unequivocal about this: 'A weak constitution must necessarily terminate in dissolution, for want of proper powers, or the usurpation of powers requisite for public safety'. (Hamilton, paper 20: 136) The point of departure for Hamilton, Jay and Madison therefore was the practical evidence of the perceived weaknesses and failures of the Articles as the first federal union in the USA.

Our brief survey of the case that was made will assist us in our contemporary thinking about the federal centre and serve to highlight how far such a centre must be a central (composite) but not a single (unitary) government. As

Hamilton reflected in Paper 31, 'all observations founded upon the danger of usurpation, ought to be referred to the *composition* and *structure* of the government, not to the nature or extent of its powers'. (Hamilton, paper 31: 196) The real basis of protection for the constituent state governments in the face of an expanding federal centre resided in the very nature of republican government itself, namely, in the 'due dependence' of the rulers upon the ruled. Madison observed that 'the federal and state governments are in fact but different agents and trustees of the people, instituted with different powers, and designated for different purposes'. (Madison, paper 46: 294) So the federal and state governments were not 'mutual rivals and enemies ... uncontrolled by any common superior'. The ultimate authority 'resides in the people alone' and decisions about whether the state or federal governments would enjoy the greater power rested with them. (Madison, paper 46: 294) Logically this brought the question of sovereignty to the forefront of the debate but since we have already noted that the federalists' conception was one of popular sovereignty, it did not prevent them from dividing competences between the federal and state governments in the bifocal terms of their respective citizenries. So the division of powers between the federal and state governments was clearly not unimportant. Indeed, in many respects it served to reinforce the idea and legitimacy of the federal centre in the eyes of the federalists. The reasoning was quite straightforward. It all depended upon what function the federal centre was expected to perform. Consequently if its function was partial so that it was given specific tasks to perform, rather than assuming the whole panoply of powers and competences, it would remain sovereign only in those areas of decision assigned to it. Hamilton insisted that 'the essential point ... will be to discriminate the objects ... which shall appertain to the different provinces or departments of power'. (Hamilton, paper 23: 155) And King acknowledged that 'although *The Federalist* accepts some notion of 'divided sovereignty', it does so on grounds of practical necessity, not as an ideal; and where it accepts such a notion, it is on the assumption that the centre can and must be fully sovereign in its sphere, which is to say in relation to those objects which define its function as a centre'. (King: 26)

How, then, did *The Federalist* present its defence *against* the national centre? What arguments did it deploy in order to assuage the fears of the anti-federalists? King has identified four distinct areas of defence and has assembled them in descending order of significance: first, defence against centralist tyranny by deriving power from the people as an undifferentiated whole (as opposed to the states); secondly, by dividing and balancing the power of the centre itself; thirdly, by the territorial division of popularly sanctioned government between a national centre and the various constituent state localities; and finally, by dividing up the interests of various sections of the population so that no one of these by itself could automatically prevail. (King: 28-29)

Madison in Paper 51 summarised the overall impact of this list in succinct fashion: 'You must first enable the government to control the governed; and, in the next place, oblige it to control itself. A dependence on the people is no doubt the primary control on the government; but experience has taught man the necessity of auxiliary precautions'. (Madison, paper 51: 322)

What is the contemporary relevance of this brief survey of the federal centre as perceived by the federalists in the late eighteenth century USA? How does it help us to understand 'governing from the centre' and 'the influence of the federal/central government'? The American federal experience suggests many things about this conceptual issue. First, it is clear that both the *composition* and the *structure* of the federal government lie at the core of the question. From the standpoint of the conceptual distinction between federalism and federation, it is obvious that difference and diversity must be represented in some way in the federal centre but that there are many ways in which this can occur. How far, then, are *political identities* integrated in the federal centre? Moreover, the way that the federation is structured in terms of its institutional architecture and its inter-institutional relations can be critical in terms of its political stability and legitimacy. For example, if it is possible to refer to a "federal" centre *in practice* in Spain, are the Autonomous Communities (ACs) adequately represented in it and how far should we construe the Federal Council (Bundesrat) as part of the federal centre in Germany? Secondly, the constitutional division of powers and the sharing of competences bring into sharp focus the empirical question of centralisation and decentralisation. What powers have been allocated to the federal centre and what is or has been the justification for this particular division?

A third conceptual issue that has empirical implications is the real and perceived strengths and the weaknesses of the federal centre. Belgium is an obvious case in point, but so are Bosnia and Herzegovina (BiH) and the European Union (EU) albeit for different reasons. Federalising processes characterise BiH and the EU by their essentially centralising thrust for closer union while some would describe Belgium as confederalising and/or defederalising, a term that incidentally has also been used recently to describe what is happening in the Russian Federation. And finally we should not ignore the *perception* of the federal centre among some Quebecois nationalist elites in Canada. In what is widely recognised as one of the most decentralised federations in the world, there remains nonetheless a strong perception in parts of the francophone Quebec nation that the federal centre in Canada is not only much more centralised than it appears but that it is also predominantly an Anglophone federal centre. In other words federal public policy preferences serve the interests of the Anglophone majority in Canada rather than the francophone majority in Quebec.

These empirical examples serve to underline the continuing contemporary significance of the point of departure about the nature and purpose of the federal centre suggested above. Not for the first time do many aspects of the late eighteenth century debate about federalism in the USA continue to resonate in the early twenty-first century. Let us turn now to look at our second dimension, namely, Elazar's matrix model of federal non-centralisation.

3. The Matrix Model of Daniel Elazar

Another way of looking at the question of whether or not there is a notion of the "centre" in federalism and what it might look like, can be illustrated by reference to a common witticism of Alexandre Marc, the father of 'integral federalism'. This thinker used to say that – in his vision of federalism – power was "everywhere, even in the centre". That remark highlights the idea of a radical *diffusion* of powers within federalism that goes against the idea of a single centre of binding public decisions. At the same time, it reflects the perception of a person living in France and having developed a theory of federalism against the dominant idea of the Jacobin state.

In fact, according to most federalist theories, the relevance of a centre is determined by how far the federal political authority has been built in direct opposition to an existing centre. In other words, the definition of a centre would be formulated through opposition by the periphery, since the centre of decision-making would constitute the jurisdiction to which all the other decision making units would be subordinate, while the federalism of Daniel Elazar would consider the combination of the whole and the parts through self-rule and shared rule (Elazar: 1987, 12). The centre therefore often seems to presuppose the idea of a top-down process of decision making, while the old tradition of federalism goes along with a bottom-up process.

Whatsoever, it is important to consider the centre in a study of federalism since most of the cases studied in the comparative approach are modern states, which are by definition sovereign states. In the modern era, federalism cannot be taken away from the development of the state-centric model featured from the Renaissance with the idea of absolute sovereignty at the centre of the state, and later with the development of the nation-state. Perhaps surprisingly, this integration of the modern state and federalism was mostly consolidated in the writing of the US Constitution in 1787, when the idea of a multi-sovereign federalism through confederation was ignored because of its incapacity to solve the problems of coordination of the new sovereign republics. It might be considered that the integration of federalism in the liberal state doctrine of the USA was at the beginning only a matter of contingency. A large part of the intellectual writings surrounding the Constitution were

about the creation of one liberal and democratic sovereign republic, and federalism was introduced in order to take into account the will of the 13 states constituting this new republic to retain their own integrity. It developed afterwards into a large literature integrating federalism to liberalism and democracy, as it has been shown from *The Federalist,* and as has been discussed above, addressing constantly the question of centralisation. This is a paradox of the American experience: at the same time as it sought a pattern of *non-centralised* political organisation within the republic, it also confined the application of the federal experience to the limits of a sovereign state, which was usually about the *concentration* of absolute power in one locus.

However, the submission of the federalist doctrines to the idea of the sovereign state in general, and to the one of the nation-state in particular, with its goals of homogeneity and self-sufficiency, could not have been avoided as they were the dominant political patterns of the modern era. Moreover, through the functional complexity of societies, there has been a trend toward the centralisation of power, even in states where strong mechanisms of checks and balances had been implemented. In mainstream federalist theories, this trend took the form of the development of so-called "cooperative federalism", which was in opposition the classical form of dual federalism expressed by Kenneth Wheare as different levels of government independent and coordinate (Wheare: 1964).

As an interim conclusion, it could be argued that the concept of the centre might be useful in studying federalism as far as it does concern federal states – or federations – in two specific cases:

- from a political approach, when the federal state is organised through an advanced cooperative federalism.
- from a legal approach, when studying the distribution of competences in a federal state, as they take their origin from one fundamental source, namely, the constitution.

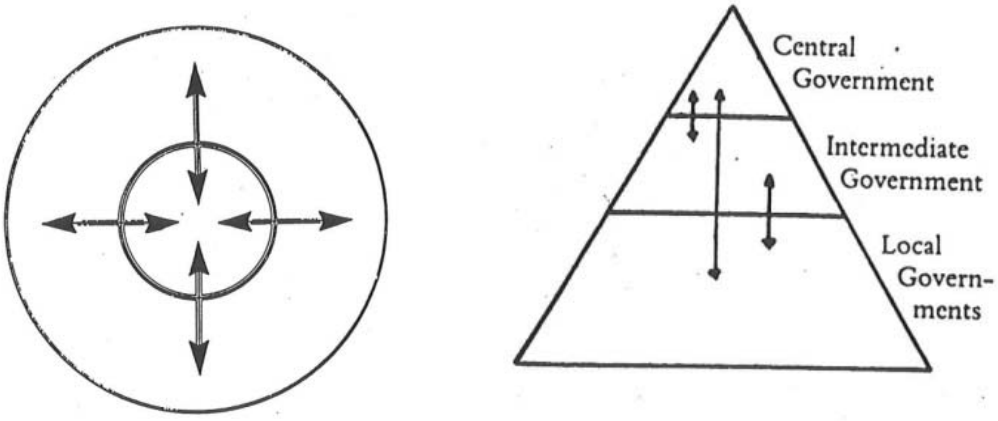
However, it can be said that federalism cannot express itself fully in the patterns of the sovereign state, considering that:

- the very nature of federalism is about the combination of the whole and the parts – or self-rule and shared rule – and not only of their hierarchy, even under a constitution.
- the phenomenon of federalism in either its domestic or its international context is actually of the same nature, basically a contractual one.

3.1 The matrix model

If we now turn to Daniel Elazar's understanding of the centre, we can consider a specific vision of federalism. Elazar raised the question about whether or not the notion of the centre is still relevant to an accurate understanding of federalism in the contemporary world, especially in an era of globalisation and the weakening of the sovereignty of the state. In his last writings, Elazar proposed the idea of a "paradigm shift" from "statism to federalism", with the development of a new way of understanding federalism (Elazar: 1995). The expression of the shift from statism to federalism expresses fully what has just been observed above. Federalism could free itself from the straitjacket of the modern state and express itself fully within the process of globalisation in what Elazar called the 'post-modern' epoch.

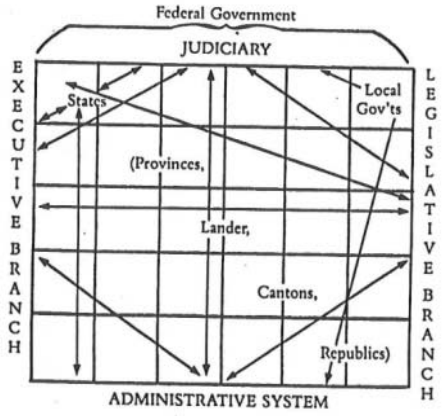
In order to provide a clear illustration of this interpretation of federalism, Elazar went back to a theory of non-centralised federalism, a theory of political relationships that he had developed since 1976, which is "challenging the dominant Jacobin-Marxian view on a number of fronts" (Elazar: 1976, Elazar: 1987, Elazar: 1994). Considering political relationships, Elazar firstly defines the centre-periphery model of the development of polities, where the sovereign power is concentrated in a single centre and reflects the idea of the Jacobin nation-state. A second model is the one of the pyramid, strictly hierarchical, developed through the empires, and focusing on an authoritarian administrative state.



These two models, according to Elazar, lead inevitably to the centralisation of the state, which could be authoritarian or democratic.

However there is a third model that Elazar considers the basis of development for a new perception of federalism which is the matrix model. In this

model, the relations between political bodies are not concentrated in one arena of political relationship. In this case, "Authority and power are dispersed among a network of arenas" within a common framework. Each arena is at the same time a locus where decisions are taken so that one decision-making process is influenced by the decisions of the other arenas. Their "organisational expression is non-centralisation". It leads to a polity composed of entities preserving their own integrity.



According to the author (1994), this model could find a new dimension in the era of globalisation, as the occurrences of federalism in domestic and international frameworks could be reunified in a common matrix. The arenas of political debates could cross-cut the borders of sovereignty: on the one hand as more international treaties constitutionally binding for the internal domestic levels are developed and on the other hand as more subnational actors – or arenas – could be active in the so-called international field, as it appears in the case of the EU.

Thus the matrix model – as a non-centralised federal union – can be considered as a model of development of political communication nowadays, as the weakening of the sovereign state has been accentuated through the fall of the Iron Curtain. While noting this, however, Elazar also believed that it was facilitated through the globalisation of communications and of economic matters. But if we can follow Elazar as regards the potentials of his matrix model, it is possible to take issue with him on the origin of the model. Elazar refers mostly to the expression of the matrix model in the American experience, through the main authors and currents of liberalism in the modern era. However, as already observed above, we would rather argue that it is actually embodied within *all* perceptions of federalism, as a combination of self-rule and shared rule in one form or another. On the other hand, one can consider that

the model of Elazar is far too closely linked to the context of the sovereign nation-state. The extension of the model to the international level, out of the context of the nation, would raise the problem of the representation of the people via a network composed of a multiplicity of decision arenas.

3.2 The multi-level governance model (MLG)

While Elazar was thinking about the development of the federalist revolution in the 'postmodern epoch', another American scholar, James Rosenau, had also been thinking about the weakening of the sovereign states through the challenge of globalisation, and labelled this new organisation according to the title of his first book on the matter: *governance without government* (Rosenau: 1992). By governance, Rosenau meant the regulation of interdependent political bodies, without the overarching control of a political authority. Although Rosenau himself was mostly concerned with the international level, further models were developed afterwards to integrate the idea of governance into a model cross-cutting state sovereignty and including domestic and international federalism – or federation and confederation.

The most advanced model of that approach is the multi-level governance model developed in the early 1990s by Gary Marks and Lisbeth Hooghe, as well as by Fritz Sharpf, as three of the most important early scholars involved in this theory. The question to raise here is whether or not the non-centralised model of multi-level governance can be considered as a new expression of federalism. As a distinct subject in its own right, MLG studies focus mainly upon political authorities or governments interacting with each other and cross-cutting the distinction between domestic and international levels. Although this theory has been developed specifically in the context of European integration, the matrix of interaction between different actors at different levels and the global connections between the domestic and international levels seem to make it quite close to the federalist type of organisation as described by Elazar. Moreover, it features the same notions of contractualism, autonomy and cooperation.

A hypothesis could be contrived to consider that MLG follows the latest refinement of federalism, considering the weakening of the sovereign state, and that politics is finally liberated from the concept of the state, which could lead to something approximating 'post-modernity'. Moreover, the multiple refinements of MLG might integrate the various developments of federalism through the complexity of modern societies. There is however a particular question related to integrating multi-level governance in terms of developments in federalism, since the main scholars do not present themselves as fed-

eral theorists. The size of this chapter limits the possibility to explore this question and therefore our position will be justified through some examples.

Recently some authors have written about MLG in the context of European integration: 'Some associate federalism with statehood and emphasize that because the EU lacks key elements of statehood it cannot be studied as a federation. Such scholars have developed a new conceptual vocabulary associated with 'multi-level governance." (Kelemen & Nicolaidis: 2007, 301) Furthermore, Hooghe and Marks, considered as prominent scholars in this field, stated in one of their main publications that "the intellectual foundation for Type I [multilevel] governance is federalism" and developed many parallel arguments in their presentation of the spectrum of multi-governance forms with the original constructions and propositions of Elazar. (Hooges and Marks: 2003)

This position, however, has not so far achieved widespread scholarly consensus and approval. The connections between federalism and MLG have attracted only a limited theoretical interest so far. Clearly they are deserving of much more attention now that each has been studied discretely. The hypothesis at this stage could be that different fields of research on MLG encompass the different subfields of studies covered by the different branches of federal studies (political, economic, sociological, domestic and international), thus considering them all as having an intellectual unity.

Eventually, it can be said that, even though the sovereign power has weakened, it has not disappeared so far. Elazar rightly stated that the model of governance in the postmodern epoch is not about the disappearance of the sovereign state, but about its integration in a new dimension. In the development of binding contracts between the different actors of the MLG, the central government of the states - that is to say the one where legal sovereignty is located in its international dimension - still plays a significant role. In this new perception of federalism, and as we are dealing with metaphorical models, the matrix model of Elazar, developed in the framework of the federal state, should be replaced by a sandglass model, or a matrix with a narrow bottleneck in the middle.

Consequently there would still be a centre in the matrix model. However, this centre should not be perceived as the ultimate centre of decision-making, but rather as a crossroads wherein the relations between the different levels have to pass, a crossroads that would actually take the form of a prism, able to modify these relations and refract them, but not inhibit them.

4. The Hollowing Out of the Centre: the Case of Belgium?

Turning from the theoretical field of the definition of federalism to the much more empirically-based issue of the 'hollowing out of the centre' in federal systems, we engage the third of our four dimensions which conceptualises the federal centre. In this case we construe it as a process of change but one which is essentially a top-down process of federalisation. By 'hollowing out', we mean a process of the reduction of the political power of the centre. In this context, the centre is not considered as a central arena, but clearly as a centre of power at the top of a sovereign state.

The process of hollowing out can take the form of the integration of the state into a larger polity, with a transfer of competences from the state to a higher level. This is typically the case in the integration of a country into a supranational polity such as the EU. However, it can also take the form of a hollowing out from below, as it is the case in centralised states entering into a process of federalisation. Among the most classical examples of that approach are the cases of Belgium (from the beginning of the 1970s) and Spain (from 1978). More recent cases can be found in South Africa and Italy.

In this short section we would like to focus on the case of Belgium. This federation concentrates to a high degree the potential for a hollowing out of the centre just as it is also concerned at the same time by the process of integration in the EU, and by a process of devolutionary federalism, dramatised by its dyadic organisation between two communities, the Flemish Dutch-speaking, and the Francophones, divided themselves into the Walloons and the French-speaking population of Brussels. Moreover, this case can be chosen in reference to the recent situation in Belgium, where there had been no possibility to find a general agreement between the communities on a coalition to form the federal government for 541 days. During this period the former outgoing government was dispatching the day-to-day matters, as a so-called 'caretaker' government.

From its beginning in 1830 to the beginning of the process of federalisation in 1970, the structure of the Belgian state was highly centralised. The relations between the different groups were organised through a consociational non-territorial non-majoritarian approach of the society into pillars, from the four main distinctions crossing through Belgian society: urban against rural, and Catholics against the secular laity, to whom were added later the Right against the Left at the end of the nineteenth century, and Flemish against Francophones, when the democratic universal suffrage showed that a majority of the Belgian population was Dutch speaking.

This latter distinction imposed itself as the major factor of distinction after the Second World War when political leaders focused on the difference in po-

litical behaviour between both communities, and when it appeared that, although it was spoken by a minority, the use of the French language was territorially expanding, mostly around Brussels. This in turn led to the first phase of hollowing out, in the 1960s and 1970s, through a mono-linguistic territorialisation of the state into several parts, Flanders and Wallonia, and the area of Brussels maintained as bilingual and "bi-territorial'. Through the next steps of the negotiation, these so-called institutional 'communities' witnessed the transfer to them of competences considered as 'personalisable', mostly in education and in the health system. The small German speaking minority in the East of Belgium also received this status of territorial linguistic 'community', although they were not really participating in the negotiations.

However, the next incentive in the process of federalisation was triggered by the economic crisis of the 1970s, when it appeared that the consociational management was no longer affordable as regards its cost. The traditional practice to solve the conflicts between communities by giving equal subsidies was coming to its end with the shortage of public resources. This was even reinforced by the necessity to support the Walloon iron and steel industry, impacted by a strong economic crisis. Moreover, there was a will from the regionalist and nationalist movements to foster the territorialisation of communities.

At this point we must refer briefly to the main differences between the Flemish and Walloon trends in relation to more autonomy. In the case of the Flemish trend, it is mostly a political and cultural driving-force directed at more autonomy on a path towards the independence of a distinct nation. This cultural identity strongly assisted toward a mobilisation of considerable popular support. On the other hand, the Walloon regionalist movement was mostly economic, aimed at autonomy but not able to build it as a specific political cultural identity. Moreover, the ambiguity of the relationship with Brussels, both being Francophone but not sharing the same identity, reinforced that difficulty. Therefore, it did not receive the same popular support and was not in a position to oppose to Flanders in the same way.

These circumstances, in turn, led to the creation of economically autonomous regions, with a progressive transfer of competences to Flanders, Wallonia and Brussels, the latter having its own specificities as the economic and financial heart of the whole country. The mostly dyadic feature of Belgium was magnified as well as it facilitated the process of the federalisation of the state in regard to only two linguistic communities both searching for more autonomy. The most recent federal elections of June 2010 showed a significant rise in Flemish nationalism and made the party of the nationalists the most important one in the Parliament. And from that peculiar situation, some commentators and politicians have adopted arguments that consider an in-

crease in the process of the hollowing out of the centre in Belgium. Let us consider two of these arguments.

- A first argument in favour of that assumption is the following: that Belgium had been able to work properly without a federal government politically approved for more than 17 months between the federal elections of June 2010 and the new government sworn in on 6 December 2011; many economic and cultural matters are dealt with by the federated entities while many other policies are managed by the EU and are implemented in the country through the caretaker government. Some political leaders and scholars consider that there is no need to maintain any competences at the federal level and that they should all be transferred to the higher or lower level.
- That the situation occurred in the specific context of the rise of Flemish nationalism, advocating the necessity to transform Belgium into a confederation, within the sovereign state of Belgium, where federal matters would be managed jointly by Flemish and Walloon governments, as well as the joint management of the city of Brussels, as a further step toward ultimate independence.

However, on the other side of the debate, some commentators were promoting the idea of maintaining a permanent autonomous government at the federal level.

- The first argument, and probably the most important one, is that some things cannot be split in the process of a division of Belgium and they still have to be dealt with jointly. This is mostly the case concerning the city of Brussels that neither the Flemish nor the Walloons would like to leave, for cultural and political reasons, as well as for economic reasons. Moreover, the cultural and political specificities of the Brussels electorate (mostly French-speaking) prevent a common management by Flemish and Walloons that could be considered as a denial of democracy for 10% of the population of the country. In fact, this argument does not foster the existence of a centre in Belgium, but it does prevent a complete hollowing out.
- A second argument is the will of the French speaking community of Belgium to keep a central government. Unlike in Flanders, the French speaking community of Belgium is not ready to give up the centre. First of all, they do not identify themselves as a nation contrary to the Flemish part and, secondly, they support the retention of some competences managed at the central level, which are mostly the social security policies that ensure the Walloons retain a level of financial transfers higher than what could be expected with their own resources.

- A third reason can be found in the necessity to keep an arena of negotiation between the two main linguistic communities. The complexity of the federal structures of Belgium (among them, two francophone regions for one Flemish) has not so far allowed the creation of a specific locus of negotiation out of the central state. This may appear through the role of the Prime Minister, whose role is mostly nowadays to conciliate and moderate the coalition parties.
- Finally the integration of Belgium into the EU partly prevents, for diplomatic and legal reasons, the secession of one region. Secession would be accepted only with difficulties by some member states of the EU, mainly the ones that have to deal with their own minorities. Moreover, it is not clear whether the seceding region would still be considered immediately as a member of the EU.

Paradoxically, these arguments are not so much in favour of the maintenance of a strong centre, but in favour of the survival of the centre, especially in its capacity to deal with common matters, to ensure a financial solidarity between the regions and to be used as the main locus of negotiations.

5. The Role of Sub-national Governments

Since one dimension of the federal idea is about the territorial dispersion of power among constituent units that together comprise federations, it is important to look closely at the role of the governments of these constituent units. A large amount of literature now exists on this subject and the notion of *constitutional space* within which such sub-national units are located and operate has been introduced by Alan Tarr and Robert Williams to focus attention upon the nature and scope of their local autonomy. (Tarr & Williams: 2004) In identifying the sources of change and development 'from below' in federations, their research into this subject has underlined both the complexity and the significance of the role of sub-national government.

From the standpoint of the federal centre, we might expect the logical role of the sub-national governments of the constituent units in federal states to be at first glance one of subordination. The very essence of being sub-national, it would seem, is to be subordinate. Indeed, the use of the term *sub-national* itself leads us in this direction. But this assumption would be at least an oversimplification and at worst a mistaken one. Since one of the hallmarks of federalism is self-rule as well as shared rule, we would expect to find a division of powers and competences of some sort in every formal federation. Consequently a closer more detailed examination of the relationship between 'national' (federal) government and the sub-national governments of the con-

stituent units demonstrates that their role can be construed in many ways. Our understanding of their role is shaped and determined *inter alia* by several discrete factors: the range of discretion and autonomy in constitutional design and development; the activism of the various constituent units within their constitutional space; and the effects of the constitutional and political initiatives by sub-national governments both upon the national and the lower levels of political authority. These factors are closely related to the division of powers; the institutional structure of the federal state; and the composition of the executive power. In contrast, the principal concern of the sub-national governments of the constituent units in federations suggests that their main focus is upon the exercise of local autonomy and the various opportunities and possibilities to enhance it. (Burgess & Tarr: 2012)

On this reckoning it makes sense to explore the relationship between the national (federal) level and the sub-national level(s) of government in most cases from two distinct perspectives which incorporate the formal constitutional and the non-constitutional (political) dimensions of authority. The view from above is typically construed in terms of the overall unity of the state – the 'national interest' – while that from below reflects the variety of sub-national, local diversities that exist within this composite unity. The former is principally concerned with the integrity of the whole while the focus of the latter is to strive to determine, preserve and promote difference and diversity, sometimes viewed by 'national' elites as a narrow self-serving parochialism. But the constituent units, we must remember, are also themselves 'wholes' whose own distinct identity and integrity it is part of the purpose of federal government to recognise, respect and preserve. This is particularly important in complex cases where the sub-national government of a constituent unit also represents a distinct nation, such as Quebec in Canada or the 'historical nationality' of Catalonia in Spain, so that so-called 'national' policy preferences must be carefully filtered and sensitised to accommodate sub-state national identity and autonomy.

The constitutional design and construction of federal states is not of course restricted to a binary or bifocal political system endorsing just two levels of government. There may be, and usually is, an active third or even fourth level of political authority at the local, communal or municipal level within constituent units that also performs a role in the distribution of functions at this level. Such local authorities are usually constitutionally subordinate to the sub-state constituent polity, leaving the impression of the constituent units as unitary actors and thus underlining the limits of 'federality' in the federation. Indeed, it is often remarked that such a condition of affairs prevails in Switzerland where federalism exists only *between* the federal centre and the 26 cantons (vertical dimension) but not at the lower levels *within* the cantons which have both the competences and the resources to decide upon what role

their local authorities should play. This perspective is sometimes referred to as the limits of 'deep diversity'. But we should not overlook the evolving horizontal relationship between the cantons themselves and the recent trends among them of informal 'regional' territorial groupings.

The idea of constitutional space is helpful from the standpoint of the division of powers and competences between the federal centre and the constituent units in the extent to which it conveys a sense of local autonomy both formally and informally. The formal aspect is determined by whether the constitutional entrenchment of powers is specifically allocated to the constituent units or to the federal government, thus pointing up precisely where the residuum or residuary powers will be located. But it is important to underline the reality of the constitutional empowerment of constituent units which can practice their recognised autonomy as a right and not as a gift handed down from above. In federal states this is what is meant by being 'coordinate' rather than 'subordinate' in separate distinct spheres of policy competence. Consequently where the constitutional theory and practice diverge in some federal states it can work both to the advantage and disadvantage of the sub-national governments.

The informal dimension arises from the political strategies of each constituent unit government in its efforts to occupy the existing defined constitutional space or to try to construe its role in a manner that can effectively extend its formal definition by informal means. This requires an activist approach to constitutional autonomy and is the basis for the notion of constituent units as 'laboratories of experimentation' which can lead to the elevation, adoption and implementation of constituent state policy preferences to the federal level. The point to be made here in terms of the influence of federal government on sub-national governments is that the traffic is not always in one direction; it can sometimes work in the opposite direction.

Overall, then, there remains a strong tendency in the mainstream literature and understanding of federal-state relations to construe them in terms of a simple binary focus when in reality the study of constitutional and political sub-national autonomy is much more complex. There is no doubt ultimately that the cards are heavily stacked in favour of a vertical (top-down) relationship that enhances the federal centre, especially where financial resources are concerned, but its influence on sub-national governments requires that we conceptualise the term *influence* in quite a sophisticated way if we are accurately to capture the complexities and subtleties involved in the role of sub-national governments.

6. Conclusion

This chapter raised a series of questions at the outset concerning the nature of the federal centre in the context of 'governing from the centre'. It sought in particular to call attention not only to the nature of the centre but also to its perception – how it was being used by different actors from different positions of constitutional and political authority. In order to explore the conceptual implications of the notion of the federal centre, we have utilised four distinct approaches to understanding precisely what it means. Let us now summarise our findings.

The point of departure was our first consideration and our brief investigation of the *Federalist Papers* in this respect led us to the conclusion that both the structure and composition of the government, which in turn derived from the constitutional design of the federation, were key to understanding the nature of the federal centre and the defences to its encroachment upon liberty. The perspective of Elazar's matrix model of federalism shifted our attention away from the specificities of the American federal experience and to a much broader conceptual consideration of the normative empirical possibilities inherent in an entirely different approach to the federal centre. Indeed, according to his perspective there need be no federal centre at all, which is why Elazar referred to it as *non-centralisation*, and this was an understanding that had close links to the most recent intellectual fashion called 'multi-level governance' which was a non-normative empirical model that described how states and unions of states (especially the EU) operated in practice. This consideration called attention to the idea of governance without government and alerted us to the reality of multiple levels of governance within formally federal and non-federal political systems. It remains very much a contested concept, especially in the context of federal studies, largely because its descriptive analytical properties seem at this stage to indicate that its theoretical implications might be quite thin.

The approach called 'the hollowing out of the centre' derived largely from the recent Belgian experience which has witnessed more and more competences shifted from the federal government to the constituent parts of the federation – the regions and communities. The way that this phrase has been formulated conveys a sense of the dramatic, almost as if the life-blood of the country was being sucked out of it, when in fact it could equally be construed as merely reconfiguring the federation. It is sometimes difficult to draw precise boundaries around this phrase in order to differentiate it from our conventional understanding of decentralisation and/or devolution in federal states, but the projection of the Belgian example would appear to suggest that the process of so-called 'hollowing out' is something more threatening to the survival of the state than just about the limits of decentralisation.

The fourth and final approach to understanding the nature of the federal centre referred to the role and position of sub-national governments. This perspective served to highlight the view of the federal government from the standpoint of the constituent states and their governments and it focused in particular upon the nuances of constitutional sub-national autonomy as a basis for expanding the allotted constitutional space for these governments. Contrary to many other images and approaches, the role of sub-national governments deflects the eye away from the traditional top-down perspective and adopts instead a bottom-up understanding of the federal centre. This is an unusually refreshing approach for the simple reason that it emphasises the sense of the federation as an integrated whole in which the sub-national governments are active in their role as distinct and autonomous polities which are simultaneously part and parcel of the larger federal constitutional structure and continue to play an important, indeed vital, role in the direction of federal systems (Burgess & Tarr: 2012).

This chapter suggests, then, that the term ‘federal centre’ should be handled with extreme care and perceived from many different angles and different contexts if we are fully to understand and appreciate its inherent complexities and its conceptual utility.

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Cooperation in the Public Administration as a Mechanism of Centralisation in Spain

Mercè Corretja Torrens

1. Introduction

This paper[1] analyzes the field of cooperation in Spain in order to spotlight the current trends and problems in this matter. Although Spain is apparently a highly decentralized country, in fact the central government wields its legislative powers to exert a great deal of power over the Autonomous Communities (from now on I'll refer to them as ACs), and that ends up limiting the ACs' legislative powers. In a nutshell, political autonomy has been transformed into broad administrative autonomy. However, recently the central government has been expanding its scope of influence to the field of inter-administrative cooperation and implementation. I would like to point out the causes and the reasons for this influence and give some ideas on how to change and improve the cooperation tools to be more respectful with the jurisdiction of ACs.

1.1 Political background

The sovereign debt crisis is certainly having an impact on the internal organization of territorial powers in Spain and it is dramatically changing the perception that citizens and political parties have about the Spanish decentralized political system, the so-called "State of Autonomies". Thus, in this sense, while before 2000 survey polls shown that, in average, citizens had a moderate satisfaction about this model and about the role of the "State of Autonomies" in implementing and developing the welfare state, right after the crisis hit the world economy, such perception has changed becoming more nega-

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1 Paper delivered at the annual meeting of the International Association of Centres for Federal Studies (IACFS) held in the University of Speyer (Germany) on the September 30th and October 1st 2011 on "Governing from the Center: the influence of the Central Government over the Sub-National Governments". The article benefited from the criticisms and suggestions from Professor *Carles Viver Pi-Sunyer*, director of the Institut d'Estudis Autonòmics (IEA) and from my colleague at the Institute, *Mireia Grau*.

tive[2]. The ACs are blamed because of their high level of debt. But, in fact, the debt of the central government is much higher (76% of Spain's total debt, while ACs' debt is only 17%) and, in addition, most of the welfare state services are provided by ACs (Health, Education and Welfare services).[3] Thus, this shows that the debate about the crisis is linked to the debate about the decentralization process. In this sense, two opposed trends can be detected:

On one hand, there is a centralizing trend that although has become more obvious after the debt crisis, has its roots in a previous line of thought, which argues and claims that the de-centralization process in Spain has gone too far and that some powers must be re-devolved to the central government. The two state-wide majority parties (the Socialist Party and the Popular Party) in Spain support this idea.

Two recently relevant events show this centralizing trend. Firstly, on September 2nd 2011, the Spanish Constitution was amended by the sole agreement reached between the Socialist Party and the Popular Party, to the exclusion of all other parliamentary parties, of the Autonomous Communities and of the citizens themselves. This is the second amendment of the Spanish Constitution since 1978 and it aims to establish a Constitutional principle addressed to limit the structural public deficit for all the public administrations. The actual limit will further be established by law (by a so-called organic law which needs a specific majority to be approved) of the central parliament for all the public administrations.[4]

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2 *Grau, Mireia* (2011) "Self-Government reforms and public support for Spain's territorial model: changes and stability (1992-2010)", Revista d'Estudis Autonòmics i Federals.

3 The Organisation for Economic Cooperation and Development (OECD) believes that the weight of public debt in Catalonia and the other autonomous communities in Spain is "relatively scarce compared to their spending responsibility" and competences. The Bank of Spain sets the AC debt in Spain at 11.4% of the GDP (121,400 million euros in total). Source: *La Vanguardia*, 4.07.2011.

4 In order to understand the debate, one has to take into account that constitutional reforms have been treated by most political parties as a complete taboo. Apart from its institutional role, the Constitution has been understood as a symbol of the large but also fragile political consensus that featured the Spanish transition to the democracy and brought about a political and societal funding pact. Thus, the idea of its reform has been largely perceived (but also made be perceived) as a threat to the fragile equilibrium and complex consensus forged during the Transition; as a consequence, the issue has been explicitly kept out of the political agenda. Only one reform has been passed since its establishment: the inclusion of political rights for EU citizens following the requirements derived from the Treaty of Maastricht, and it was passed by unanimity. Thus, in these circumstances, in mid-August, the Spanish Government announced its intention to introduce a constitutional limit of public deficit, following the German ex-

Secondly, on late July 2011, the Spanish Constitutional Court ruled that the Central government is constitutionally entitled to fix limits on the spending of the Autonomous Communities through the establishment of compulsory objectives of budgetary stability by means of its horizontal and coordination competences in economic matters.[5] Paradoxically, in previous rulings, the Constitutional Court had stated that the Central government had no powers to establish generic controls over the ACs. Both cases show how the debt crisis arises as the justification to strengthening the control that central government has over the ACs and damaging their autonomy.

On the other hand, from Catalonia's perspective, there is a strong aspiration to have more political and financial autonomy and further recognition of the Catalan identity. Five out of the seven parties represented at the Catalan Parliament (2010-2014 term) support such an aspiration, although in different degrees, just mirroring the Catalan society. To fulfil this aspiration, in 2005, Catalonia promoted an amendment of its Constitution which was approved both by law of the Central Parliament[6] and finally by referendum of the people of Catalonia. In spite of this, the amendment was appealed to the Constitutional Court which in its rule of July 2010[7] frustrated most expectations and ways of action. After November 2010 Catalan elections, and as an alternative to the ruling of the Constitutional Court and its effects over the Catalan Charter of Self-Government, the new Catalan government promoted an urgent reform of the regional finance system addressed to obtain full fiscal autonomy for Catalonia by establishing a new model based in a bilateral agreement between the Central government and the Catalan government, in which the the Catalan government collects all the taxes generated on its territory and later transfer a fee in concept of solidarity to the Spanish government.

To understand the finance issue some basics must be described. There are two regional finance systems. The "chart system" applied to the Basque Country and Navarra, and the "common regime" finance system applied to the other fifteen Autonomous Communities, Catalonia included. In that system, unlike the other, it is the central government the one that collects the taxes, then keeps a percentage of the yields and distributes the remaining rest among the ACs according with certain agreed percentages. The main revenues of the ACs are ceded taxes and transfers from solidarity funds but they

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perience. In a record time, the reform was agreed exclusively between the Socialist Party and the PP at a central level. See further: IEA Newsletter. Available in English at: www10.gencat.cat, Publicacions, Butlletí d'Estudis Autonòmics, n. 18.

5 Ruling of the Constitutional Court 134/2011, July 20th.

6 Organic Law 6/2006, July 19th.

7 Ruling of the Constitutional Court 31/2010.

have reduced regulatory powers over ceded taxes. There is not a limit to the solidarity principle. Therefore, in some Autonomous Communities like Catalonia, there is an enormous difference between what citizens of Catalonia contribute by taxes and what they receive in return from the central government through investments or transfers. Being one of the first tax contributors, Catalonia scores lower than the average in the classification of income per capita. In other words, Catalonia is above the average in tax contribution but it is under the average in the classification of income per capita due to the redistribution of resources among the ACs. In 2006 the Catalan government considered that this was an unfair fiscal treatment and tried to modify this situation through the amendment of the Catalan Constitution.[8] But the ruling of the Constitutional Court RCC 31/2010 declared unconstitutional this provision. In 2009 the regional finance system was modified but it did not change this situation (Bosch, 2012). Due the financial crisis the reform of 2009 has not been totally implemented and the unfair fiscal treatment of Catalonia persists.

So, after the ruling of the Constitutional Court of 2010 and the Sovereign debt crisis, there is a polarisation between the aspirations of Catalonia to have more self-government and the aspirations of the Spanish Government to reinforce its power over the ACs.[9]

1.2 Legal perspective: Techniques to expand central government's competences on the field of implementation

From a legal perspective, the tension between centralization and decentralization has been always present in Spain. The central parliament and the central government have always exerted a relevant power over the ACs' competences through legislative and regulative means. Thus, the possibilities of the ACs for developing different legislations and regulations have been ac-

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8 See: www.it-intransit.eu. The amendment of the Catalan constitution enacted in 2006 established a limit to the solidarity principle, the creation of a consortium with the Spanish government to collect all the taxes and more regulatory powers over taxes of the Catalan government.

9 Recent polls carried out in Catalonia have for the first time asked questions about a hypothetical referendum for the independence of Catalonia. 42.9% of respondents said they would vote in favour (compared with 20.2% who would vote against and 23.3% who would abstain), and among all the reasons given by those who say they would vote in favour, economic and fiscal arguments predominate: 36.4% of those who say they would vote in favour of independence cite economic reasons (in order to increase economic and fiscal autonomy); the second most popular reason (that the Spanish do not understand the Catalans) was given by 13.6%. See further: IEA Newsletter, October 2011.

tually reduced as well their real sphere of autonomy. In fact, while the Constitution allowed an asymmetric model, both the pacts between the state-wide parties and the persistently centralizing trend have drifted the system towards a very homogeneous model from the point of view of competences.[10]

The conflicts of competences between the Spanish government and the ACs are abundant, especially between the Spanish government and the Catalan government. However, the Spanish government and Parliament not only exert their power in the field of legislation, but they also project their competences over the implementation field and inter-governmental relations in matters that fall under the ACs' competences. They use different techniques that are also mostly common and well-known in other countries.

As the IEA has pointed out in other papers[11], basically they are the following five techniques:

a) Spending power and centralized subsidies. The central government uses its spending power to grant subsidies on matters falling within the ACs' jurisdiction without allowing the ACs any participation in defining the processes, targets and/or recipients' requirements. The influence of this technique on implementation main entails regulating plans and programs or national agencies to centralize the subsidies. For example, the central government has created a national program to give subsidies to citizens to substitute the tires on their cars with environmentally-friendly tires. The central government has the framework competences in Energy and the Environment, but the ACs have legislative competences in Industry, Environment and Energy, yet they had no participation in these subsidies.[12]

b) The monopolistic use of European Law. The vast majority of directives and regulations that need to be transposed are implemented by the central

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10 Differences in competences among ACs revolve mainly around three areas: civil law, traffic and penitentiary services. There are also differences with regard to the official language system (Catalonia is trilingual; five other ACs have bilingual systems and the other 11 ACs are monolingual, although several of them recognize more than one language modality) and the regional finance system (economic agreement or chart in two of them –Basque Country and Navarre- and common system in the others).

11 *Viver Pi-Sunyer, Carles* (2010) "Centralisation and decentralisation trends in Spain. An assessment of the present allocation of competences between the State and the Autonomous Communities" in Decentralizing and Re-centralizing Trends in the Distribution of Powers within Federal Countries, IEA, Barcelona.

12 See: Resolution 18th. Of April 2011, Ministry of Energy, which published the Resolution of the Institute for Energy Diversification and Energy Saving, which establishes the rules for the call for participation in the grant program for tires exchanges as part of the intensification of savings and energy efficiency, BOE 98, 25.04.2011.

government by invoking a variety of framework or transversal competences, even when the matter refers to AC powers. Furthermore, it does this in such a complete way that the Autonomous Communities have practically no room left to regulate or implement anything. Another common practice to the central government's advantage is its interpretation that the European requirements to establish "single authorities" within the country can only correspond to the central government's institutions, thus interpreting that "single authority" is synonymous with "central government's authority" and taking the power of this single authority from the ACs. Two examples are the implementation of the EMAS Regulation[13] and the Directive on Services.

c) The extensive interpretation of basic (framework) powers. The central Parliament and government make an extensive interpretation of their basic constitutional powers applied to shared jurisdiction. On those matters, both the central government and the ACs have legislative powers, but with different scopes. The central government has the power to establish principles, while the ACs have legislative and regulatory powers to implement these principles. But the central government usually uses this power to regulate, not to legislate, and it regulates in a very complete and detailed way and that diminishes or eliminates the legislative powers of the ACs. For example, the central government uses its framework powers in Health to approve a regulation to set a compensation scale for animals put down in case of animal disease.[14]

d) The expansion of transversal powers into Autonomous Community legislation. The central Parliament makes an expansive and exaggerated use of its constitutionally transversal powers based on its constitutional duty to guarantee the equality principle among all Spaniards. For example, by using this technique, the central government can create new rights or principles in matters falling under the sole jurisdiction of the ACs such as Welfare Services, and the ACs must implement these new rights or principles with their own civil servants and resources or must legislate according to these objective and principles in matters falling under their exclusive competences.

e) The assumption of powers by applying Spanish-wide territorial boundaries to the provision of services. In some matters, the central government can only act when the geographical scope of service (or public good)

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13 Regulation (EC) No 1221/2009 of the European Parliament and of the Council of November 25, 2009 on the voluntary participation by organisations in a Community Eco-Management and Audit Scheme (EMAS), repealing Regulation (EC) No 761/2001 and Commission Decisions 2001/681/EC and 2006/193/EC.

14 Regulation 389/2011, BOE 89, 14.04.2011.

encompasses the whole country, that is, by applying Spanish-wide boundaries. In this sense, the central government uses territory as a constitutional resource to legislate in matters falling under the ACs' jurisdiction, creating overlaps of competences and duplicated services. Examples include creating "national plans", "national registers" or "national networks". For instance, while education falls under the ACs' jurisdiction, and the services are thus totally devolved, the central government may create a network of "Centres of Excellence" covering all of Spain. The excuse is that the ACs only can exert their jurisdiction in their respective territories but not in the territories of other ACs, and that there is very little cooperation among them.

From the de-centralizing perspective, and as neither the Spanish Constitution nor the Catalan Charter of Self-Government have a clear system for allocating competences, the amendment of the Catalan Charter of Self-Government aimed to deal against these five techniques by reinforcing the political power of the Catalan government mainly by using two legal techniques:

a) First, the functional description of each type of competence including the type of powers that the Catalan government can exert in each case (legislative, regulatory, executive) and whether these powers are exclusive to the AC or shared between AC and the central government.

b) Secondly, an exhaustive description of the contents of each matter falling under the Catalan government's jurisdiction in order to avoid duplications, overlapping and doubts about the comprehensive meaning of each matter and to clarify the area of exclusive jurisdiction of the Catalan government.

Complementing these two techniques, the Catalan Charter establishes mandatory principles obligating the central government to allow the Catalan government to take part in appointments on central bodies and some of the central government's decision-making processes that affect the policies and interests of the ACs.

Apart from Catalonia, six other ACs amended their Charters of Self-Government. The scope and the aims of the amendments are different but they basically aimed to expand and strengthen their competences, to regulate the principle of cooperation and to establish specific rights for their citizens. [15]

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15 These six ACs are Andalusia, Aragón, Valencian Community, Balearic Islands, Castilla-León and Extremadura. Three other ACs tried to amend their respective charters but they did not succeed: the Basque Country (its amendment was rejected by the Spanish Parliament) the Canary Islands and Castilla-La Mancha, which respectively withdrew the proposals. So, 10 out of 17 ACs 17 have tried or amended their Charter of Self-Government in the period 2006-2010.

As I said, the amendment of the Catalan Charter, approved by referendum, was appealed by the Popular Party before the Constitutional Court. Although the Constitutional Court initially accepted the legitimacy of the configuration of powers and matters set up by the Catalan Charter, the Constitutional Court then went on to invalidate practically all the innovations that the Catalan Charter was designed to introduce by weakening its function in constitutional terms. So, in this sphere, the situation essentially remains the same as it was before the reform. Little has changed:[16] competences that are not guaranteed, difficulty in delimiting the scope of action, de-constitutionalised system for allocating competences with a very prominent position for the central government and a rise in the role of the Constitutional Court in delimiting competences. Therefore, the central government is continuing to encroach upon the realms of competence using the five techniques mentioned above.

It has to be said that the ruling of the Constitutional Court about the Catalan Charter about the nature and functions of Charters of Self-Government applies to all the Charters of Self-Government, even if they have not been appealed.

1.3 The field of cooperation: from bilateral to multilateral cooperation

The Spanish Constitution doesn't mention the principle of cooperation but the Constitutional Court has said that it is inherent to the system. In fact, the cooperation between the central government and the Sub-National governments started by bilateral commissions to execute the process of devolving competences and services to Catalonia and the Basque Country. Also, the cooperation has been developed in practice by signing bilateral agreements in which the central government provides funds for certain purposes and the Autonomous Community conducts the material actions. Finally, we should also mention the bilateral cooperation commissions created to prevent conflicts of competences. So, the bilateral intergovernmental relations are one of the features of the Spanish State of Autonomies.

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16 As the "Report on the judgment by Spain's Constitutional Court regarding the appeal lodged by 50 members of the Spanish Parliament and Senate from the *Partido Popular* alleging the unconstitutionality of Catalonia's Statute of Autonomy" says: "The judgment accepts the legitimacy of attributing to the Catalan Government exclusively and 'fully' all the functions in the exclusive matters but it immediately warns that this exclusivity cannot prevent the Central government from continuing to exercise its powers over the same matters" (page 25). The director of the IEA (Institut d'Estudis Autonòmics) has taken part in the Report. See further: www.gencat.cat/iea, English version.

In contrast, the multilateral cooperation has been promoted by the central government, particularly since 1992 and after a process of levelling competences among the ACs through the so-called "Autonomous Pacts".[17] The main multilateral instruments are the sectoral conferences. There are 35 of them, around 25 of which are held regularly. The way they work is quite uneven, although the central government plays a prominent role in all of them since the Minister of the Central government or his or her representative is always the person with the authority to call a meeting and determine the agenda.[18] Their main purpose is to facilitate the exchange of information or points of view among the participants. In theory, they should not substitute the bodies in the ACs that hold these competences, nor can they adopt binding decisions.[19] However, in practice, the content and functions of these conferences are not delimited, which leaves a great deal of leeway (Arbós, 2009). But this is changing and recently some working groups or committees have been created by central parliament's law. In 2004, the President of the government spearheaded the creation of a Conference of Presidents that has met four times so far, the last time on the 14th of December 2009, without reaching any agreement.

The lack of horizontal cooperation among ACs should also be noted as a feature of the Spanish State of Autonomies. Although it is rather complex to identify the whole range of factors that account for this lack of cooperation, four factors can be highlighted: 1) constitutional and legal obstacles (the Spanish Constitution establishes that agreements between ACs must be communicated and authorized by the Senate among other requirements) 2) the competition between ACs for having more capacity to influence on central government by means of establishing intergovernmental bilateral relations the latter; 3) a traditional mistrust among the ACs because of their different cultures, languages and traditions; 4) the subordination of the ACs' governments to the political parties interests: in this sense, it must be emphasized that the political map of the ACs has always reproduced the balance of powers held at

17 There are two Autonomous Pacts. The First Autonomous Pact was subscribed in 1981 by the two majority parties (the Socialist Party and the "Democratic Centre Union") to define the map (how many ACs should be created as well as their territorial limits). The Second Autonomous Pact was subscribed by the Socialist Party and the Popular Party in 1992. It aims the levelling of ACs' competences to eliminate asymmetries and the development of the principle of cooperation.

18 Several studies spotlight the ACs' complaints. See: *Arbós, Xavier* (coord.) (2009) Las relaciones intergubernamentales en el Estado Autonómico. La posición de los actores, IEA.

19 RCC 76/1983.

central level with the two state-wide parties governing in the large majority of ACs.

Nevertheless, the ACs have done a big effort to create a Conference of Autonomous Governments. In 2008 a platform was created and in 2010 it has been transformed into a Conference.[20]

Other problem of intergovernmental cooperation in Spain is the absence of mechanisms for ACs to participate in central government's decisions affecting their competences, either through the Senate or directly appointing members in central institutions or organisations.[21] The Catalan Charter of Self-Government introduces a principle of participation in certain central bodies, but the ruling of the Constitutional Court of July 2010 determines that this principle is not binding for the central government.

The central government has taken advantage of this situation, launching new mechanisms in the administrative realm, like the plans or programs that substitute the lack of cooperation between ACs.

According to the laws currently in place, the characteristics of these plans and programmes are first that they must be agreed upon between the central government and the ACs and that they cannot be unilaterally imposed, and secondly that they must contain actions to attain shared objectives in concurrent spheres of competences. The sectoral conferences are in charge of initiating, approving and monitoring the plans and programmes.[22] The approval agreement of the plan must be published and has binding legal efficacy for both the central government and the participating ACs which have signed it. The plan can be complemented with bilateral agreements on specific aspects.

Below we shall see how cooperation takes place in two specific cases: administrative coordination to lower burdens and simplify procedures, which was launched in view of the Services Directive but has developed a personal-

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20 The immediate forerunner of this conference is the "Meetings among Autonomous Communities to Develop their Charters of Self-Government", which got underway in 2008. Numerous agreements and political declarations were signed at these gatherings. The IEA served as the Technical Secretary for the meetings among Autonomous Communities for one year (October 2009 – October 2010). However, today inter-AC relations are highly mediatised by the political parties; such mediatisation weakens even further the role of horizontal relations in Spain.

21 In 2007, the Organic Law on the Constitutional Court was amended to allow the judges that are appointed by the Senate to be chosen by the latter following the proposals made by the autonomous-community Parliaments. However, for the time being, the new Senate's appointments to the Court determined in 2010 did not follow at all any of the proposals made by these parliaments.

22 Article 7 of Law 30/1992.

ity of its own, and the implementation of e-government. Through the legislative framework and the instruments created, we shall examine support for the central government's competence to launch them, the role of the ACs in these mechanisms and to what extent they confer on the central government a leading, steering role in the process. In short, the goal is to analyse to what extent these cooperation mechanisms affect the administrative and executive autonomy of the Autonomous Communities, as mentioned above.

2. Development of inter-administrative coordination through Directive 2006/123/EC on Services in the Internal Market

2.1 The cooperation mechanisms designed for Directive 2006/123/EC on Services in the Internal Market

With the objective of boosting the European Union's economic and commercial competitiveness, one of the goals of the Services Directive (Directive 2006/123/EC) approved by the European Commission is administrative simplification and the elimination of the so-called administrative burdens to economic activity, yet at the same time to also uphold the protection of consumers' rights. The Directive specifically affects the freedom of establishment and the freedom to provide services, and it has had a huge impact on the legislation and regulations of the member states that regulate the provision of services and consumer protection, as well as their administrative organisation. We can categorically state that administrative cooperation is essential to ensuring the functioning of the internal services market, and this is understood in the Directive, which devotes all of Chapter VI to regulating these administrative cooperation mechanisms. However, it should be stressed that the cooperation system envisioned by the Directive is interstate (among member states) but not intrastate, since the internal sphere is left in the hands of each of the member states (Jiménez Asensio, 2010).

In order to grasp the scope of this regulation, it should be noted that until now European directives have regulated two models of administrative cooperation: the one based on the country of origin and the one based on the host country. As some authors have pointed out, if the principle of control of the country of origin is chosen, the degree of cooperation and assistance will be higher than if the principle of control of the host country is chosen, in which they will usually only call for actions involving mere information assistance (Jiménez Garciía, 2008). In the case of the Services Directive, an intermediate model was chosen in which the principle of the country of origin is formally eliminated but kept in practice, since the service provider is subjected to the administrative regime of the country of origin in terms of the access criteria to

the service provided. For this reason, the existence of information assistance mechanisms among member states is fundamental. Yet at the same time, the Directive requires the country of origin to conduct any checks, inspections and investigations requested by another member state, which it must then inform about the results and the measures taken (articles 28 and 29).

In the event that a state has real knowledge of a behaviour or specific facts on a service provider operating in its country that is providing services in other member states which, in their opinion, may cause serious harm to the health or safety of people or the environment, the Directive creates a quick alert mechanism that enables them to report the facts to all the member states and to the Commission (article 32). Likewise, the member states must exchange information on the reputation and reliability of the service providers. Finally, the state where the service provider is located is required to supervise and monitor these service providers, even if they are operating outside their territory.

All of these actions are guaranteed through the creation of a network of liaison points (each member state must designate one or more contact or liaison points whose contact details must be forwarded to the Commission). The information requested by other member states must be sent through electronic means, and the registers provided so suppliers can submit their documentation must also be electronic. It is the Commission's task in cooperation with the member states to create an electronic system to facilitate the exchange of information.[23]

In short, the Directive establishes a system of interstate cooperation based on an information assistance mechanism, liaison points, a quick alert mechanism, obligations to supervise and control and an obligation to provide information by electronic means.

2.2 The intrastate cooperation mechanisms to fulfil the objectives of the Services Directive

The implementation of this directive in Spain's internal system has led to the launch of mechanisms to simplify the administration and lower the burdens, and it has also driven the creation of mechanisms for inter-administrative cooperation between the central government and the AC governments.

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23 A detailed outline of the cooperation mechanisms and an assessment of their impact can be found in *Jiménez García, F*. (2008) "La cooperación administrativa en la directiva relativa a los servicios en el mercado interior", Revista de Derecho de la Unión Europea, n. 14.

First, we should note that even though the Directive essentially affects services which fall under the competences of the ACs, the central government has exercised the initiative to transpose this Directive and has chosen a two-phase transposition: first, a Spanish general Law (Law 17/2009), which is practically a literal translation of the Directive with a few additional conditions or requirements, and secondly a law that amends the laws of the central parliament affected by the Directive (Law 25/2009), except in a few specific areas, such as trade, which is regulated by its own law. The laws regarding e-government were also regulated by a separate law. Both laws were approved and entered into force just one or two days before the transposition deadline. Subsequently, and therefore past the deadline, the ACs approved norms with the rank of law to adapt their legislation to the provisions of the Directive according to the principles and criteria of Law of the Central Parliament 17/2009. Vertical cooperation mechanisms were created to conduct this process of legislative revision, which affects all levels of public administration, the central administration, AC administration and local administration. What we are interested in analysing here is not the legal and regulatory transposition and the job of identifying, evaluating and amending the legal norms, which led to the amendment of a significant number of both central parliament and AC laws,[24] but the mechanisms of cooperation which were created through the Services Directive.

In this respect, as outlined above, it should be borne in mind that the Spanish Constitution does not reserve a competence for the central government to transpose European law; rather the transposition befalls whichever level of government has the material competence over the sector in question.[25] However, it is also true that the entity responsible for the transposition before the EU is the central government, not the ACs, and that should the ACs fail to comply there are no internal mechanisms to compel them to comply. This situation has led the Constitutional Court to recognise that the central government can set up coordination and cooperation systems that help to prevent irregularities or shortcomings in compliance with EC law, as well as the inter-administrative compensation systems on financial responsibility which can be

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24 It should be borne in mind that the Directive affects multiple regulatory bodies, not only public powers in the strict sense but also professional colleges and associations. See: *Baiges Pla, E., Gibert Bosch, A., Pellisé de Urquiza, C.,* and *Tornabell Gonzalez, I.*(2008): "Transposar la Directiva de serveis: reptes i oportunitats per a la competitivitat", Nota d'economia 90, p. 117.

25 The Constitutional Court is constantly reiterating this by stating that the translation of EU regulations to internal law follows the constitutional and statutory criteria for sharing competences (among many others, RRCC 102/1995 and 67/1996), and that there is no specific competence in favour of the state for executing EU law.

generated by the central government itself as the responsible party in the event that the EU institutions take note of this non-compliance or shortcoming.[26] Along these lines, the central government has spearheaded the approval of the Law 2/2011, dated the 4th of March 2011, on the sustainable economy, which has introduced an internal responsibility mechanism.

Despite the lack of competences in the services affected by the Directive, its transposition via a central parliament's law was done by invoking basic competences (the framework of the legal system of the public administrations) and transversal competences (the guarantee of citizens' equality in the exercise of their constitutional rights and responsibilities and the bases and coordination of economic activity planning). That is, some of the techniques outlined in the introduction were used once again.[27]

It should also be noted that European law does not require a transposition law to be approved, and that some member states have not conducted a general transposition (France and Germany); rather they have directly amended the law, an option that would also have been applicable in Spain.

If we focus on the intrastate cooperation mechanisms adopted in the wake of the Directive, we should note that they are complex and have encompassed all levels of public administration: central, AC and local. Basically, they consist of creating working groups and a computer system.

First an inter-ministerial working group was created (without the presence of either regional or local governments), which drew up a manual for the transposition and a questionnaire for all the public administrations. It also created a computer application called SIENA (System of identification and Evaluation of the Regulations Affected).

Then a second inter-ministerial working group was created, but in this case the ACs and local entities were involved, too (March 2007). It drew up a working programme organised into four avenues of action: cooperation among the administrations involved; the inclusion of the Services Directive in the Spanish legal system; and the implementation of the single window and the Internal Market Information (IMI) system, which is the electronic system

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26 RCC 148/1998, FJ 8th. See further: *Medina Guerrero, M.*(2011): "CCAA y crisis económica: la eficiencia económica y política del Estado autonómico en el actual contexto de crisis", Cuadernos Manuel Giménez Abad, no. 1.

27 A critical perspective on the state transposition can be found in: *París, Neus* and *Corretja, Mercè* (2010) "Aproximació al procés de transposició de la Directiva de Serveis: incidència en el sistema de competències dissenyat per la CE i l'EAC", Revista d'Estudis Autonòmics i Federals n. 10.

through which administrative cooperation among the different member states takes place.

Within the central administration, too, several working groups were set up for technical, inter-ministerial and sectoral coordination. Several technical groups were also created made up of interlocutors from the different ministries, Autonomous Communities and the Spanish Federation of Municipalities and Provinces.[28]

And, finally, in coordination with the transposition process cited above, each Autonomous Community designed its own transposition process based on the manual and criteria established. In Catalonia, an interdepartmental working group was created on the 16th of October 2007 headed by the Department of Economy and Finances. Its mission was to coordinate the transposition procedure in Catalonia.[29]A questionnaire that complemented the one drawn up by the central government was created, and finally the process culminated with the Catalan government's approval of Legislative Decree 3/2010 on the 5th of October 2010 to adapt the regulations with the rank of law to Directive 2006/123/EC of the European Parliament and Council dated the 12th of December 2006 on Services in the Internal Market.[30]

In conclusion, we could note that the initiative in launching the implementation process was unilateral. The central government enacted a general law and established the criteria, designed the process and the computer tool and drew up a manual. The ACs' participation in the process came with the local administrations in a later phase, and the implementation of the Directive in the procedures within their competence was subordinated to the criteria established by the central government.

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28 The transposition process has been detaily explained by numerous authors, including *Rivero Ortega, Ricardo* (2010): "La transposición de la Directiva de Servicios en España" in Ricardo Rivera Ortega (dir.) Mercado europeo y reformas administrativas. La transposición de la Directiva de Servicios en España, Madrid, Civitas; *Jiménez García, Francisco* (2008) "La cooperación administrativa en la Directiva relativa a los servicios en el mercado interior" Revista de Derecho de la Unión Europea, no. 14; *Villarejo Galende, Helena* (2008) "La simplificación administrativa en la Directiva relativa a los servicios en el mercado interior. Sus repercusiones en la Administración electrónica española y el desafío que plantea su transposición", Revista de Derecho de la Unión Europea, no. 12.

29 *López, Cristina*: "Transposició de la directiva 2006/123/CE: afectació a les competències de les administracions públiques en general, i de les comunitats autònomes", (Grant IEA 2010, unpublished), Document collection of the Institut d'Estudis Autonòmics (www.gencat.cat/iea).

30 DOGC 6.10.2010.

2.3 The continuation of administrative simplification: The action plan to lower administrative burdens

The simplification of the administrative procedures and burdens was not complete with the implementation of the Services Directive. In fact, the modernisation of the public administration has been an issue needing to be addressed for many years, and for the time being it has only been addressed partially through a variety of legislative amendments. The implementation of the Services Directive has served as an excuse to once again spotlight the shortcomings and needs in this realm, and this evidence is now compounded by the economic crisis, which casts doubt as to the cost of public decisions and their impact on both citizens and companies (Rivero, 2011).

Therefore, in order to make progress in this process of simplifying and lowering burdens, on the 20th of June 2008 the Council of Ministers approved an "Action Plan to Lower Administrative Burdens" which falls within the framework of the updated Lisbon strategy. Its purpose is the lower by 30% the burdens companies have to deal with by the 31st of December 2012. The plan is only binding for the central government, but there are plans for the Autonomous Communities to join it by signing an agreement.[31] The plan also calls for designing "efficient coordination mechanisms" that are attractive for the ACs and local governments, which aim to get them involved in the objectives of the plan, since it expressly recognises that the central government has not competences and legal instruments to impose these objectives on the ACs and local governments.

Regarding the coordination mechanisms, the plan distinguishes between "sectoral coordination", which should take place through the sectoral conferences and other more flexible support bodies and the meetings of general or technical directors, and "horizontal or general coordination", which is transversal in nature and is newly created. To assemble them, the plan creates a new commission for general coordination and stipulates that each AC will be asked to appoint an interlocutor, while for the local governments this role should be borne by the Federation of Municipalities and Provinces. In the implementation of this provision, a working group has been created between the Ministry of Public Administrations and the ACs to lower administrative burdens and improve regulations; this working group includes representative from all the ACs as well as the cities of Ceuta and Melilla. Specifically, eight framework agreements with identical content have been signed with the ACs in Cantabria, the Balearic Islands, Asturias, Extremadura, Murcia, Castilla-La

31 See http://www.mpt.gob.es/areas/funcion_publica/iniciativas/normativa_es.html.

Mancha, Aragon and Valencia to work together on lowering administrative burdens.

It should be noted that the ACs' adhesion to the plan and their signing of the agreements is totally voluntary, so there should be no argument to oppose this kind of cooperation. However, it could have been more respectful of the ACs' political autonomy by having decided on the contents of the plan with the ACs prior to its approval. This would have unquestionably facilitated its acceptance and application, as well as the launch of the coordination mechanisms instead of having chosen unilateral approval, which lowers the ACs' options to join the plan or not. On the other hand, since the content of the plan was not agreed to in advance, the provisions of Law 30/1922 on cooperation plans has not been fully complied with.

Along the same lines of unilateral decisions related to administrative simplification, we can also mention two more mechanisms. The first is the Spanish Law 2/2011 on the Sustainable Economy dated the 4th of March 2011, which sets objectives and principles related to administrative simplification and lowering burdens and requires all public administrations to fulfil them in the exercise of their regulatory initiatives. For this reason, it requires them to promote prior analysis instruments, pay the utmost attention to the public consultation process and promote the development of evaluation procedures. They are also required to periodically revise their norms, and it names the sectoral conference of the public administration as the framework of cooperation for promoting sound regulation principles. Either central government and ACs must report each year about their compliance to the cooperation body.[32]

The other mechanism is the creation of the Central Agency to Evaluate Public Policies and Quality of Services. In theory, its scope of action should be the central administration. Its statutes stipulate that every year the Council of Ministers must determine which public programmes and policies of the central administration will undergo evaluation. However, its goals are not limited to the central administration; rather they also include the signing of agreements with the Autonomous Communities to evaluate their public policies and programmes.

Regarding the Law on the Sustainable Economy, we should note that it is an example of the technique of the extensive use of the central government's

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32 Regarding the Law on Sustainable Economy we also can say it that creates new plans (using territory as a competence) in matters which fall under AC's competences, like urban transport and housing imposing binding objectives and principles on the ACs. The Catalan Advisory Body has established that some articles of this Law don't respect the allocation of competences. The Parliament of Canary Islands has appealed the Law.

framework competences (in this case, the competence on the legal system of the public administrations and regulation of the common administrative procedure, article 149.1.18 EC). This has an impact on the scope of administrative autonomy, since the goals and principles set forth in the law directly affect the procedure for drawing up the legal norms of the ACs, a procedure that falls within their exclusive competence and has been regarded as a mechanism of guaranteeing their regulatory autonomy.[33]

The basic competence in the legal system of the public administrations has been interpreted in different ways.[34] However, it should be borne in mind that at times the Constitutional Court has noted that the intensity of the central government's bases should be lower and that their binding nature should be lower when these bases affect more internal factors related to administrative organisation and the provision of means and resources (RCC 50/1999), such as the procedure of drawing up regulations. Therefore, the central government's support of competences to approve the aforementioned objectives and principles is debatable

In relation to the Agency, the question of voluntariness once again arises. Inasmuch as the signing of agreements is voluntary, its purpose cannot be debated. However, the ACs may also create agencies with the same purposes and functions, and we could then run into an assumption of duplication. Therefore, it would have been more advantageous to decide upon the creation of the Agency with the ACs, and representatives from the ACs could even have been included in its governing bodies, which would have made its purpose as a cooperation body more evident and visible.

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33 This was underscored by the Constitutional Court itself in RCC 106/1986, which states that wherever the Constitution determines a realm of autonomy, independence, self-governance or separation it is simultaneously endowing this realm with a regulatory power in the organisational, procedural and statutory aspects among them.

34 See *Lliset, Francesc* (1988) "Règim jurídic de l'Administració de la Generalitat (EAC 10.1.1)" in Comentaris a l'Estatut d'Autonomia de Catalunya, IEA, Barcelona, who upholds a highly restrictive view of the matter, compared to the extensive view defended by the Attorney General in several different lawsuits before the Constitutional Court. The Constitutional Court has upheld an intermediate position (RCC 32/1981).

3. Vertical cooperation in the realm of e-government

3.1 Regulation and implementation of the e-government by the central government

The second major area where administrative cooperation is currently taking place is in e-government. Let us begin by outlining the central parliament legislative development in this matter.

As noted above, the Constitution reserves a basic competence over the legal system of the public administrations for the central government, and in accordance with this competence it has legislated on e-government by establishing principles and objectives common to all the public administrations. However, the central parliament has also legislated on electronic commerce and the electronic signature, as if the act of using a different kind of technology turned one matter (public administration, commerce) into a new realm of competence.

Regarding the public administrations, article 45 of Law 30/1992 set forth principles for encouraging the use of technologies and electronic means by the public administrations. This law was later amended to introduce the possibility of creating remote computerised records and receiving notifications and submitting documents by this means.[35] Even later, Central Parliament's Law 59/2003 regulated the electronic signature by establishing different kinds of signatures, the legal effects of electronic signatures and the requirements service providers must fulfil regarding electronic signatures. In particular, this law regulated the so-called electronic identity document. The identity document is a compulsory document issued by the central government, and by including an electronic signature on this document the electronic signature becomes available to all citizens. The electronic identity document must be recognised by all the public administrations. Finally, as a transposition of the Services Directive based on the general transposition law, Central Parliament's Law 11/2007 on citizens' electronic access to public services was enacted. This law, which is also based on the basic central parliament's competence on the legal system of public administrations, establishes a catalogue of citizen rights regarding the use of electronic means, imposes a series of obligations on the public administrations and calls for cooperation mechanisms among them in order to fulfil these obligations and implement the laws.[36]

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35 Article 68 of State Law 24/2001.

36 Some of the provisions of this law, such as the compulsory nature of the electronic identity document, have been criticised from the perspective of competences. *Bernadí Gil, Xavier* (2007) "Cap a l'Estat autonòmic electrònic. Les TIC en la reforma

Regarding cooperation, the law creates a sectoral e-government committee which depends on the sectoral conference of the public administration; that is, it falls within the corresponding vertical conference. Participation in this committee is voluntary. Its goals are to ensure the compatibility and technical interoperability of the systems and applications and to prepare joint action plans and programmes to implement e-government.

One of the principles established in the law is the interoperability of systems and applications, and to guarantee this system it calls for the public administrations to cooperate through plans called the "National Interoperability Scheme" and the "National Security Schemes", which must be drawn up with the participation of all the administrations and then approved by the central government. The law has been implemented two years later by Royal Decree Royal Decree 1671/2009, which is the regulation that truly enables the law and the electronic requirements of the Services Directive to be effectively implemented.[37] And three years later, after a process coordinated by the central government, both plans have been approved: by Royal Decree 3/2010 (the "National Security Scheme") and by Royal Decree 4/2010 (the "National Interoperability Scheme"). Both plans impose the criteria that all the public administrations (central, ACs' and Local administrations) must apply and they are binding for all of them.

So, first, the central government has decided unilaterally about the technology and the security only for central administration and later has obliged by law all the ACs' and local administrations to "interoperate" with their technology. As a result of this, ACs' and local administrations have to adequate their technologies to the central governments' regulations.

On the other hand, we should also mention that the central government has taken the initiative in implementing European law on this matter. In this vein, we should mention that the European Union approved the eEurope Plan 2005 and later the eEurope Plan 2010, and within this framework the central government has approved the plans Avanza and Avanza2. In 2006, 19 agreements were signed with ACs, and this figure has risen each year with addenda and new agreements. The purpose of these agreements is for each signatory administration that invests to provide funds in five avenues of action: development of the ICT sector to support companies; ICT training, which is an ave-

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estatutària i en la nova legislació bàsica estatal", Revista de Dret Públic de Catalunya, no. 35.

37 The delay in the development of the law triggered doctrinal criticism. See *Rivero Ortega, R.* (2010): "La transposición de la Directiva..." Mercado europeo y reformas administrativas. La transposición de la Directiva de Servicios en España, Madrid, Civitas.

nue targeted to small and medium-sized companies and citizens; digital public services, which is targeted at improving the quality of the services provided by the public administrations; infrastructure, to drive the development and implementation of information systems; and co-financing and security, aimed at developing and encouraging information security programmes and accessibility for ICT services.

In addition to approving laws and norms for promoting e-government, the central government has also made use of means that have positioned it as a key player in this matter. Besides the identity document mentioned above, it also owns the Spanish Royal Mint, so it can develop security technologies at a lower cost than the other administrations, which must hire private companies.

As a final consideration on the cooperation mechanisms developed by the central government, we can stress that the central parliament's laws and regulations make no distinction between ACs and local governments. In the cooperation mechanisms designed, all the public administrations are present at the same level, which serves to dilute the role of the ACs as an intermediate level between the central and local governments.

3.2 The Autonomous Communities and e-government

In parallel to the central government's actions mentioned above, some ACs have also conducted actions from the start to drive and implement e-government within their sphere of competence. In short, the application of electronic technologies and procedures is considered a formal or procedural aspect inherent in the authorisation to self-govern and inseparable from administrative organisation.

Along these lines, in 2000 the Catalan government signed an agreement with representatives of local governments to implement e-government in these administrations, and in 2002 an inter-administrative consortium was created to promote online administrative services, one of whose goals was to create only one website for all the Catalan administrations and a user-friendly system of electronic signatures accessible to all citizens as a way of interacting with the administrations. Not having an ID card, the health card issued by the Catalan Government was chosen, but it does not cover the entire population.

The introduction of electronic procedures has been gradual and encompasses a significant number of procedures, such as the drawing up of a catalogue of data so that citizens do not have to provide documents or information to the administration which it already has through a system of data intercommunication from the different public administrations. A public procurement

platform has been created;[38] an election management system has been launched which enables electoral information to be managed among the Catalan government, the town halls and the election boards; and the use of remote computerised means in taxation management and the payment of certain taxes has been regulated.

Also worth noting is the regulation of the electronic prescription and remote computerised submission of medical prescription by the Catalan Health Service[39] since it is an example of the low degree of cooperation among the ACs in Spain and the need to strengthen these mechanisms of interaction. Catalonia has been one of the pioneering ACs in implementing the electronic prescription service.[40] The competences on managing the provision of medicine are held by the Autonomous Communities. However, since their territorial scope of action is limited, the effects of the electronic prescription only apply within their territory. The Conference of Governments of the ACs spearheaded the signing of a cooperation agreement, but the initiative was stalled because in parallel several ACs signed agreements with the Minister of Health of the central government in order to adapt their electronic prescription system in an effort to guarantee its interoperability with the other ACs and the circulation of prescription information through a healthcare intranet called for in the General Healthcare Law.[41] Royal Decree 1718/2010 dated the 17th of December 2010 approved the healthcare prescription which regulates the general criteria electronic prescriptions must fulfil, which can be completed by the ACs. Therefore, the central government took on the coordination of this area, using territory as its competence along with the framework competences it holds in healthcare matters (two of the techniques we mentioned in the introduction),[42] instead of cooperation among the ACs.

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38 Worth mentioning is the 9th European Commission Benchmark Report on e-Government, which particularly spotlights the Procurement Platform of the Public Administrations in Catalonia created by the Generalitat as an example of the regional implementation of e-government in the realm of public procurement.

39 Decree 159/2007 dated the 24th of July 2007, DOGC 26.07.2007.

40 Today, the ACs of Catalonia, Galicia, Valencia, the Basque Country and Andalusia have pilot projects or have already implemented the electronic prescription. See further: *Gómez Jiménez, María Luisa* "La receta electrónica y su progresiva implantación en el sistema sanitario español: especial referencia al caso andaluz" Revista eSalud.

41 The Catalan government signed an agreement with the Ministry of Health and Social Policy and with the company Red.es to develop digital public services in the national health system. BOE de 4.01.2010.

42 The Spanish Constitution reserves a framework competence and coordination in healthcare matters for the central government.

In 2010, the Parliament of Catalonia approved Law 29/2010 on the use of electronic means in the public sector in Catalonia. The purpose of this law is to facilitate the use of these means throughout the entire public sector in Catalonia, in relation to both the Catalan government and the local governments, public enterprises, foundations, public universities and concessionaires of these public administrations' services.

The law establishes a Catalan model of e-government and establishes the principle of cooperation among all the target entities in the law so they agree upon the infrastructures and common e-government services, ensure the interoperability of the systems and make the services offered to citizens more effective and economical.

It is worth noting that the second additional provision of the law states that the Open Electronic Administration Consortium of Catalonia is the body in charge of developing applications for the local governments so that they can fulfil the citizen rights set forth in Central Parliament's Law 11/2007 dated the 22nd of June 2007 on citizens' electronic access to public services.

Finally, it is worth noting that the Conference of Governments of the ACs created in 2010 spearheaded the signing of a protocol on defining common strategies aimed at encouraging joint actions on the quality of public services through the information technologies, which has yet to enter into force.

Therefore, despite the fact that in these matters the central government only has basic competences, not only has it approved laws but it has also developed technologies and means parallel the ACs, where the underdevelopment of horizontal relations is particularly noticeable. This is a realm in which prior inter-administrative cooperation should be particularly prominent, as well as AC participation in the design of the procedures and technologies, so that citizens can have easy access to as extensive a catalogue of e-government services as possible.

In the case of Catalonia, we should stress the cooperation between the Catalan government and the local governments in implementing these electronic services jointly, so far with good results.

4. Conclusions

To conclude what we have discussed, it is important to highlight that because of the sovereign debt crisis, the power of the central government over the ACs has increased in Spain. The amendment of the Spanish Constitution is an example of this. And even more, the position of ACs is weaker: their charters of self-government have been severely blurred by the Constitutional Court and the cooperation between them is very poor. The sovereign debt crisis also has

opened the debate on the financing system. So, these facts reinforce the centralizing trend in the Spanish State model and re-open the debate about the relations between Spain and some ACs, such as Catalonia.

In the legislative field, the centralizing trend has always been manifested through the expansion of the central government's jurisdiction by means of the five techniques I have analyzed before. Nevertheless, it must be said that central government has not just restricted its legislative power on the matters of the ACs, but has also expanded it to the cooperation field. European law and horizontal or basic powers have been extensively used to expand central government's power over ACs by means of legislation and planning. Actually, central government promotes multilateral cooperation through planning and programs. Joining them is voluntary but these are unilaterally designed and guided by central government. So, it is a top-down cooperation.

ACs have fewer resources and means to develop their own processes (to lower administrative burdens or to implement e-government) and it is easier for them to sign an agreement with the central government and to accept its conditions.

So, the central government is using multilateral cooperation as a tool to centralize competences and to reduce ACs powers also in the field of implementation.

So, some aspects should be changed to improve the cooperation between central government and ACs:

1. ACs should be previously consulted and they have to participate at the beginning of the processes, in order to design them and to take the important decisions together with the central government.
2. The processes and the calendars should be draw up by ACs and central government together.
3. Representatives of ACs should be included in the central bodies.
4. ACs should increase multilateral and horizontal cooperation in matters falling under their competence to avoid central government's interferences.
5. Last but not least: the central government should be more respectful with ACs competences.

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Governing from the centre: the influence of the federal/central government on subnational governments. The Italian case. General report

Stelio Mangiameli

1. Problems regarding the distribution of powers between the Central and Regional governments following the amendments made to Title V of the Italian Constitution

From the outset, the distribution of legislative powers introduced by Constitutional Law No. 3 of 2001 amending Title V of the Constitution had little chance of being implemented by the national Parliament.

Little notice was taken of the warning from many quarters not to follow the obsolete criterion of "subject matter" for organising the distribution of powers, but to look to the experience of federal States in which the central legislator had originally started out with a rather limited number of enumerated competences to be strictly interpreted, but had become the legislator with general competence within the system, with powers to act in every sector and no constitutionally-imposed predefined scope or restrictions on the extension of its legislative powers. In some instances, this has been done on the basis of certain clauses in the Constitution itself, which have been used in a manner that the Constituent Assembly could certainly never have foreseen; on other occasions it has been due to the creativity of the Supreme/Constitutional Courts which, consistently with the thinking of legal theories, have given metaconstitutional canons the character of "constitutional rules", where this has been considered necessary to rationalise the system.[1]

In the case of Italy, in particular, it became immediately evident that all the powers that had been vested exclusively in the central government by article 117(2) and (3) n.f. Const., were extremely limited in scope, even in comparison with the powers of federal States in the oldest federal tradition. Indeed it was said that it was not credible for the distribution of competences to be

1 The reader is referred to S. Mangiameli, Riforma federale, luoghi comuni e realtà costituzionale, in Quale dei tanti federalismi, edited by A. Pace, Padova 1997, 307 ss.

able to weaken the central government to such an extent[2] that this would have made it necessary to channel most of the financial resources to the regions to the point of undermining the role of central government as the guarantor of national unity, and of compromising the protection of the national interests at the supranational and international levels.

Scepticism was also caused by the substance of the subject matters falling within the scope of the central legislator's competence. Federations have come into being historically as a result of the devolution of powers by their member states which, until their functions were devolved, had been States *pleno iure*, endowed with full sovereign powers, and as a rule the powers devolved were over matters which generally lay on the external side of sovereignty (Foreign Affairs-Defence) and the governance of the economy and the market. Conversely, matters such as civil and criminal law, justice, the police and demographic services (including, originally, citizenship) were generally left fully within the jurisdiction of the member states themselves.

When Italy amended the Constitution, rather than follow this historical precedent, it did the exact opposite: central government retained its powers over *civil and criminal law and the justice system*, *public order* and *security*, as well as the *civil registry*, while the regional governments, in addition to the considerable so-called "residual" legislative powers vested in them under article 117 (4) Const. *"*in all subject matters that are not expressly covered by State legislation*"*, were also vested with concurring powers, *inter alia*, over such matters as *foreign trade*, *job protection and safety*, the professions, scientific and technological research, including *support for innovation in productive sectors*, *health protection, nutrition, sport and civil ports and airports, large-scale transport and navigation networks*, *communications* and even *the production, transport* and *national* (sic!) *distribution of energy*. Consequently, despite the decision to adopt the enumeration technique for the central legislator, according federal theory Italy's constitutional system cannot possibly be likened to a traditional federal system.

Federalism, from the interstate commerce clause in the Unites States' 1787 Constitution to the German *Zollverein* of 1833, and up until the experience of the European Union beginning with the Common Market established under the 1957 Treaty of Rome, has been fuelled by the need to expand and unify markets, vesting wide-ranging powers of intervention in the central (or rather, the federal) authorities. In 2001, while a process of European integration was at its height, against the background of an irrepressible internationalisation of the economy and finance, the Italian Republic voted through a

2 S. Mangiameli, Il riparto delle competenze normative nella riforma regionale, in La riforma del regionalismo italiano, Torino 2002, 119.

constitutional reform, which – in the best case scenario – will tend to lead to a fragmentation of economic policy.[3]

2. Intervention by the Constitutional Court to make the distribution of competences more flexible, and the co-operative principle: the appeal to subsidiarity

This is the key issue in the systematic interpretation of the new distribution of competences initiated by the Constitutional Court in Judgment no. 282 of 2002[4]. This decision appears to have been driven by the aim of taking seriously the reversal of the enumeration technique. The Court specified that the new wording of article 117 requires the central government to prove the specific right on which to base the exercise of its law-making powers. Whereas under the previous system the assumption had been that central government had general powers, following the 2001 reform it became a legislator with very specific competences.[5]

But this construction was immediately to prove inadequate for the reasons stated above, and in its judgement No. 303 of 2003, the Constitutional Court completely reversed the approach based on a systematic interpretation in relation to a law on major national infrastructure projects.

The starting point for the Court's reasoning would appear to be its assessment of reversing the enumeration of powers, but there was an immediate change of perspective from the *natural* constitutional interpretation. For the

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3 Both judgements examined here, considering also the work of the judge who drafted them, clearly perceived this inconsistency and tried to remedy it in some way.

4 The case law of the Constitutional Court has an important role in defining how Italy's regionalism is supposed to work. This article shows this to be the case in two important respects. First, the state and regions can appeal directly to the Court regarding the legitimacy of regional or state and regional legislation and administrative decisions. The aim here is to define the content of constitutional measures in terms of decisions taken by the Court. Second, this approach gives the allocation of competences the necessary flexibility for it to function even in the absence of formal adjustments through the revision of the Constitution. The Constitutional Court also acquires its legitimacy via the choice of justices and the procedures used for appointing them. Finally, the Court is by its very nature encouraged to exercise a certain self-restraint and caution in reaching its decisions in order to avoid, where possible, inter-institutional conflict and criticism of its decisions.

5 Cf. Constitutional Court, judgment No. 282 of 2002, point 3 in the Points in law (Considerato in diritto). Similarly, see judgment No. 1 of 2004, in which the Court ruled that "the State's legislative power only exists where the Constitution provides specific legitimation".

State was acknowledged also having jurisdiction in areas falling within the scope of the regional legislators, justified by the need to pursue unitary requirements derogating from the system of the constitutional distribution of law-making powers.[6]

From then on the Constitutional Court's judgment – for obvious reasons – has been creating a different constitutional system from the one resolved by the Parliament when it amended the Constitution[7], and it is therefore producing a different breakdown of competences.

All the commentators on this point are in agreement, and have already emphasised the core issues raised by this different constitutional interpretation produced by the Court, which is normally referred to as "the appeal to subsidiarity". There is a mechanism which makes it possible to derogate from the distribution of powers provided by article 117 of the Constitution, to enable central government to take over and regulate, by Act of Parliament, the exercise of administrative functions even in respect of legislative matters attributed to the concurrent or residual legislative powers vested in the Regions, by virtue of the principle of subsidiarity, within the meaning of article 118(1) Const., whenever central government deems it necessary for the purpose of guaranteeing the unitary (supra-regional/national) exercise of those powers.

It is to this reversed interpretation that the principle of legality would apply with what appears to be a syllogistic reasoning, according to which the functions vested by way of subsidiarity must be organised and regulated by an Act of Parliament, since they cannot be governed in different ways by different Regional laws, which would be inconsistent with the elementary need to guarantee the sound operation of government.

It is at this point that the creative nature of the judgment is enhanced: by establishing the reversed relationship between the administration and the law, the judgment provides that *the principle of subsidiarity and the principle of proportionality coexist with the normal distribution of legislative powers en-*

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6 Cf. Constitutional Court, judgment No. 303, of 2003, point 2.1 in the Considerato in diritto.

7 Even though the Constitutional Court cannot admit it, and tries to attach meanings to certain terms used in the Constitution which would be difficult using the traditional tools (logical-textual, teleological and systematic reasoning) for interpretation. For example, the Court says that the: "*Our constitutional system also has devices giving greater flexibility to a plan which, in spheres in which different powers and functions coexist and are interwoven, might, considering the wide range of complexity of powers and competences, run the risk of thwarting the demands for unification present in the widest range of different life environments which, in terms of legal principles, are supported in the proclamation of the unity and indivisibility of the Republic*" (point 2.1 of the *Considerato in diritto*).

shrined in Title V, with the result that there has been a shift away from the flexibility required for the distribution of competences[8] to a completely uncertain division of powers in which – as might have been expected – the decisive role of attributing legislative competences and powers inevitably falls to the Constitutional Court.

This is a matter which was well known during the initial period of Italian regionalisation which revolved around the – excessively discretionary – powers of the Constitutional Court when it ruled on the existence, or otherwise, of "national interests", whose controversial nature gace rise to the comment that this useful term, derived from the scholarship of Santi Romano, had been *punished* by being deleted from the Constitution.[9]

It was precisely for this reason that, in its judgment no. 303, the Court hastened to throw cold water on a possible outbreak of fire: this has resulted, on the one hand, in the establishment of a so-called "procedural and consensual" interpretation of the principles of proportionality and subsidiarity, according to which mere reference to these principles in itself would not be sufficient to justify any derogation from the distribution of competences[10] while, on the other hand, the judgment regarding the "appeal to subsidiarity" appeared to be clearly restricted as did a strict scrutiny of constitutionality. This has introduced the issue of the principles of proportionality, reasonableness and loyal

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8 In its judgment the Court ruled that: “alongside the original static dimension, which becomes evident in the potential attribution of most administrative functions to the municipalities, there is now a dynamic vocation to practise subsidiarity, such that it no longer operates as a ratio lying at the basis of a predetermined and established order of powers, but as a factor of that order's flexibility in order to meet the requirements of unitary action” (point 2.2. of the Considerato in diritto).

9 Following the revision of Title V, it placed great emphasis on the issue of "the national interests" A. Barbera, Chi è il custode dell’interesse nazionale?, in Quad. cost., 2001, 345; on this point see also R. Bin, L’interesse nazionale dopo la riforma: continuità dei problemi, discontinuità della giurisprudenza costituzionale, in Le Regioni, 4, 2001, 1213; R. Tosi, A proposito dell’interesse nazionale, in Quad. cost., 1, 2002, 86; Q. Camerlengo, L’ineluttabile destino di un concetto evanescente: l’interesse nazionale e la riforma costituzionale, in Aa.Vv., Problemi del federalismo, Milano, 2001, 327.

10 Since this would also show "that they cannot undertake a function which the national interest once had, reference to which is no longer sufficient to justify the exercise by central government of the function which is not vested in it under article 117 of the Constitution. In the new Title V the equation elementary national interest=central government competence, which in previous legislative practice underpinned the erosion of the administrative and parallel legislative functions of the regional governments, has now lost any deontological value because the national interest is no longer a constraint of legitimacy or substance on regional legislative powers” (p.to 2.2 of the Considerato in diritto).

cooperation as the yardsticks by which to assess central government's legislative intervention (cf. judgment no. 303, *cit*., point 2.2 of the *Considerato in diritto*).

Reasons for, and portions of central government intervention to safeguard unitary (but no longer national) interests have not had – as might have been foreseen – any real significance; indeed, as in the case of the national interest, this was a *de facto* opinion whose true logic resides more in the judge's common sense than in the logic of law or legal arguments.

The Constitution had made provision for cases in which central government was empowered to derogate from the breakdown of competences, and also for instruments whereby this derogation of powers had to be effected. For *"in order to drive economic development, cohesion and social solidarity, to remove economic and social inequalities, to encourage the effective enjoyment of personal rights, or to make provision for the normal exercise of their functions for different ends",* central government may allocate *"supplemental resources"* and implement *"special measures"* for the benefit of specific municipalities, provinces, metropolitan cities or regions. However, this provision, which echoes the federal power to make grants-in-aid, had the drawback of being costly and of excessively restricting central government powers by admitting derogation to the constitutional distribution of competences according solely to the "the payer has the powers" principle. This is why the Constitutional Court rejected an interpretation based on the provisions of the Constitution.

Conversely, the principle on which the Constitutional Court in the end focused so strongly was "loyal cooperation", hinging essentially on the possibility for the Standing Conference of the State and Regions (or perhaps even in a unified forum with Municipalities and Provinces) to issue an administrative measure.[11] The expansion of the "Conference" model – following Judgement no. 303 – appeared to be inevitable, at least until a series of judgements were handed down last year, evidencing a certain degree of rethinking on the part of the Constitutional Court.[12]

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11 For a fuller account, the reader is referred to our Il principio cooperativo nell'esperienza italiana (del primo e del secondo regionalismo), in TDS 3/2005, 419 ff, and 1/2007, 57 ff respectively. See also the thorough analysis on the effectiveness of the Conferences system by R. Carpino in Evoluzione del sistema della Conferenze, in Le istituzioni del federalismo 2006, 13 ff..

12 This is a reference to judgement no. 401 of 2007 on a number of the provisions of the "Contracts Code", in which the Court rejected the idea that in relation to the exercise of exclusive crosscutting central government competence in the matter of "competition protection" (art. 117(2), Const.), especially in the matter of public contracts/tenders, the Regions had necessarily to be involved without this having the effect of creating a

It should be emphasised that the co-operative circuit hinging on the Conferences system to compensate the Regions for their loss of legislative powers over matters that certainly fall within their sphere of competence under the Constitutional distribution of powers, was only adopted as an extreme remedy to compensate for the inadequacy of the constitutional amendments to create parliamentary representation for the Regions (and local authorities).

In a judgement handed down shortly after judgement No. 303 in 2003 the Constitutional Court reiterated its position that the national parliament was required, as a condition for the constitutional legitimacy of any legislation it enacted, to comply with the principle of loyal cooperation, by providing adequate instruments for participation, mainly in the form of the agreement with the Regional governments initialled at the Standing Conference of the State and Regions, even in the continuing absence of any changes to the parliamentary institutions and, in more general terms, of legislative procedures, even solely within the limits provided by article 11 of Constitutional Law No. 3 of 18 October, 2001 (amendments to Title V of the second part of the Constitution).[13]

This ruling is relevant on several counts. Firstly, it clearly shows that the Constitutional Court is fully aware of the mechanisms governing federal systems, in which any change in the order of competences can only be justified if there are adequate compensatory mechanisms in terms of the functions that are actually devolved by the central legislator to the Regions. In the case of the assumption of law-making powers by the central government, only permitting the Regional governments to participate in Central government legislation can adequately compensate the Regions for this interference with their powers.

Secondly, cooperation in terms of the administrative function is a temporary adjustment measure dictated by the need to guarantee the constitutional functionality of the distribution of powers, although at the same time it quite evidently demonstrates the maximum limit on the Court's constitutional creativity, beyond which it additional intervention by the legislator would be necessary to amend the Constitution, either to adjust the provisions regarding the material distribution of powers to meet the actual requirements of the State in its present historical phase, or to introduce coordinated procedures that are

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case of "strict interference with material areas falling within the competence of the Regions" (points 6.7, 7.1 and 7.3 of the Considerato in diritto). The statements made there were subsequently taken up, as far as our argument here is concerned, in the later judgement issued the same year, no. 431.

13 Constitutional Court, judgment no. 6 of 2004, point 7 of the Considerato in diritto.

able to give the distribution of powers a degree of flexibility consistent with the functions involved.

However, the regional system took a different course, both because of the failure to implement article 11 of Constitutional Law No. 3 of 2001 (which was the first important attempt to link the Central and the Regional governments' legislative systems), and because of difficulties of reforming the Senate to make it a Chamber of the Regions and the local authorities. The Italian co-operative model was therefore established on a skewed basis, since – as leading legal writers have pointed out – in order to remain coherent, "when cooperation is invoked to justify exceptions to the distribution of legislative powers, it must precede, and not follow, intervention by the central legislator".[14]

3. Ctd.: the protection of competition

Judgement No. 303 of 2003 brought infrastructure of national importance within the sphere of competence of the central government (and immediately afterwards, Judgement No. 6 of 2004 did the same for production, transport and the national distribution of energy). Judgement No. 14 of 2004 unified the whole scheme of the distribution of powers characterised by fragmented instead in the economy. This was done by introducing the consideration of "the protection of competition".

In this ruling, the Constitutional Court placed a particular interpretation on the role of central government with respect to market support policies, making it possible to place a wholly different construction on it to the one enshrined in the Constitution. For even though the Court based its reasoning on an alternative solution regarding the actual scope of central government competence over the economy (that is to say, whether central government (still) operated using instruments for direct intervention or only through the power to promote and support activities undertaken by the Regional governments and the local authorities), it eventually ruled that central government had exclusive competence in respect of both: direct action, as well as support for the economic policy measures adopted by the Regions and the local authorities.[15]

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14 A. D'Atena, Le aperture dinamiche del riparto delle competenze, tra punti fermi e nodi non sciolti, in Le Regioni, 2008, 815.

15 Point 3 in the Considerato in diritto. This is an evident reference to the instruments provided by article 119 (5) Const., as the only provision (together with article 120 (2) Const., in respect of which see the Constitutional Court's regarding its *extraordinary character*, judgment No. 43 of 2004) according to which it is only possible to derogate

By so doing, the Court dispensed with the natural interpretation of the Constitution and contrasted it with the constitutional essence of the role of the central government in respect of the market, encompassed in the expression "the protection of competition". Its reasoning was therefore built on a dimension which, while consistent with the dogmatics of constitutional law, was actually outside the formal Constitution making it possible to establish a new series of constitutional prescriptions (if it can be described as such), different from the one found in the provisions adopted by the legislator in the course of amending the Constitution.

For in order to answer the question raised, it would appear to be sufficient for the constitutional court "to set public intervention (in the economy) in a wider systematic context", sites that the public intervention measures "are classified in Community law as 'State aids'. They therefore involve relations with the European Union and affect competition which is governed, in the current phase of supranational intervention, on two tiers: the Community and the State levels".

The Court, using European legislation to promote a competitive market, expresses its conviction that the rules of competition are linked to an idea of economic-social development which gives state institutions tasks of active intervention in the market in addition to the power to impose penalties for violations of competition law.

With its dynamic interpretation, the notion of competition is used by the Constitutional Court to address the central government legislator with the role of guarantor of the unitary national market and a unified public economic policy by adopting State measures to reduce imbalances, to foster conditions for the adequate development of the market or to introduce competitive systems.

It has not been so much the meaning attributed to "protection of competition", which has caused so much debate among commentators on judgement No. 14, and its consistency with the notion of competition and Community law, that has been the subject of discussion, as the role assigned to this competence in the national system of public intervention in the economy.

In constitutional terms, then, what is important is the relationship that exists between this and the other matters enumerated in paragraph (3) of art. 117, or the matters falling within the exclusive competence of the Regions (such as agriculture) in paragraph (4) of art. 117. As far as these are concerned, whether they are actually enumerated, whether they are inferred from the clause dealing with residual powers, the Constitutional Court judgement No. 14 no longer poses the problem of limiting respective spheres of compe-

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from the Constitutional distribution of (legislative and/or administrative) competences as an exception.

tence, but of measuring the reduction in the scope of the subject matter falling under "the protection of competition". In fact, as the Constitutional Court has ruled, this competence is undeniably teleological in character, whose capacity to expand cannot be determined *a priori*.

All this ultimately affects the system of the distribution of competences between central government and the Regional governments, to the resultant detriment of regional powers in the matter of economic development. In addition to this, the Court also noted the need to draft criteria for governing the exercise of central government cost-cutting competence, in order to restricted extension and to delimit the respective spheres of competence (point 4 of the *Considerato in diritto*).

This once again raises the issue of the principle of unification (falling to central government), according to which the constitutional essence of the State lies in its capacity to effect *reductio ad unitatem*, which, in the case of the market means specifically the guarantee to maintain national economic unity, which is therefore included in the subject matter "protection of competition".

It is certainly not consistent with the wording of the Title V to say that "the intention of the constitutional legislator in 2001 was to unify under the central government the economic policy instruments of relevance to the development of the country as a whole". On the contrary, the spirit driving amendment to the Constitution was the exact opposite. A very small number of economic matters fall within the competence of Central government in comparison with the large number of economic matters provided by article 117(3), and Title V mentions economic unity, not to address the distribution of competences and powers, but to provide a particular means of replacement to be brought into play only in the event of very serious economic crises.[16]

The principle that "state intervention" in the economy can always be justified on the grounds of its "macroeconomic importance" regardless of the subject matter to which it refers[17] is therefore due to the constitutional creativity of the Constitutional Court.

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16 In that judgement no. 43 of 2004, the Court reiterated the fact that "the terms 'juridical unity' and 'economic unity', whatever they might mean (which it is not necessary to examine here), are evidently references to interests falling "naturally" to Central government, which has the responsibility of last resort for maintaining the unity and indivisibility of the Republic guaranteed by article 5 of the Constitution".

17 Judgment No. 14 states that, "it is only within this framework that the central government retains the right to adopt both specific measures of substantial magnitude, and State aids systems permitted by EU law (including the de minimis aids), provided that they are in every instance able to affect the general economic equilibrium, with regard

Conversely, intervention regarding regional production fall within the "concurrent or residual legislative competence of the Regions" which the Court did not hesitate to define as "localistic or microsectoral in character, and hence not to be deemed macroeconomic".

This judgement refers to a model of unified federalism. Under this the economy must be governed, in contemporary States, even of a federal nature, by unitary logic in respect of which the contribution of the Member States, the Länder, the Regions and the Autonomous Communities are considered to work together and on rare occasions to be act odds.

There is no doubt that the Constitutional Court's ruling appears to contradict the historical reality of the revision of the Constitution, which is designed to broaden the legislative powers of the Regions. But, as previously occurred with judgement No. 303, the compelling need being pursued was an essential part of the rationale for the governance of the economy by central government and the Constitutional Court merely provided a possible justification for it in the light of the new wording of the Constitution. The Constitutional Court now laid down restrictions on possible intervention in the market by central government ("it does not fall within the remit of this court to appraise the economic soundness of the legislator's decisions, namely, to establish whether intervention has such important effects on the economy as to transcend the regional sphere"), but merely provided grounds based on the principle of reasonableness and proportionality.[18] These were therefore the principles it used as the basis for gauging compliance by central government legislative measures with the formal division of competencies, considering that "the protection of competition" does not define "spheres that can be objectively delimited", but if it would interfere "with the many competences vested in the Regions". It reached the conclusion that "if it can be shown that the instrument used is consistent with the purpose of activating the factors which establish general economic equilibrium, the legislative competence of central government provided by article 117(2) (e), cannot be denied".

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to their accessibility to all the players concerned and to their overall impact" adding that these would be "instruments which, in the last resort, are of a unitary nature, such that some are interpreted by applying the others, and all are designed to balance the volume of financial resources in the economic circuit" (point 4 of the Considerato in diritto).

18 According to the court, these decisions cannot "evade the test of constitutionality to see whether the bases underlying them are not manifestly irrational and whether the instruments for intervention have been provided in a manner that is reasonable and proportional in terms of the objectives they are expected to attain" (ppoint 4.1 of the Considerato in diritto).

4. Ctd.: Crosscutting competences and the waiver of the prevalence principle

The third case in which the Constitutional Court flexibly construed the division of legislative competences, with reference to the principle of loyal cooperation, had to do with the normative spheres which central government acts upon through the exercise of its so-called "crosscutting" or “transversal” legislative competences.

This expression refers to the particular character of certain central government competences, and refers to a dynamic, rather than a static, division of legislative powers between the central the regional governments; more specifically, this refers to provisions under which central government competence is not identified objectively, but functionally, and in terms of the purpose pursued, as in the case of "safeguarding the environment", for example, pursant to article 117(2)(s) Const.

From a different point of view there is also a central government competence to “establish the essential levels of services regarding civil and social rights which must be guaranteed throughout the national territory", pursuant to article 117(2)(m) Const.: in this case, the competence is not identified in terms of purpose and yet it empowers the central government to act "transversely" and hence to intervene in legislative areas which fall to the concurrent or residual competence of the regional governments.

In these cases it is obvious what the Constitutional Court intended to do: acknowledge the central government's right to intervene, as the condition for pursuing unitary interests on a national scale.

This reveals the contradiction in judgements that have laid down, as a condition of constitutional legitimacy of central government legislation, the provision for “collaborative modules”, and in particular, the need for agreement when implementing it.[19] As has been correctly pointed out, “if these matters constitute the condition for pursuing the national interest, problems arise when claiming that their implementation is conditional upon agreements to be concluded by parties pursuing their own (concrete) interests, which are unwilling to be channelled – under an agreement – into a decision which is of necessity unitary in nature”.[20]

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19 Constitutional court judgment no. 134 of 2006, point 9 of the Considerato in diritto.

20 L. Violini, La negoziazione istituzionale nell’attuazione della Costituzione: livelli essenziali e scelte di sussidiarietà a raffronto, in Itinerari di sviluppo del regionalismo italiano, a cura di L. Violini, Milano 2005, part. 206.

In these cases, the central government exercises the competence which is "proper" or "exclusive" to it, albeit *sui generis*. Furthermore, the inevitable interference which the exercise of crosscutting powers produces in areas falling within the scope of regional legislation does not, in itself, constitute a basis that authorises the Regions whose exercise of legislative competence is conditioned thereby, to become involved in the face of adopting administrative measures.

In reality, it is clear that the application of the principle of loyal cooperation is a complete anomaly in cases where there is interference in or interlinkage between the constitutional powers vested in different tiers of government, determined by the phenomenon of the "connection" between areas falling within the legislative competence of central government and regional government.

In this case, where there is a superimposition or contiguity in the powers of the various authorities involved, even without the clause on "implicit powers", it would be necessary, as the Constitutional Court has itself said, to apply frequently the "prevalence principle" to attribute and divide the legislative and administrative competences.[21] However, the Constitutional Court has often said that it is impossible to reach an acceptable interpretation based on the Constitution which, because of the mutual interrelationships, defines the two distinct material areas falling within the scope of the central and the regional governments. Therefore, it is precisely here, that the Constitutional Court eventually identified the area of priority for the application of the principle of loyal cooperation between central and regional governments. This gives prevalence to central government legislation while requiring agreement to be reached with the regions so that the central government can perform administrative functions.[22]

In this context of enhanced central government powers and the loss of meaning of the regional enumeration system (at least in respect of the matters referred to in article 117(3), Const.), the reference made by the Constitutional Court to the need to adopt instruments for concerted action has helped compensate the regions for the losses sustained in terms of legislative powers.

Both these elements – recourse to the criterion of loyal cooperation in the case of concurrent competences, and its compensatory character – are in con-

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21 Constitutional Court judgement No. 384 of 2005: by subject matter which, although interfering, were "mainly relative to matters falling within the scope of central government", "in principle, the failure of the Conference to issue an opinion does not entail unconstitutionality".

22 In this connection see S. Bartole, Collaborazione e sussidiarietà nel nuovo ordine regionale, in Le Regioni, 2-3/2004, 578 ff.

trast to the innovations introduced by the amendments made to the Constitution. In particular, one has to consider the rationale of the new division of legislative powers, where the regional laws should have been given the focal position, in respect of the specific powers of the central government legislator. It is in this context that the overlapping of subject matters ought to have been resolved by establishing a clear separation between them ("aut…aut"), by applying the prevalence criterion.[23]

However, considering the "complexity of the social domain to be regulated" the Constitutional Court saw the "interweaving of central government and regional competences" and considering that it could not envisage "the certain prevalence of one corpus rules over another, making the related legislative competence dominant", it refused to pronounce on the prevalence issue and judged the legitimacy of central government provisions not by ascertaining whether the central government was empowered to enact legislation, but whether the central government law provided "adequate instruments for regional involvement" and whether the central government organs complied with them. In essence, the Court applied the criterion of loyal cooperation, which "requires central government laws to provide adequate instruments for the involvement of the regions, in order to safeguard their competences".[24]

The Court does not therefore appear to consider linkage as a interpretative and systematic issue, to be resolved on the basis of positive constitutional law in order to avoid duplication of competences and legislation, or procedures to determine the instruments for implementing legislative provisions, complicated by multiple coordination actions. What it seems to do, however, is to make a policy choice in the opposite direction, giving pride of place in the system to elements of agreement and coordination, and in practice incorporating collaborative modules with no constitutional basis. By so doing, the Constitutional Court appears to be unaware of the inefficiency, in addition to the increasing public expenditure, which leads to widespread and permanent coordination between different tiers of government.[25]

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23 In this regard, the reader is referred to S. Mangiameli, La connessione, il principio di strumentalità, la Gesichtspunkttheorie e l'enumerazione regionale, in Le Regioni n. 6, 1991, 1757 ff.; ID., Le materie di competenza regionale, Milano, 1992, 190 ff.

24 See, *ex plurimis*, Constitutional Court judgment no. 308 of 2003, nos. 50, 219 and 231, all from 2005, no. 133 of 2006 and nos. 24, 58, 81 and 162, all from 2007.

25 See also Constitutional Court judgment No. 63 of 2006 on prohibiting smoking in places open to the public in which the Court ruled that "on the ban on smoking in places open to the public the interweaving of legislative and administrative central and regional competences makes it difficult to resolve matter in terms of sharp division". Then there was judgment No. 213 of 2006 which evidently shows the Court does not examine the provisions being challenged one by one, to delimit the scope of the com-

Constitutional Court case-law has thus not made a contribution to clarifying the scope of the respective competences, and the linkage established between concurrent competence and loyal cooperation emerges as a serious weakness and precariousness of regional legislative autonomy, and of the efficiency, effectiveness and cost-effectiveness of the whole system of both legislative and administrative functions.

5. The need to supersede problems deriving from loyal cooperation and possible solutions: the Federal Senate and fiscal federalism

The chasm into which Constitutional Court case-law has tumbled with the appeal to subsidiarity and the principle of loyal cooperation, was profound. For by arguing on the basis of "the presence of a system entailing the process in which concertation and horizontal coordination have their due importance, that is to say establishing agreements, which must be conducted on the basis of the principle of loyal cooperation" (Judgment No. 303 of 2003), the regions have lost some of their responsibilities as has clearly emerged from legal disputes over such important issues as energy, foreign trade, infrastructure, the production of public goods, etc.

This has given rise to considerable concern within the Constitutional Court, that the remedy is nothing short of overruling its own case-law on the principle of loyal cooperation. Its references to the principle of efficient administration within the meaning of article 97 Const. are widely known, even in the case of a "strong" agreement, as an essential requirement with which all administrative systems must comply. The same is for a less rigorous interpretation of this principle in order to safeguard the central government normative acts.

In particular, the Court has had to emphasise – not without contradicting itself – the non-constitutional nature of the principle of cooperation and that it is central government that is responsible for its organisation (Judgment No. 401 of 2007), and a hierarchical interpretation of the matters falling within the scope of central government with respect to regional matters, with a power of attraction of the environment, for example, then the regional powers, such as

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petencies by reference to the Constitution and to see which competences are specifically vested in central government of relevance to the law being challenged. Conversely, after affirming the existence of an undemonstrated interlinkage of central and regional government competences, it has not formed an assessment based on prevalence, even though it did refer to it (point 7.2. of the *Considerato in diritto*), but it considers that the "complexity" of the financial intervention offered by the central government in the legislation being challenged justifies, in itself, the call to subsidiarity, requiring an agreement on the measure implementing it.

local governance. In this way, the environment has moved from being a subject matter/value (Judgment No. 407 of 2003), as a source of the necessary cooperation between the central government and the regions, to become the exclusive preserve of central government (Judgment No. 325 of 2010) and, ultimately, prevailing over regional competences (judgment No. 33 of 2011).

The Constitutional Court has often urged the national Parliament to remedy the situation that has arisen in relations between central government and regional governments (and the local authorities), primarily by referring to involving representatives of the Regions and the local authorities in the national Parliament, as provided by article 11 of Constitutional Law No. 3 of 2001, emphasising the need for a root and branch reform of Italian bicameralism and the institution of a Federal Senate.

The Federal Senate would appear to be a means of rationalising the whole system of relations between central government, regional governments and the local authorities, as has emerged following the constitutional reform of 2001; and it is in this context that its role as a Chamber representing the regions, regardless of the value one might wish to be attributed to it (guarantee or compensation), forms part of the sphere of the institutional reforms which would uphold the principle of the indivisibility and political unity of the Republic (art. 5 Const.) and could, at the same time, give a federal character to the other constitutional organs of the Republic (participating in the election of the President of the Republic and the judges of the Constitutional Court). Moreover, by guaranteeing the effective representation of the Regions and the local authorities[26], the Federal Senate would also enable them to play a part in central government legislation in a clear and unambiguous manner, involving the regional Councils, which are vested with regional legislative powers, in any derogations from the division of powers through the so-called “call to subsidiarity”.

The Constitutional Court is also resolved to request the legislator to introduce fiscal federalism, in, for example, Judgment No. 370 of 2003, in which the Court ruled that "the implementation of article 119 of the Constitution is a matter of urgency in order to put into practice the provisions of the new Title V of the Constitution. Otherwise there would be a contradiction with the different division of competences in the new constitutional rules”. The Court also emphasised that "the continuation or indeed the institution of forms of financing for the Regions and the local authorities in contradiction to article 119 of the Constitution would open the way to risking jeopardising the functionality of, or even blocking, whole sectors”.

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26 V. A. D’Atena, Un Senato "federale". A proposito di una recente proposta parlamentare, in Rass. parl., 1/2008.

In various seminars held recently, the constitutional judges themselves, with a certain frankness, have openly voiced the Constitutional Court's unease, and the need to rethink the issue of cooperation procedures.

The need for restyling Title V and its implementation are widely known. Law No. 42 of 2009 on fiscal federalism is based on a provisional identification of the fundamental functions of municipalities and provinces and on a very uncertain definition of the regional administrative functions.

The Constitutional Bill on the Federal Senate is still before Parliament and even though it is supported by all the political parties, it has not yet been placed on the agenda for debate.

State Challenges to Coercive Federalism in the United States

John Kincaid

The theme of my papers for many years has been the rise of coercive federalism: federal mandates imposed on states, federal preemptions of state powers, expansive policy rules attached to federal grants-in-aid, nationalization of criminal law, federal court orders, and others.

Recently, I have begun also to look at the decline of treaty-making and the rise of executive agreements as another feature of coercive federalism. Treaty ratification requires a two-thirds vote of the Senate, the states' house, but executive agreements require only a simple majority vote of each house of Congress on implementing legislation. The two-thirds Senate vote was included in the federal Constitution to protect the interests of diverse states and to prevent the federal government from using treaties to erode state powers.

However, the United States entered both NAFTA in 1993 (61-38 vote in Senate) and WTO in 1994 (76-24 vote in Senate) via the executive-agreement procedure because it was uncertain whether the Senate could muster two-thirds votes to ratify them as treaties. Other trade agreements were approved by the Senate as follows: Extend Andean Trade Preference Act 2002 (64-34 Senate vote), Chile Singapore FTA 2003 (65-34 Senate vote), PNTR with China (85-15 Senate vote), CAFTA 2005 (55-45 Senate vote), and Morocco FTA 2004 (85-13 vote). As one can see, only three of these seven trade pacts drew sufficient votes to ratify a treaty.

Ruling on a challenge to this procedure, a U.S. appeals court upheld the executive-agreement procedure, arguing that the Constitution's treaty clause does not stipulate when the treaty procedure must be used to approve an international commercial agreement. The court also held that the judiciary lacks a clear rubric for distinguishing between agreements that do and do not require Senate treaty-ratification and that having to evaluate the "significance" of an international agreement in order to determine whether it should be a treaty would "unavoidably thrust [the justices] into making policy judgments of the sort unsuited for the judicial branch." The court opined further that foreign-affairs considerations rendered judicial intervention unwise (Made in the USA 2001). The U.S. Supreme Court declined to review this appeals court decision.

This case illustrates one important factor in the rise of coercive federalism, namely, the willingness of the modern federal judiciary to defer to the will of

the political majority in Congress and the White House over interpretations of the substantive powers of the federal government vis-à-vis the states. To protect their powers, the states must rely on the political process.

Coercive federalism continues to prevail, therefore, but, here, I wish to focus on current challenges to two federal policies, discuss the apparent causes of the challenges, and assess the possible consequences of the challenges.

1. REAL ID and Terrorism Prevention

One challenge is state opposition to a federal law, called REAL ID, enacted in 2005. This law requires certain security, authentication, and issuing standards for driver's licenses and identification (ID) cards that are issued by the states to their residents. The law does not directly mandate state compliance, but if a state fails to issue compliant licenses, its residents will not be able to use their license for "official purposes" as defined by the U.S. Secretary of Homeland Security. For example, they will not be able to use their driver's license to board an airplane or passenger train, enter a federal building or nuclear power plant, or open a bank account. In effect, therefore, the law is a de facto mandate.

The law has provoked unusual resistance. Sixteen states have passed laws opposing compliance; eight states have passed a joint or concurrent resolution opposing REAL ID; each house of the Pennsylvania legislature has expressed opposition; and the Michigan House of Representatives also has done so. Hence, 26 state legislatures have expressed some form of opposition to REAL ID—moves that resurrect the ghost of John C. Calhoun and the doctrine of state nullification of federal law that was vigorously debated before the Civil War.

However, this opposition is rooted only partly in federalism concerns. More salient are civil-liberties concerns, which have attracted opposition from a sizable alliance of left-wing and right-wing groups. For example, the American Civil Liberties Union, a left-wing group, and the American Center for Law and Justice, a right-wing Christian group, held a joint press conference in 2008 opposing the law. Real ID is opposed, for example, by other human and civil rights organizations, libertarians, such as the Cato Institute, immigrant advocates, Christian fundamentalists, privacy advocates, internet-freedom champions, state groups such as Floridians Against REAL ID, government-accountability groups, Gun Owners of America, the Constitution Party, The Wall Street Journal, major labor unions such as the AFL-CIO, and the liberal People for the America Way. These groups believe the law is an unconstitutional invasion of personal privacy, a de facto national identifica-

tion card, and an over-extension of government power. REAL ID, they argue, opens the door to the kind of "big brother" surveillance dramatized by George Orwell.

However, even though 26 legislatures have expressed opposition to REAL ID, 41 of the 50 states are nevertheless moving toward compliance. Five states have certified full compliance, ten are issuing acceptably compliant licenses, another 11 have pledged to comply but need more time, four have enhanced driver's licenses that will likely meet federal requirements, and 11 states have pledged to achieve 15 of 18 interim benchmarks promulgated by the U.S. Department of Homeland Security. The remaining nine states – Alaska, Idaho, Louisiana, Maine, Massachusetts, Montana, New Mexico, Oklahoma, and Oregon – will not meet four or more federal benchmarks within the next year, but only six of those states seem adamant about not complying.

This case illustrates several features of the politics of coercive federalism in the United States. For one, state opposition to federal policies is often more rhetorical than substantive. It appears that only about six states might actually try to refuse compliance, although several other states will continue to comply at a turtle's pace. Rhetorical opposition is not entirely hypocritical, however, because it serves domestic political purposes and it places political pressure on implementing bureaucrats to tread carefully, on the White House to revise regulations and extend deadlines, and on Congress to amend or repeal the law.

Indeed, while the administration of George W. Bush supported REAL ID, as early as January 2008, Barack Obama said: "I do not support the Real ID program because it is an unfunded mandate, and not enough work has been done with the states to help them implement the program" (Broache and McCullagh, 2008). Early in his first year in office, Obama and his Secretary of Homeland Security, Janet Napolitano, a former governor of Arizona who opposed REAL ID, sought to soften the law's regulations and asked Congress to repeal the law and enact a new one supported by most of the governors. Consequently, resisting states had support from the new president himself, which may have emboldened more state resistance. Whereas seven states enacted laws opposing REAL ID in 2007, ten states enacted such laws after Obama's inauguration.

Another factor in state resistance was resentment at federal intervention into a voluntary process already being undertaken by the states to improve driver's license security. Most states had long been concerned about individuals evading state laws by obtaining driver's licenses in multiple states and falsifying documents to obtain licenses. It is possible that states would have achieved sufficient driver's license security on their own, but the enactment of REAL ID in 2005 disrupted this voluntary process and also politicized the is-

sue, thereby triggering oppositional intervention by powerful civil-liberties organizations and other interest groups.

To date, the president and the states have failed to convince Congress to amend or repeal REAL ID; on the contrary, in March 2011, some senior Republicans in the U.S. House of Representatives publically urged the president to speed up REAL ID's implementation (McCullagh 2011). The Republican leaders did so because the president extended REAL ID's implementation deadlines several times. States were originally supposed to comply with this law by May 11, 2008, but the U.S. Department of Homeland Security extended the deadline to December 31, 2009, and then to May 10, 2011 and now to January 15, 2013.

Such deadline extensions and other state accommodations are fairly common under coercive federalism, especially when the president endorses accommodation and when powerful interest groups also support state accommodations. That is, while coercive federalism prevails in the policymaking arena where state officials have little input, more cooperative intergovernmental patterns often prevail in the policy-implementation arena. In the case of REAL ID, moreover, the law had been attached to a must-pass spending bill, and neither house of Congress held hearings on REAL ID or subjected it to serious floor debate. Consequently, opposition was mobilized mostly after enactment and, thus, during its implementation.

In the final analysis, however, federalism as a principle is not a key factor in this struggle, and there is, for example, no regional pattern to state opposition to REAL ID. Federalism is a factor only because the states have historically issued driver's licenses with virtually no federal role until enactments of the Commercial Motor Vehicle Safety Act of 1986 and the Motor Carrier Safety Improvement Act of 1999, both of which deal with interstate trucking. Instead, civil liberties are the key factor. Most of the non-governmental groups opposed to REAL ID have little interest in federalism. The American Civil Liberties Union, for example, avoids emphasizing states' rights and the Tenth Amendment when expressing its opposition to REAL ID. Only a few conservative groups, such as some Tea Party activists and the Tenth Amendment Center, wave the federalism flag.

Furthermore, REAL ID still stands; it continues to be supported by many conservative groups and by enough Republicans in Congress to block legislative change; and too few voters are aware of REAL ID to make it an issue in the 2012 election. The clash over implementation, therefore, will have to come to a head at some time. Most likely, implementation will be resolved by negotiations among federal and state officials as well as representatives of the most influential non-governmental opponents, and some states will be allowed to comply with REAL ID without formally admitting it so long as their

implicit compliance produces the same results as explicit compliance. Indeed, the states have a self-interest in establishing a nationwide agreement that will increase assurance that individuals will have only one driver's license from one state and that no licenses are obtained with false identification.

2. Federal Health-Care Reform

The second challenge involves state opposition to President Obama's signature health-care reform in 2010. Congressional enactment of the Patient Protection and Affordable Care Act (PPACA) as amended by the Health Care and Education Reconciliation Act of 2010, marked an unusually substantial increase in federal power over both citizens and the states. Furthermore, the law passed the U.S. Senate by the use of a highly unusual, perhaps unprecedented, parliamentary procedure that allowed the Democratic majority to circumvent a Republican filibuster that would have killed the law. This procedure added considerably to partisan bitterness and polarization.

Although other developed democracies have long had universal health-care systems, such systems and the concept of the social-welfare state as a whole have long been resisted in the United States on such grounds as liberty, individualism, and limited government, especially limited federal power. Health insurance developed, therefore, as an employee benefit regulated by the states. The federal government long operated a separate health-care system for military veterans but did not become substantially involved in general health care until 1965 when Congress enacted Medicare and Medicaid. Medicare is a health-insurance program for all citizens and legal residents who are age 65 or more. It covers routine physician visits, medical tests, hospitalization, prescription drugs, and some other matters but not long-term care for the elderly. It is run by the federal government and financed by a federal payroll tax. Medicaid is a joint federal-state health-insurance program for poor people. The federal government contributes from 50 percent to 79 percent of the states' costs for Medicaid, with the precise federal contribution depending on a state's per capita income.

The PPACA is a major overhaul of the American health-care system. Among other things, it requires all individuals to purchase health-care insurance beginning in 2014; authorizes states to sell federally approved health-insurance products through state-operated exchanges with a government subsidy for low-income people; expands the federal-state Medicaid program's eligibility up to 133 percent of the poverty level, which will likely increase Medicaid enrollment by about 25 percent (18 million more enrollees) by 2014; prohibits denial of health insurance for pre-existing conditions; elimi-

nates lifetime coverage limits; and allows young people to remain on their parents' insurance to age 26.

The states are quite concerned about the law's expansion of Medicaid because Medicaid is now a huge cost for the states and constitutes the single largest category of state spending at about 21.8 percent of state budgets. The PPACA provides that the federal government will pay 90 percent of the costs of Medicaid's expansion, but only up to 2020. The principal driver of rising Medicaid spending is that Medicaid covers the costs of nursing home and long-term care for elderly poor people. This group includes many formerly middle-class people who, upon entering a nursing home, quickly spend down their assets on long-term care to the point where they qualify for Medicaid. The nursing home and other long-term care populations are expected to grow substantially over the next 50 years.

The PPACA contains mandates as well as a blockbuster de facto preemption, namely, authority for the federal government to enter a state to establish an exchange to sell federally approved health insurance to a state's residents when the elected officials of their state refuse to operate such an exchange. This will be a revolutionary federal displacement of traditional state power.

Consequently, a constitutional challenge to the PPACA has been mounted jointly and individually by governors or attorneys general of 28 states, almost all of who are Republicans. The challengers' principal contention is that the PPACA violates state sovereignty. The core challenge is that the PPACA's individual mandate exceeds Congress's constitutional commerce power. This mandate requires every uninsured citizen and legal resident to purchase federally approved health insurance by 2014 unless they are exempt (e.g., for religious reasons). Those who do not buy insurance will have to pay to the U.S. Treasury an annual penalty of $750 or 2 percent of their annual income (whichever is higher) by 2016. When Congress debated this mandate, the president said the penalty was "absolutely not" a tax or a tax increase, but in response to states' court challenges, the U.S. Department of Justice defended the mandate as a proper exercise of Congress's "power to lay and collect taxes."

The key issues are whether 'activity' is required for Congress to employ its interstate commerce power and whether the individual mandate is 'activity' or 'inactivity.' The challengers contend that the individual mandate regulates inactivity because not buying insurance is 'inactivity' and that compelling individuals to purchase insurance would remove all conceivable limits on Congress's commerce power, thereby nullifying the concept of federalism that is embedded in the principle of limited federal power. The PPACA's defenders contend that activity is not needed to trigger Congress's commerce power but that even if activity is required, not purchasing insurance is 'activ-

ity,' particularly because individuals who do not purchase health insurance will enter the health-care system at some point in their lives. Defenders also argue that the individual mandate can be upheld because it is an appropriate exercise of Congress's power "to make all Laws necessary and proper" to regulate interstate commerce.

Massachusetts enacted an individual mandate of this nature, but it is not relevant to the federal government. States can do this, just as they require all automobile owners to purchase automobile insurance, because the Tenth Amendment of the U.S. Constitution reserved the police power to the states.

A key judicial precedent that might uphold the mandate is Wickard v. Filburn (1942), which upheld federal regulation of home-grown wheat used for home consumption. Mr. Filburn's allotment for 1941 was 11.1 acres (4.5 ha), which would normally yield 223 bushels of wheat. Filburn planted 23 acres (9.3 ha), which yielded 239 more bushels than his allotment.

A key precedent that might invalidate the mandate is United States v. Lopez (1995), which struck down the federal Gun-Free School Zones Act of 1990 as exceeding Congress's commerce power, and also United States v. Morrison (2000), which held that parts of the Violence Against Women Act of 1994 were unconstitutional because they exceeded Congress's commerce power.

Another challenge is that the PPACA violates the Tenth Amendment because it 'commandeers' the states to enforce federal law. This ground might be tenuous, though, because the PPACA allows the states to implement its provisions or to let the federal government do so instead. Some states contend that the law also violates the Constitution's spending clause as well as the Ninth and Tenth Amendments because it unilaterally increases state Medicaid costs. In addition, Virginia's attorney general filed a separate lawsuit contending that his state's law nullifying the PPACA preempts federal law.

Three federal district-court judges (all appointed by Democratic presidents) have upheld the PPACA, while two federal district-court judges (both appointed by Republican presidents) have struck down all or parts of the PPACA. In addition, three federal appeals courts have upheld the law, while another federal appeals court (Eleventh Circuit, Atlanta) has struck down the individual mandate. Each appeals court ruling was a split 2-1 decision, with a Democrat and Republican making up the majority in most cases but with a Republican dissenting on the appeals court that upheld the law and a Democrat dissenting on the appeals court that struck down the mandate. The Obama Administration urged the U.S. Supreme Court to expedite an appeal from the lower court that held the "individual mandate" to be unconstitutional but not necessarily other parts of the ACA. A decision is expected in late June 2012.

Unexpectedly, the Supreme Court also agreed to review the PPACA's mandatory Medicaid expansion. The suing states argue that the penalty of losing all Medicaid funding if they do not comply with the expansion is coercive and an illegal commandeering of states' autonomy. States, they contend, have no real choice to leave Medicaid. Starting in 2014, individuals who earn up to, effectively, 138 percent of the federal poverty line will qualify for Medicaid. The federal government will pay all additional costs (other than administrative costs) until 2016. By 2020, states will pay 10 percent of the expanded program.

In 1936, the Court opined that unrestrained conditional grants "could become the instrument for the total subversion of the government power reserved to the individual states." In 1987, the Court seemed to suggest that the federal government cannot make offers the states cannot refuse. The justices acknowledged that, "in some circumstances, the financial inducement offered by Congress might be so coercive as to pass the point at which 'pressure turns into compulsion.'"

If the Supreme Court strikes down the individual mandate or the entire ACA, the suing states will have blocked a significant expansion of federal power and reinforced the Court's occasional willingness since United States v. Lopez (1995) to limit Congress's interstate-commerce reach. However, the justices would likely frame such a rejection as an exception rather than a precedent readily applicable to other cases.

If the Court strikes down the Medicaid expansion as unconstitutionally coercive, it will set an entirely new precedent. Again, though, the Court would likely cast such a ruling as an exception because Medicaid is such a gargantuan federal-aid program.

Some 29 state legislatures are considering state constitutional amendments to nullify sections of the PPACA, while more than half have rejected such nullification proposals. Thus, consistent with party polarization, the majority of Democratic governors and legislatures support the PPACA, while the majority of Republican governors and legislatures oppose it. Nevertheless, much like REAL ID, nearly all the states are proceeding with implementation of the PPACA.

If the U.S. Supreme Court strikes down the individual mandate or the entire PPACA, the federal government will experience a major reversal of policy fortune, and the states will have blocked a significant expansion of federal power. If the PPACA falls, health reform could shift to the states, which have had major, historical health-policy responsibilities and where Republicans have a better record than Democrats in expanding health insurance coverage.

This case illustrates a number of things, but I wish to point out two salient things.

First, it clearly indicates the extent to which federalism has become a convenient partisan political tool to be embraced or abandoned depending on policy preferences. Many of the Republicans who oppose the PPACA support REAL ID, while most of the liberal and Democratic groups that oppose REAL ID support the PPACA. Members of both parties wave the federalism flag when they believe it will advance their political and policy objectives and toss it aside when it threatens their objectives.

Second, the case shows just how much the federal Constitution is the last line of defense for federalism. In the absence of political forces that have a vested interest in maintaining federalism as a general principle, the federal Constitution is the only potential pillar of that principle. However, the U.S. Supreme is the ultimate arbiter of the Constitution, and as the lower federal court rulings on the PPACA suggest, if the judges tossed their august robes aside, most of them would be exposed as naked partisans. This is why judicial appointments have become such bitter political contests in the U.S. Senate and also why we can predict that when the Supreme Court does rule on the PPACA, it will be a 5-4 ruling. What we cannot predict, though, is which way the ruling will go because Justice Anthony Kennedy continues to be the Court's one predictably unpredictable swing vote.

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Governing from the Centre – Resisting from the Periphery: Constitutional, Institutional and Societal Conditions and Drivers of Federal Encroachment on the Autonomy of Constituent Units

Christian Leuprecht

In theory, federal constitutions safeguard the efficiency of the supply of public goods by establishing institutionally preset conditions for making political decisions when regional preferences differ, and by instituting horizontal competition among jurisdictions. In practice, central governments routinely interfere in the provision of public goods by constituent units, and they may do so for perfectly good reason. On the one hand, insufficient, inadequate or deficient vertical intervention risks imposing undue constraints on the federal government's ability to respond to changing social, economic or political conditions. On the other hand, excessive intervention runs the risk of overcentralizing at the expense of the efficiencies inherent in subsidiarity and horizontal competition. Federal governments affect policy initiatives at the level of constituent units through a variety of institutions, measures, or processes. Some federal constitutions are designed to enable such intervention; others have measures that are meant to limit intervention. Constitutions can enable interference directly or indirectly. In the United States, for example, the Equal Protection Clause has been used to extend the purview of the Bill of Rights to the States. Canada has made extensive use of the federal spending power to enforce a degree of programmatic commonality across the country. Yet, in both examples the mechanism used to compromise the autonomy of constituent units was not originally included in the constitution for that purpose but instead developed as such over time. Other constitutions, such as India's and South Africa's, include explicit emergency powers that allow central governments to encroach on the affairs of constituent units under specific conditions. Yet, the Canadian Constitution shows that just because such powers are included, they may not necessarily be useable. In short, different conditions have a bearing on the nature and extent of federal interference in constituent affairs. But what are these conditions? This paper examines three sets of conditions: constitutions, institutions, and society.

The universe of data could encompass up to n=27 de jure and de facto federations. However, there are diminishing returns on comparing that many cases, some of which are outliers. Instead, the literature commonly draws inferences from a set of critical case studies. For example, Stepan's work on political institutions has shown that "majority-constraining" and "inequality-

inducing" effects are, in part, a function of the number of electorally-generated veto players: direct election of the political executive (presidential vs. prime-ministerial systems); direct election of the legislative chamber based primarily on representation by population (commonly known as the "lower chamber" or the "house of representatives"; direct election of the bicameral chamber grounded primarily in the principle of geographic equality (commonly known as "the senate"); and direct election of constitutionally-guaranteed autonomous levels of government whose separate and distinct legislative and administrative powers are enshrined in the Constitution (commonly known as the "division of powers"). Over half of 23 long-standing democracies in advanced economies, 12.5 to be exact, Stepan finds to have only one electorally generated veto player, another 7.5 have two veto players. Austria is an example of a federation with only one such veto player with the effect that in many ways Austria functions more like a unitary system than a federal one (which also explains why it is considered an outlier in the literature on federalism). Germany, Venezuela (post-2000), Belgium, Spain and Canada are illustrative of countries with two effective electorally generated institutional veto players (although de jure Spain technically has three such veto players). Only three countries, Switzerland, Australia and Mexico, have three veto players; and only Argentina, Brazil and the United States, have four veto players. Ergo, while federations may have fewer than three electorally-generated veto players, federations differ from unitary systems insofar as only federations can have more than two such veto players.

The emergence of more meaningful, electoral-based federal institutions thus has the potential to create new political opportunity structures that may facilitate new forms of resource mobilization and even create new veto players. That is, newly activated federal political arenas and their veto players can constrain nondemocratic regimes and contribute to progressive mobilization. The same dynamics can effectively impose constraints on the latitude of central decision-making power in federal systems. Linz and Stepan (2000), Huber and Stephens (2001), Kittel and Obinger (2003) and other recent research on the relationship between institutions and the welfare state seems to confirm that the number of veto players affects policy outcomes (measured as a function of inequality) by virtue of the (in)capacity for federal governments to influence the affairs of constituent units. Following Tsebelis' (2002) theory of veto players, one might thus be tempted to hypothesize that the proliferation of veto points is expected to have a constraining effect on federal intervention in the affairs of constituent units. Yet, the number of electorally-generated veto players does not appear to correlate directly with the institutional capacity to constrain federal intervention in the affairs of constituent units: Its four veto players notwithstanding, Washington's influence over the affairs of U.S. states appears to have grown since the country's inception, whereas in Can-

ada, with only two veto players, it appears to have waned. Now, Canada might just be an outlier; but it turns out that it is not. The observation that game-theoretic predictions do not offer as neat and tidy and explanation of constraints on federal encroachment on constituent units suggests that the conditions that foster or deter encroachment warrant further investigation into possible constitutional, institutional and societal dynamics that might have a bearing on outcomes. To this end, the paper will discuss the prospect of federal encroachment on constituent units by virtue of: the division of powers, fiscal autonomy, cabinet, the bureaucracy, parliament (notably its upper chamber), the courts the political party system, as well as economic, demographic and civic diversity.

1. Constitutions

Watts (2006) identifies two measures that affect the scope of interdependence: formal and fiscal. The impact of the constitution on federal intervention in constituent matters may be postulated as follows:

H1: Whether the constitution explicitly assigns exclusive areas of jurisdiction to constituent units affects the prospects for creeping centralization;

H2: Constitutions with a lot of concurrent powers or those that do not specifically enumerate the powers enjoyed by constituent units are at risk of judicial interpretation giving rise to creeping centralization;

H3: The more functional divisions do not match the complexity of modern public policy, the more interdependence one can expect;

H4: Interdependence is a function of the extent to which expenditure pressures diverge from the capacity to raise revenues;

H5: The closer the allocation of resources meets constitutional obligations, the less interdependent the levels of government are, thus reducing the likelihood of intervention;

H6: States with greater fiscal autonomy and greater capacity for revenue-raising are subject to less federal intervention.

The paper distinguishes two scales: centralization-decentralization and interdependence-autonomy. That is because no inference about autonomy can be drawn from the degree of decentralization. A federation may be quite non-centralized and yet marked by a high degree of interdependence between the federal and constituent-unit governments. So, the paper broaches the extent of autonomy accorded to constituent units relative to the degree of interdependence, not the degree of decentralization.

Table 1: Federal Government Revenues before Intergovernmental Transfers as a Percentage of Total (Federal-State-Local) Government Revenues

	2000-2004
Nigeria	98.0
South Africa	95.0
Mexico	91.3
Russia	91.0
Malaysia	86.9
Australia	74.8
Belgium	71.0
Spain	69.2
Brazil	69.0
Germany	65.0
Austria	61.8
India	61.1
United States	54.2
Canada	47.2
Switzerland	40.0

Note: Revenue shares are before intergovernmental transfers and represent 'own-source' revenues. In cases of revenue sharing, revenue sources have been allocated according to the government that has the power to levy and set rates (usually the federal government). Figures are rounded to one decimal point. Countries are listed broadly in descending order of centralization. Depending on source these figures are the latest available between 2000 and 2004.

Source: Watts 2008 (Table 9).

Since an exhaustive comparison of the distribution of legislative powers is beyond the scope of this chapter, by way of example, variations in the form of the distribution of legislative and fiscal authority illustrate the point. A common characteristic of the allocation of fiscal powers in just about all federations is that the majority of major revenue sources have been assigned to the

federal governments. Even where some sources of tax revenue are shared or concurrent, the federal governments tend to predominate because of the federal power to pre-empt a field of concurrent jurisdiction and because of provisions limiting the range of tax sources, both direct and indirect, that regional governments have been assigned. Table 1 is indicative of the degree to which the ability to levy revenues has been generally concentrated in federal governments and the range of variation.

Two points are worthy of none with respect to Table 1. First, generally in the allocation of revenue powers, federal governments have been favoured over states and local governments. Second, control over revenues has been much more concentrated among the federal governments of emergent federations than in the mature federations. In mature federations the contemporary range of federally levied revenues as a percentage of total federal, state and local revenues generally ranges from 40 percent in Switzerland to 65 percent in Germany, with Australia as the outlier at 75 percent of state and local revenues. Among emergent federations, by stark contrast, the range is from 69 percent in Brazil to Nigeria at 98 percent. Furthermore, because natural-resource revenue in most federations with twentieth-century constitutions accrues to the central government, and because a disproportionate amount of revenue in developing countries tends to come from resource revenues, the fiscal clout of federal governments in emergent federations is even more asymmetric than in mature federations. Aggravating the situation in federations such as India, Malaysia as well as Austria, is that foreign borrowing is placed under exclusive federal jurisdiction. On the premise that "he who pays the piper, plays the tune," such fiscal asymmetry means that either the federal government can starve or coerce constituent units, or that constituent units have relatively little autonomy to begin with. Yet, even in mature administrative federations where constituent units do not actually have much autonomy of their own, such as Austria and Germany, own-source fiscal revenues still far exceed those of the bulk of emergent federations. In other words, federal governments in emergent federations enjoy a lot of clout by virtue of their proportion of total tax revenue raised.

In federations where the administration of a substantial portion of federal legislation is constitutionally assigned to the governments of the constituent units as in Switzerland, Austria, Germany, India, and Malaysia, the constitutional expenditure responsibilities of the regional governments are significantly broader than would be indicated by the distribution of legislative powers taken alone. Moreover, provision of some of the most expensive services, such as education and health care, tends to lie with constituent units. And federations have tended to resort to a process of a general spending power that transcends their enumerated legislative and administrative principles. Thereby they pursue certain objectives they deem in the national interest but in areas

of jurisdiction of constituent units by providing grants to regional governments that otherwise could not afford to provide these services. In federations where the constitution assigns to constituent units administrative responsibility for a considerable portion of federal legislation (as is the case in Germany and Austria), substantial federal transfers, either as portions of federal tax proceeds or in the form of unconditional and conditional grants, are typical.

Table 2: Federal Government Expenditures after Intergovernmental Transfers as a Percentage of Total (Federal-State-Local) Government Expenditures

	2000-2004
Malaysia	84.3
Brazil	64.0
Nigeria	59.7
Australia	59.3
Mexico	58.7
Austria	55.0
Spain	51.0
South Africa	50.0
Russia	46.0
United States	45.9
India	44.6
Belgium	38.1
Germany	37.0
Canada	37.0
Switzerland	32.0

Depending on the source, these figures are the latest available between 2000 and 2004.

Note: Expenditures are after transfers of shares of federal taxes and grants to state and local governments. Figures are rounded to one decimal point. Countries are listed broadly in descending order of centralization

Source: Watts 2008 (Table 6).

Table 2 shows the cumulative level of federal expenditures as a percentage of total federal, state and local expenditures after intergovernmental transfers across select federations.

By comparison with the distribution of revenues (in Table 1) the range of variation is considerably less, although generally the federal proportion of expenditures has been higher in emergent federations than in mature ones. In most federations the federal portion of expenditures is in the range of 45-60 percent. Presumably, federal governments at the higher end of that spectrum might be more predisposed to exercise undue influence over subnational matters than those at the lower end. Malaysia lies significantly above that band, Belgium, Germany, Canada and Switzerland below. That is, the inference that follows from Tables 1 and 2 is that interdependence is partially a function of the extent of fiscal independence.

2. The constitutional division of powers and courts of law

To set boundaries to federal overreach courts need to be able to draw on constitutional rules. In other words, in the absence of constitutionally enumerated fields of exclusive jurisdiction of constituent units – as is common in Anglo-Saxon federations -- courts appear to find it difficult to prevent creeping centralization. In light of Table 1, for instance, it is no coincidence that in federations with the lowest revenues at the level of the federal government the Constitution entrenches exclusive areas of jurisdiction of constituent units. Which level of government ultimately prevails is a function the way legislative powers are assigned. In Switzerland, Canada and, more recently, Belgium, most legislative powers are assigned exclusively to either the federal or constituent-unit governments, and defined quite specifically in the case of Switzerland and Belgium. In the United States and Australia, by contrast, most federal powers are shared or concurrent. Other federations where the Constitution specifies extensive categories of both exclusive and concurrent powers include Austria, Germany, India and Malaysia. Yet, the constituent units that have proven most adept at defending their autonomy and accountability for a given policy area are ones where the Constitution assigns a responsibility exclusively to one government or another. Conversely, shared and concurrent jurisdiction to enable creeping centralization to the detriment of the autonomy of constituent units.

Others variables to consider with respect to the influence of courts on intergovernmental relations is the distinction between supreme and constitutional courts, and the difference between common and civil law federations. Supreme courts tend to be the final arbiter over all law. By contrast, constitutional courts as are common across much of Europe's federations have a

much more technical focus on constitutional matters only. Concomitantly, precedent plays a key role in common law federations whereas civil law is primarily concerned with the explicit interpretation of law. Owing to different instantiations of sovereignty in common and civil law federations (Fleiner, 2011), common law federations tend to have supreme courts, civil law federations constitutional courts. Ergo, the two are mutually reinforcing. Yet, in neither system the judiciary appears to have had much of an influence on intergovernmental relations. Yet, Supreme Courts in common law federations have had more significant an impact than in common law federations. In the United States, for example, courts have used the Equal Protection Clause, part of the Fourteenth Amendment, to extend the purview of the Bill of Rights to the States: "no state shall […] deny to any person within its jurisdiction the equal protection of the laws." Initially, the Judicial Committee of the Privy Council had a significant impact on reducing federal powers in Canada (Cairns, 1988); but in recent decades Canada's judiciary has not had much of an impact on the fundamental nature of intergovernmental relations in recent decades (Saywell, 2002). The Canadian example is nonetheless instructive insofar as the courts have shown themselves reticent to rein in provincial powers. Similarly, German courts have not had a noticeable impact on the fundamental nature of relations between the federal government and the Länder. To the contrary, they seem to reinforce the status quo (Bruillet, 2006), or even have a centralizing effect (Bzdera, 1993; Lajoie, 2008-2009). Yet, as recent German court decisions in the realm of fiscal federalism show, the courts also seem apprehensive to force the federal government's hand to intervene in the affairs of constituent units, even when confronted with constituent units trying to precipitate greater intervention. In Spain, the Constitutional Court in 1992 (judgment no. 13) permitted a federal spending power in areas of exclusive jurisdiction of the Autonomous Communities, but only within certain limits. In sum, courts have, at times, aided federal governments to extend their influence to the jurisdictions of constituent units but, by and large, they are more likely to prevent federal intervention than they are to abet or encourage divergence from the status quo. Courts are thus more likely to check federal intervention than they are to be party to it.

3. Political executives

The cabinet system of parliamentary government commonly found in Westminster-style dual federalism contributes to a form of governance known as executive federalism whereby intergovernmental relations are heavily driven by political executives and relations among them; as opposed to, say, by bureaucrats who tend to play a greater role in presidential and administrative

federations. In parliamentary systems the prime minister depends on his or her supporters to pass or block legislation. Owing to this "absorption rule," a prime minister does not count as an independent institutional veto player. This arrangement contrasts with presidential/congressional systems where intergovernmental arrangements tend to be shaped by strong presidents. The need to capture a single presidential post has induced political parties to seek compromises to win maximum electoral support aggregating a wide range of political demands. The separation of powers and the multiple checks and balances have usually been an inducement to compromise. But this beneficial influence has been achieved at a price. The various checks and balances have often meant that a solution has taken a long time to emerge or mired in deadlocks, for example, when president and congress are controlled by different political parties. The effect is known as cooperative federalism: The federal government must cooperate with states to implement policies that are in the national interest but do not fall in the federal government's constitutional jurisdiction. The resulting intergovernmental arrangements have been likened to a marble cake whose hallmark is a system of grants that give the federal government substantial control over the way these grants are then spent by subnational units.

The effect of cabinet as opposed to presidential/congressional systems on intergovernmental relations is manifest in the accommodation of interests: Their focal points are alike but in cabinet systems overridden by party discipline which results in executive rather than cooperative outcomes. That is, owing to party discipline, cabinets are more preoccupied with federal policymaking and execution than with expression and accommodation of provincial interests. Ergo, neither their interest in nor their leverage over subnational units is as strong as that in presidential/congressional systems, thus relying to a greater extent on both political elites at the subnational and national level and their deliberative abilities to come to a negotiated settlement that reconciles both federal and subnational interests. Executive federalism effectively requires the consent of Canada's provinces to facilitate implementation of legislation in their area of constitutional jurisdiction. Germany's Bundesrat is a hybrid veto player of sorts: on the one hand, it is an upper chamber that meets Tsebelis' criterion of an absolute veto player; on the other hand, its representatives answer directly to Germany's Länder, thus also making the Bundesrat a veto player at the behest of the constituent units.

The degree of executive federalism is one way of gauging dependence. A ready way of measuring the impact of executive federalism is by means of the nature and extent of equalization transfers. Federations whose constituent units are heavily dependent on equalization but where the actual formula for equalization is politicized rather than constitutionally enshrined are necessarily at greater mercy of the federal government, Canada being one example. As

summed up in Table 3, in federations characterized by a separation of executive and legislative powers within each order of government, such as the United States, the primary arena for adjusting financial arrangements is the federal congress. In federations characterized by fused parliamentary executives, the primary arena has been that of executive federalism.

Table 3: Arenas for Resolving Issues of Federal Finance

United States	Congress: negotiations among representatives of different states in Congress over allocation of grant-in-aid programs; representatives of state administrations act as lobbyists.
Switzerland	Federal Parliament: negotiations within Federal Council (i.e., federal executive) and Parliament (containing cantonal representatives) but with extensive consultation of the Conference of Cantonal Governments, and assisted from time to time by commissions.
Canada	Processes of executive federalism predominate. Ultimate decision lies with federal government and federal legislation, but in practice for each five-year period renewal is preceded by extensive federal-provincial negotiations through officials and federal provincial finance ministers to arrive at an agreed program. Recently, disputes over previous equalization modifications led to an independent commission (2006 Expert Panel on Equalization and Territorial Finance).
Australia	Processes of executive federalism predominate. Ultimate decision lies with federal government and federal legislation, but equalization transfers from the GST pool are based on recommendations of an independent expert Commonwealth Grants Commission (CGC), whose recommendations are usually implemented, the recommendations being made within a context established by an intergovernmental ministerial council.

Austria	Executive federalism: intergovernmental negotiation with dominant federal-government role, but federal second chamber is composed of representatives of state legislatures.
Germany	Executive federalism: ultimately fiscal arrangements require endorsement by a majority in the Bundesrat, which is composed of representatives of governments of Länder.
India	Ultimate decision lies with Union government, but constitutionally mandated quinquennial independent Finance Commissions make recommendations for the total state share of shared central taxes and for unconditional grants to states, and for distributions of both among states. Recommendations have in practice usually been implemented. These transfers are supplemented by substantial conditional grants allocated on the recommendation of the Planning Commission.
Malaysia	Executive federalism: dominant role of federal government, but it is constitutionally required to consult National Finance Council which includes a representative of each state.
Belgium	Interparty coalition bargaining within the federal government and intergovernmental negotiation.
Spain	Executive federalism: regional financial arrangements are negotiated every five years in the Fiscal and Financial Policy Council, an intergovernmental ministerial body with the decisions made by a qualified majority vote in which the vote of the two central-government ministers is equal to that of all the regional councillors. Legally an advisory body but in practice decisive.
Brazil	General lack of institutional structures for financial arrangements except for the National Council for Fiscal Policy (CONFAZ) for coordinating the fiscal and tax policies of the states, but in practice this performs purely formal functions. Ultimate approval is by Congress where the smaller states have disproportionate influence.

Mexico	Lack of institutional structures. In response to dissatisfaction with fiscal federalism at the sub-national level, the federal government introduced a "New Federalism" program that sought to transfer resources to states and municipalities, to reduce the discretionary power of the federal government in the allocation of funds, and to simplify and clarify the process of resource distribution to states and municipalities.
Nigeria	Allocations from the Federation Account to the federal, state and local governments are based on recommendations of the National Revenue Mobilization, Allocation and Fiscal Commission (NRMAFC), but ultimately must be approved by the National Assembly.
Russia	Intergovernmental negotiation determines revenue flows, leading to an ineffective dispute-resolution process dominated by the federal government.
South Africa	Ultimate decisions lie with the national government, but an independent Financial and Fiscal Commission (FFC) of 22 members, of whom 9 are appointed by provinces and 2 by local governments, is mandated by the constitution to make recommendations on the "equitable shares" for state and for local governments and on the formula for distribution. These are reviewed by the Budget Council and the Budget Forum (both intergovernmental councils). In practice, the FFC has been treated by the Finance Ministry of the national government largely as an advisory body.
Ethiopia	A joint session of Parliament has to vote by a two-thirds majority on tax powers not specifically assigned by the constitution separately or jointly to one or both orders of government. The House of Federation determines the formula for subsidies states are entitled to receive from the federal government. Revenues from joint federal and state tax sources and subsides provided by the federal government to the states are also determined by the House of Federation based on recommendations made by the Committee of Revenue Sharing.

Source: Watts, 2008 (Table 14)

Other metrics to measure dependence include differences in the regional distribution of federal spending, such as defence spending, regional development assistance, and direct transfers to individuals for social welfare where both qualifying periods and the amounts of payout may be distributed asymmetrically across the federation.

Notable outliers include Russia and South Africa. Russia has a parliamentary system but with a French-style executive presidential system that gives the federal government largely unfettered ability to intervene in subnational affairs (Trochev, 2011). Yet, the Russian case also offers interesting evidence of the constraining effect executive federalism can have even on as strong a central government as Moscow's: Söderlund (2005) has calculated a positive and statistically significant relationship between votes for regional executives and their influence at the federal level. Another way to push back or influence the federal government is institutional cooperation to overcome collective-action problems among the parts. Canada's Council of the Federation, for instance, is a deliberate effort by the provinces, and especially Quebec, to resist federal incursion in areas of provincial jurisdiction.

The Swiss collegial form of executive combines the stability of the fixed-term executive and the checks and balances within the central institutions found in the American system with the representation of different regional groups in the collective central executive as in the cabinet system. Furthermore, the arrangement whereby any legislation challenged must be put to a referendum encourages Swiss politicians to form broad multi-party coalitions encompassing not just the bare majority but having the support of virtually all major parties and interest groups to avoid potential challenges of legislation through the referendum. This system appears to have maximized inducements for reconciling political conflicts and cleavages, but it also has its price. As in the United States, the system has difficulty reacting quickly (or at all) in areas where the diverse groups disagree. Conversely, the Swiss system is designed to forestall action that might exacerbate political cleavages.

4. Parliament

Legislative institutions have two dimensions that have the potential to affect the propensity and nature of their intervening in subnational affairs. First, their membership, that is, how representative they are, and which interests are represented, has an impact on the institution's legitimacy. To this end, the upper house tends to be pivotal, since it is usually structured around regional representation. Yet, it is not always electorally-generated which has implications for its nature as a potential veto player. Second, since federations have both upper and lower houses, not only the distribution of powers among the

federal and remaining levels of government matters, but also the relative powers of each institution. Tables 4 and 5 depict the variegated structure and power of second chambers across federations. Central governments with weak second chambers are particularly prone to encroaching on the affairs of constituent units because they impose few constraints. The greater the legitimacy of the second chamber, and the more it is representative of the interests of constituent units, the more constitutional powers it has, and the greater its political role, the greater its ability to rein in the political executive and the other legislative chamber.

Table 4: Variations in Selection, Composition, Powers and Role of Second Chambers in Selected Federations

Selection	Composition	Powers	Role
1. Appointment by federal government (no formal consultation) (e.g. Canada term until age 75, Malaysia 63% of seats)	1. Equal "regional" representation (e.g. Canada for groups of provinces)	1. Absolute veto with mediation committees (e.g. Argentina, Brazil, Mexico, Switzerland, USA)	1. Legislative chamber only (e.g. Argentina, Australia, Brazil, Canada, India, Malaysia, Mexico, Switzerland, USA)
2. Appointment by federal government based on nominations by provincial governments (e.g. Canada: Meech Lake Accord proposal)	2. Equal state representation (e.g. Argentina, Australia, Brazil, Mexico, 37% of Malaysian senate, Nigeria, Pakistan 88% of seats, Russia, South Africa, USA)	2. Absolute veto on federal legislation affecting any state administrative functions (e.g. Germany, South Africa)	2. Combined legislative and intergovernmental roles (e.g. Germany, South Africa)
3. Appointment *ex officio* by state government (e.g. Germany, Russia 50% of seats, South Africa 40% of seats)	3. Two categories of cantonal representation (e.g. Switzerland: full cantons and half cantons)	3. Suspensive veto: time limit (e.g. Malaysia, South Africa (except above), Spain)	3. Ultimate interpretation of the constitution (e.g. Ethiopia)

4. Indirect election by state legislatures (e.g. USA 1789-1912, Austria, Ethiopia, India, Pakistan, Malaysia 37% of seats, Russia 50% of seats, South Africa 60% of seats)	4. Weighted state voting: four categories (e.g. Germany: 3, 4, 5 or 6 block votes)	4. Suspensive veto: matching lower house vote to override (e.g. Germany for some)	
5. Direct election by simple plurality (e.g. Argentina, Brazil, Mexico 75% of seats, USA since 1913)	5. Weighted state representation: multiple categories (e.g. Austria, India)	5. Deadlock resolved by joint sitting (e.g. India)	
6. Direct election by proportional representation (Australia, Nigeria, Mexico 25% of seats)	6. Additional or special representation for others including aboriginal (e.g. Ethiopia, India, Malaysia, Pakistan)	6. Deadlock resolved by double dissolution then joint sitting (e.g. Australia)	
7. Choice of method left to cantons (e.g. Switzerland: in practice direct election by plurality)	7. A minority of regional representatives (e.g. Belgium, Spain)	7. Money bills: brief suspensive veto (e.g. India, Malaysia) or no veto (Pakistan)	
8. Mixed (e.g. Belgium, Ethiopia, Malaysia, Mexico, Russia, South Africa, Spain)			

Source: Watts, 2008 (Table 18)

Table 5: Selection, Composition, and Powers of Some Federal Second Chambers

Argentina	Senate: elected by direct vote; one-third of the members elected every two years to a six-year term; absolute veto.
Australia	Senate: direct election (by proportional representation); equal state representation; absolute veto (but followed by double dissolution and joint sitting).
Austria	Bundesrat: elected by state legislatures; weighted representation (range 12:3); suspensive veto (may be overridden by simple majority in lower house, the Nationalrat).
Belgium	Senate: combination of directly elected (40), indirectly elected by linguistic Community Councils (21), and co-opted senators (10); variable representation specified for each unit; equal competence with House of Representatives on some matters but on others House of Representatives has overriding power.
Brazil	Senado Federal (Senate): 3 members from each state and federal district elected by a simple majority to serve eight-year terms; one-third elected after a four-year period, two-thirds elected after the next four-year period; absolute veto.
Canada	Senate: appointed by federal government; equal regional representation for 4 regional groups of provinces (Ontario; Quebec; 4 western provinces; 3 maritime provinces) plus 6 for Newfoundland and one each for the 3 territories; absolute veto (legally) but in practice weakened legitimacy.
Ethiopia	House of Federation (Yefedereshn Mekir Bet): 71 members (63%) appointed by regional bodies and 41 (27%) appointed based on population and ethnicity. This body serves as the supreme constitutional arbiter. Members serve five-year terms. For members selected by states, directly or indirectly elected according to decision of state councils.
Germany	Bundesrat: state government *ex officio* delegations; weighted voting (3, 4, 5 or 6 block votes per state); suspensive veto on federal legislation overridden by corresponding lower-house majority, but absolute veto on any

	federal legislation affecting state administrative functions (60% of federal legislation reduced to about 40% by reforms in 2006); mediation.
India	Rajya Sabha (Council of States): elected by state legislatures (plus 12 additional representatives appointed by the President for special representation); weighted representation of states (range 31:1); veto resolved by joint sitting.
Malaysia	Dewan Negara (Senate): 26 (37%) elected by state legislatures plus 44 (63%) additional appointed representatives for minorities; equal state representation (for 37% of total seats); suspensive veto (six months).
Mexico	Camara de Senadores (Senate): 128 seats in total; 96 (3 per state) are elected by popular vote to serve six-year terms and cannot be re-elected; 32 are allocated on the basis of each party's popular vote; absolute veto.
Nigeria	Senate: each state has three seats while one senator represents the Federal Capital Territory. A total of 109 senators are directly elected for a four-year term; absolute veto (except taxation and appropriation bills resolved by joint sitting) with joint committees to resolve deadlocks.
Pakistan	Senate: 100 seats indirectly elected by provincial assemblies to serve 4-year terms. Of the 22 seats allocated to each province, 14 are general members, 4 are women and 4 are technocrats. Federally Administered Tribal Areas (FATAs) and the Capital Territory fill seats through direct election, with 8 seats given to the FATAs and 4 for the Capital Territory; no veto on money bills, budget, borrowing or audit of federal accounts
Russia	Federation Council (Soviet Federatsii): Asymmetry of length of term and method of selection depending on the republic or region. Each unit has 2 representatives in the Federation Council, one elected by of the constituent unit legislature, the other appointed by the governor; dispute resolution by joint committee which may be overridden by two-thirds majority in lower house.

South Africa	National Council of Provinces (NCOP): 90 seats, consisting of 54 representing provincial legislatures and 36 representing provincial executives; equal provincial representation (6 legislators plus 4 executives per province); veto varied with type of legislation.
Spain	Senate: 208 directly elected members and 51 appointed by parliaments of 17 Autonomous Communities; categories of 4, 3 or one directly elected senator(s) per provinces (sub-units of Autonomous Communities) supplemented by representation of one or more (related to population) appointed by each autonomous parliament; suspensive veto (2 months).
Switzerland	Council of States: in practice direct election (direct election by plurality; method chosen individually by all cantons); 2 representatives for full cantons and 1 for half cantons; absolute veto (mediation committees).
United States	Senate: direct election since 1913 (by simple plurality); equal state representation (six-year terms with one-third elected every two years); absolute veto (mediation committees).

The United States Senate enjoys a high degree of legitimacy because it is premised on equal representation of all constituent units; moreover, it is one of four veto players in American federalism which makes its agreement constitutionally indispensable to federal legislation. On the high end of the spectrum of are federations with three of four electorally generated institutional veto players. Until recently, that included all Latin American federations which makes them distinctive among the world's democracies: Brazil (Mainwaring & Samuels, 2004), Argentina, Venezuela, and Mexico. The Brazilian Senate is an example where institutional veto players became more malapportioned which had a "demos-constraining" effect. In Mexico, by contrast, institutional veto players became less malapportioned which had a "demos-enabling" effect. The only other country in the world with four electorally generated institutional veto players is the United States.

Parliamentary federations have given cabinets with majority legislative support an opportunity for more rapid and effective action, but this arrangement also exacts its own price. At the level of central government it places complete sovereignty over those functions assigned to the central government in a majority unrestrained by institutional checks. This is exemplified by the

typical weakness of second chambers in most parliamentary federal systems. The Canadian Senate, for instance, has little policy-making significance, little function in federal-provincial relations and even less legitimacy because it is not electorally generated. Stepan would conclude that its veto capacity is not robust. *De jure*, Canada's bicameral institutional design might appear to constrain federal intervention in the affairs of constitutent units. *De facto*, it does not have the means to do so because it is not equipped as an actual veto player: it can only delay, not scuttle, the passage of legislation. In contrast to the de facto strength of the Senate in the United States and the Council of States in Switzerland, Canada is actually comparable to Austria: Parliament functions as a single veto player (Obinger 2003). By contrast, by virtue of its unique veto powers and membership Germany's Bundesrat has considerable policy-making significance and mediates inter-governmentally along vertical and horizontal lines.

In general, in non-parliamentary systems, Senates tend to have strong veto powers and thus considerable power to constrain federal intervention in the affairs of constituent units. In parliamentary systems, by contrast, the lower house tends to bear the dominant role in relation to cabinet that can facilitate a more centralist approach. Nonetheless, parliamentary systems can be equipped with constitutional features that impose certain constraints on federal interventionism. Australia, with its veto as a result of double dissolution, is an exception. Other outliers include Ethiopia, its second chamber represents nationalities instead of constituent units and enjoys special powers including ultimate interpretation of the constitution and controls the distribution of powers of taxation and subsidies.

5. Party systems

Whether electoral rules encourage proportional representation, whether they encourage multiparty systems, and whether these favour the formation of coalition governments, will have a significant impact on the way party systems affect intergovernmental relations (Chandler and Chandler, 1987). Majoritarian systems, such as those found in Canada and Australia, will perforce generate stronger central governments than party systems that produce coalitions with greater sensitivity to regional interests. Proportional representation across Europe's federations tends to have this effect. One might thus surmise that greater proportionality fostering multiparty coalitions might contain federal incursion into the affairs of constituent units.

The form of executive influences intergovernmental relations indirectly through the way in which the character and pattern of political parties has been affected. In the United States and Switzerland the fixed executive has

produced relatively undisciplined political parties since executive stability has not depended on the continued support of political parties. This has had a two-fold effect upon administration in these federations. On the one hand, political parties in both federations have been in a weaker position to exert monolithic control over the operations of administrative officers and agents. On the other hand, administrators have had to lobby, that is, engage with the political leadership, in seeking support for their programmes.

In parliamentary federations, by contrast, the lack of institutional checks upon the majorities in parliamentary federations puts responsibility for taking minority views into account and for reconciling political conflict and cleavages directly upon the internal organization and processes of the political parties themselves. Tight party discipline has been encouraged by the fact that cabinet stability depends on it. This has reinforced the cohesiveness and consolidation of cabinet control over administrative and political relations with other governments, which in turn has provided less room for administrators to lobby or to seek political support for their projects without going through cabinet. Thus, the interaction between the operations of political parties and the administrative structure has contributed to the contrasting marble cake and layer cake patterns of administrative relations in different federations. In Westminster parliamentary systems, then, political parties do not play much of a role in policy making or, with some exceptions, in mediating intergovernmental conflict, in part because federal and subnational parties operate largely independently. As a result, political parties do not impose the same sort of structural checks on federal intervention in constituent units as they do in congressional systems. Germany's parliamentary system is somewhat of an outlier here: A parliamentary system nonetheless marked by strong parties with a high degree of interconnectivity among federal, constituent and local party associations. By contrast, in presidential systems political parties have more of a role in mediating intergovernmental conflict, since there is extensive cooperation among party associations. As the case of Argentina demonstrates, however, giving political parties too much influence can have deleterious effects on constituent units as well: By virtue of its party system, one partisan veto player (in the form of a political party) can (and has) control over all electorally generated institutional veto players, thereby effectively reducing the number of veto players from four to one. In other words, party systems can have a substantial impact on political institutions.

6. Administrative Relations

In modern democracies, bureaucracies tend to be organized along functional lines. The impact of bureaucracies on intergovernmental relations parses by

parliamentary and congressional systems. Owing to cooperative federalism, in congressional systems bureaucrats enjoy greater latitude to negotiate the organization of administrative services directly with constituent units. The American system is both representative of such arrangements and somewhat of an outlier. The American and Swiss forms of executive, incorporating the principle of agencies at one level of government, have meant that the administrative agencies at one level of government are freer to negotiate with the agencies at another level of government in working out specific functional schemes. The resulting interlacing of administrative activities is well illustrated by an example that Grodzins cites of a health officer styled 'sanitarian' of a rural county in an American border state. This single officer illustrates the whole idea of the resulting 'marble cake' character of American federalism (Watts, 1969: 18):

> The sanitarian is appointed by the state under merit standards established by the federal government. His base salary comes jointly from state and federal funds, the county provides him with an office and office amenities and pays a portion of his expenses, and the largest city in the county also contributes to his salary and office by virtue of his appointment as a city plumbing inspector. It is impossible from moment to moment to tell under which governmental hat the sanitarian operates. His work of inspecting the purity of food is carried out under federal standards; but he is enforcing state laws when inspecting commodities that have not been in interstate commerce; and somewhat perversely he also acts under state authority when inspecting milk coming into the county from producing areas across the state border. He is a federal officer when impounding impure drugs shipped from a neighbouring state; a federal-state officer when distributing typhoid immunization serum; a state officer when enforcing standards of industrial hygiene; a state-local officer when inspecting the city's water supply; and (to complete the circle) a local officer when insisting that the city butchers adopt more hypienic methods of handling their garbage. But he cannot and does not think of himself as acting in these separate capacities. All business in the county that concerns public health and sanitation he considers his business. Paid largely from federal funds, he does not find it strange to attend meetings of the city council to give expert advice on matters ranging from rotten apples to rabies control. He is even deputized as a member of both the city and county police forces. The sanitarian is an extreme case, but he accurately represents an important aspect of the whole range of governmental activities in the United States. Functions are not neatly parceled out

> among the many governments. They are shared functions (Grodzins, 1967: 257; 1966).

The major part of intergovernmental adjustment in the United States and Switzerland, then, has been through a continual process of administrative interaction between central and state or cantonal administrators negotiating directly in areas in which their responsibilities overlap. Both in the United States and Switzerland there has resulted a wide range of joint programmes often supported by central grants-in-aid and administered by state officials (Watts, 1969: 19). Such programs, however, give the central government considerable leverage since they are usually conditional on meeting certain requirements that are often established unilaterally by the central government.

In parliamentary federations, although there has been considerable intergovernmental administrative co-operation, the dynamics are different. Because responsibility for all executive action at either level of government is focused in a responsible cabinet, ministers and civil servants have generally been inclined to be more cautious about negotiating independently with their homologues, always looking over their shoulders with concern for cabinet clearance or for awkward questions in the legislature. This has affected intergovernmental administrative relations in four ways. First, technocrats play a secondary role in intergovernmental negotiations. Ministers and politicians, by contrast, figure prominently. Second, individual projects for functional co-operation tend to be subsumed under more general co-operative arrangements. Third, there has been a tendency within each government for co-operative arrangements to be placed under the control of staff agencies exclusively concerned with intergovernmental affairs. Fourth, summit conferences of governmental leaders at both levels, such as the Premiers' Conference in Australia, federal-provincial conferences in Canada, the Kultusministerkonferenz in Germany, and similar conferences of governmental leaders in new federations, have become the major instrument for the resolution of intergovernmental relations. Thus, in parliamentary federations intergovernmental administrative relations have taken on a quasi-diplomatic character resembling those between sovereign powers, reinforcing the 'layer cake' pattern of federalism in these countries. On the one hand, central politicians thus wield considerable power. On the other hand, their power is contained by the politicization of intergovernmental relations.

7. Society

A wide range of empirical consequences of diversity are well documented in the literature across a broad array of developed and developing countries (eg.

Alesina and La Ferrara, 2005). This section will treaty diversity as an exogenous variable, assessing four measures of federal diversity, on the premise that homogeneity enables federal influence whereas diversity limits it. First, multination federations are one measure of diversity. Second, economic disparity among federal components is another, often measured in per capita GDP and/or per capita tax revenue in each unit. Third, there is also some survey data on public tolerance of asymmetric policy outcomes. Finally, diversity is affected by the distribution of population across the federal territory. These are better measures than mere geographic disparity in the size of units, or the mere number of units, for instance; units such as city-states may be geographically small but carry a disproportionate demographic and economic weight.

On way to distinguish federations is by to those who follow in George Madison's vein by championing checks and balances; and those that have as their primary objective to reconcile unity and diversity. In addition to Switzerland and Canada, most twentieth-century federations have as their raison d'être the need to reconcile some form of diversity. One could contend, of course, that even in the case of classic dispersal-of-powers federations such as the United States and Australia, territorial diversity played a considerable role in the reasoning behind adopting a federal system. On that count, one might expect administrative federations to be particularly prone to federal influence because they also tend to be less heterodox.

A second measure of diversity is per capita GDP. Many mature federations used to be quite economically homogeneous. This allows for the introduction of equalization since differences to be equalized among constituent units used to be quite small in countries such as Germany and Canada. Disparities have grown in the meantime, especially in federations where constituent units have a stake in natural-resource revenues. As disparity grows, affluent units grow reticent about territorial redistribution. And the more invasive the distributive scheme, the greater their resistance to federal influence.

A third measure of diversity is public opinion; that is, just how tolerant public opinion is of asymmetric and diverse policy outcomes. This metric is a bit less reliable because there are no consistent survey data across federations, with a notable dearth of such data for emergent federations. However, there are data for the three North American federations (Kincaid & Cole, 2011), with particularly good data on Canada (Fafard, Rocher & Côté, 2010), and for some European countries (Jeffrey, 2011) with detailed data for Germany (Jeffrey 2007; Bertelsmann, 2008). One of the ironies of federal systems is that their citizens favour symmetric outcomes (perhaps because they have been conditioned by T.H. Marshall's (1950) model of social citizenship that is intrinsic to the modern welfare state). This observation is highly significant. It

constraints veto players in the exercise of their powers. Germans are exceptionally disinclined towards just about any form of asymmetric policy outcomes. That is, a federation that has historically been exceptionally homogeneous ethnoculturally, economically, and demographically coincides with a very strong preference for symmetry (Leuprecht, 2012).

A fourth measure of diversity consists of two measures of horizontal demographic diversity: the distribution of the population across the federal territory as well as the diversity of the population within a given territory, according to measures such as ethnic fractionalization (Campos and Kuzeyev, 2007), polarity (Esteban and Ray, 2008) and age structure (Leuprecht, 2012). That is, fractionalizing, polarity and differentials in age structure across a territory have been shown to drive conflict. Ergo, diversity bolsters the clout of the governments of constituent units to resist the homogenizing and unitarizing tendencies of central governments. Diversity distinguishes the political interests of particular units from one another, and from the federal government, thereby increasing citizens' identity with the constituent unit and its claims to political autonomy.

8. Conclusion

Although the small universe of representative cases lends itself only to generating hypotheses, not to testing them methodically, the general expectation at the outset of this paper appears to obtain: the greater the number of effective institutional veto players, fewer opportunities for federal governments to impose fiscal "vetoes," and heterogeneity as a proxy variable for a societal "veto" of sorts, the more constraining the effect of federal incursion into the affairs of constituent units. One problem with systematic empirical testing is that, as the experience of Argentinean federalism under the Peronists demonstrates, skillful manipulation of institutions by compounding malapportionment through the adroit use of patronage, can significantly alter the number and impact of effective veto players. In this respect, Argentina's experience offers welcome evidence to observe the effect of a reduction of the number of veto players on intentional albeit subversive federal control of the political machines of constituent units. In the end, the model is useful insofar as it helps us project which federal systems are at greatest risk of federal unilateralism, it allows us to identify potential drivers of incursion and to explore potential mitigation strategies. However, capacity of institutional mechanisms to coordinate competing demands and thus generate or sustain equilibria may be overwhelmed by growing territorial differentiation and the complexity of modern policy making in institutional environments marked by multiple veto players.

Constitutionally, the exclusivity of the way legislative powers are assigned is probably the single greatest assurance against federal encroachment. Concomitantly, constituent units with a greater capacity to raise their own revenue relative to their constitutionally assigned responsibilities, with fewer conditional transfers, and with depoliticized mechanisms to assess and allocate transfers, will be less prone to federal influence than those with large gaps between their constitutionally assigned responsibilities and capacity to raise own-source revenue, that are more dependent on conditional transfers, and subject to a highly politicized equalization scheme in the form of a federally-controlled transfer assessment and allocation.

Institutions can induce federal incursion; or they can contain it. They can contain it in two ways: By making it difficult for the federal government to reach a consensus at the federal level; or by constraining the federal government's leverage over the affairs of constituent units. In general, cabinet parliamentary arrangements seem to constrain influence relative to presidential systems; yet, effective congressional systems may nonetheless impede ready consensus at the federal level, thus containing federal sway. Bureaucracies in congressional systems have greater ability to engage constituent units directly, thereby fostering cooperative approaches to issues. By contrast, bureaucracies in parliamentary system do not enable greater federal influence but also do little to forestall it. As for second chambers, those in congressional systems seem to induce collaboration whereas those in parliamentary systems generally do not limit federal influence over constituent units. Courts have the potential to contain federal influence although their actual influence tends to be more indeterminate. Party systems, finally, seem to bolster federal unilateralism in Westminster parliamentary systems. Ergo, institutional arrangements that would seem the most inclined towards federal influence over the affairs of constituent units are presidential systems with weak second chambers, civil-law constitutional courts, and integrated multilevel majoritarian party systems. In other words, the expectation at the outset of this section that the number of institutional veto players positively contains federal intervention is generally confirmed, although the typological approach employed here makes it difficult to test this proposition methodically against the plethora of actual institutional arrangements. By contrast, institutional arrangements that would seem to impose the greatest constraints on federal unilateralism are cabinet parliamentary systems with strong and representative second chambers, an objectively controlled civil service, common-law supreme courts, proportional-representation coalitions and fragmented party systems.

Federal homogeneity and attitudes towards symmetry seem to correlate. This sort of positive relationship, of course, gives federal governments latitude to intervene in the affairs of constituent units, under the guise of remedying asymmetries in outcome. Generally, public opinion data suggest that

populations exhibit considerable tolerance – albeit to varying degrees – of federal intervention, especially if it is rationalized on the ground of remedying asymmetric outcomes. Even in multination federations, citizens seem quite attached to Marshall's model of social citizenship. This would intimate some latitude for the federal government to intervene in the affairs of constituent units to equalize differences that may be a function of aging populations and outmigration in one part of the country, and high rates of immigration and young population structures in another. Nevertheless, it is entirely possible to have federations that are highly diverse, yet also highly centralized; Nigeria is one example. In other words, diversity may bolster autonomy claims, but federal encroachment is, ultimately, a function not of societal but of institutional factors.

Institutionally, then, one way to stave off federal influence is through coordinating mechanisms. Electorally generated institutional veto players are one manifestation of such mechanisms, with presidential systems that have weak upper chambers, strong bureaucracies, a majoritarian party system and few constitutionally enumerated areas of exclusive jurisdiction of constituent units at particularly great risk of intervention. The probability of intervention grows with large gaps between constitutionally assigned responsibilities and capacity to raise own-source revenue, dependence on conditional transfers, and politicized federally-controlled transfers, reinforced by territorial, economic, and societal homogeneity. Conversely, opportunities for intervention are fewer in cabinet parliamentary systems with strong second chambers, objectively controlled bureaucracies, and fragmented coalition party systems, constitutionally enshrined areas of exclusive jurisdiction of constituent units, small gaps between constitutionally enshrined tasks and own-source revenues, unconditional transfers, institutionalized redistributive mechanisms, and a high degree of federal diversity.

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The Berlin Republic – Germany: A Federal State without Federalists

Hans-Peter Schneider

1. Introduction

The Weimar Republic existing from 1919 to 1933 was perceived as a "democracy without democrats". Due to the autocratic past of the German Empire all three branches of government have been more or less occupied by anti-republicans and even by monarchists. Looking at the Berlin Republic since the reunification of Germany in 1990 the question can be raised, whether it is today a still federal state, and if yes, at any rate a federation "without federalists", without a population (including the political class) which estimates the benefits and advantages of a federal system. In a public opinion poll on the importance of the federal structure and the role of the German Länder conducted by the Bertelsmann Foundation in 2007 every fourth citizen regards the Länder as superfluous. In 8 of 16 Länder the majority voted for a merger with the neighboring states. Nationwide 40% shared this position. Asked for the specific characteristics of their own Land in comparison with others only 3% of the citizens mentioned the state policy. In North Rhine-Westphalia and Lower Saxony every fourth citizen was not able to identify distinguishing features of his own Land. The strongest identifications with the Land level of government can be found in Bavaria and Mecklenburg-Vorpommern. The citizens identify themselves first with the city or municipality of their residence, than with the federal level or even with the EU; the state level was mentioned least of all. Two thirds of the population voted for a stronger role of the federal and the local level in the future; the Land level was very seldom given. Nationwide 88% of those questioned preferred the concept of solidarity amongst the Länder to the idea of competition and 74% supported the existing leveling fiscal equalization scheme. Two of three citizens wanted to be represented in Brussels by the federal government even in matters of exclusive jurisdiction of the Länder. 91% of the questioned were in favor for nationwide comparable standards in nursery institutions, schools and universities. A vast majority of 85% voted for uniform tax throughout the country. No wonder that the politicians and major stake holders in Germany follow also these tracks drawn by the opinions of the people. Their answers are short and clear: Let us govern from the center. In order to explain this attitude by observing the political praxis I will focus my paper on

three areas: (1) higher education, which belongs to the exclusive powers of the Länder, (2) information technology (IT), which is meant to be a common task of the Länder and the Federation, and (3) finance, which needs a close cooperation of both levels of government.

2. Higher Education and Research

I will start with higher education and research. Higher education at universities is a matter of exclusive jurisdiction of the Länder. Scientific research belongs the shared powers of both level of government. Nevertheless, there are two major fields of common concern which need not only a cooperation between the Bund and the Länder, but also a co-financing of the Federation: (1) the additional placement of 275,000 students at the universities according to a "Higher Education Pact", and (2) the promotion of outstanding scientific research by an "Initiative for Excellence". Both projects are regulated by administrative agreements between the Bund and the Länder and based on Article 91 BL, enshrined in the constitution with the reforms of 2006: "(1) The Federation and the *Länder* may mutually agree to cooperate in cases of supraregional importance in the promotion of: 1. research facilities and projects apart from institutions of higher education; 2. scientific projects and research at institutions of higher education; 3. construction of facilities at institutions of higher education, including large scientific installations. Agreements under clause 2 of paragraph (1) shall require the consent of all the *Länder*. (2) The Federation and the *Länder* may mutually agree to cooperate for the assessment of the performance of educational systems in international comparison and in drafting relevant reports and recommendations. (3) The apportionment of costs shall be regulated in the pertinent agreement".

According to these constitutional provisions Bund and Länder have concluded already in 2005 a "Higher Education Pact", which is to run until 2020. The Federal Government and the Länder want to give an additional 275,000 new university entrants the opportunity to take up their studies. Institutions of higher education are facing great challenges in Germany: The number of young people qualified to enter university is set to increase significantly by 2020. At the same time, international competition demands that universities put a greater emphasis on research. In order to maintain the performance of institutions of higher education and give more new entrants access to university, the Federal Government and the Länder have decided to continue the Higher Education Pact 2020. The Federal Government alone is providing more than €5 billion for the second program phase. The aim is to give the 275,000 additional new entrants expected between 2011 and 2015 a chance to pursue a high-quality university education. Providing one-off payments for

research projects supported by the German Research Association will increase universities' ability to develop new strategies.

A first-rate research landscape and highly qualified professionals are key factors for a country's social and economic development. Universities play a particularly important role in securing Germany's future. As the central institutions of our research system, they are the drivers of knowledge acquisition. At the same time, they provide qualifications for young scientists. Demand for university graduates in the labor market is growing and will continue to grow in future. At the same time, the number of matric holders applying for a university place is set to increase in coming years. The Federal Government and the Länder want to join forces to meet these challenges. That is why the Federal Government and the Länder agreed on a Higher Education Pact in June 2007 to create good educational opportunities for the next academic generation while maintaining universities' research performance. This Pact has already achieved considerable success. It has stopped the downwards trend in the number of new university entrants and sustainably strengthened academic research.

In addition to this pact Bund and Länder arranged a program for the support of scientific research, called “Initiative for Excellence”. By promoting top-class university research, the Federal Government is trying to establish internationally visible research beacons in Germany. At the Education Summit on 22 October 2008, the heads of the Federal Government and the Länder agreed to continue the Initiative for Excellence as part of the Qualification Initiative for Germany. On 4 June 2009, the Federal Chancellor and the Minister-Presidents of the Länder signed an agreement on a continuation of the Initiative for Excellence which had been commissioned by the specialist ministers of the Joint Science Conference (GWK) and approved at its special meeting on 22 April 2009. Despite the financial crisis and the new debt incurred by the state, educational opportunities for young people are being kept open. After all, investing significantly more in education and research can help secure jobs for qualified workers.

In order to give new applications and follow-up applications from the first two rounds an equal chance, the funding volume will be increased by 30% to approximately €2.7 billion until 2017. A decision on the new and follow-up applications will be taken by summer 2012 at the latest. In order to be able to take the special features of smaller universities and research departments into account, funding bands for the three different funding lines have been proposed: between €1 million and €2.5 million per year for research schools (approximately €60 million per year in total), between €3 million and €8 million per year for excellence clusters (a total of €292 million per year), and a total of approximately €142 million per year for future concepts. The most success-

ful aspects of the Initiative for Excellence will be maintained: the science-driven competitive procedure, which has received great international recognition, as well as the structure with three funding lines (research schools, excellence clusters and future concepts). The Initiative for Excellence is to be evaluated by an international expert committee in 2016. The Initiative for Excellence achieved extraordinarily positive results after a relatively short period of time. This is substantiated by the report on the Initiative that was issued by the Joint Commission of the German Research Foundation and German Council of Science and Humanities in November 2008. The Initiative for Excellence has triggered a number of structure- and profile-building developments at German universities. It has created research-friendly structures and promoted interdisciplinary cooperation within universities, between different universities, and between universities non-university research institutions and the private sector. Young scientists in particular have benefited from the Initiative for Excellence. The Initiative has also promoted equal opportunities and measures to help balance work and family life. Not least, the Initiative for Excellence has made an important contribution to the internationalization of German universities and increased their attractiveness to students and scientists from Germany and abroad. Approximately 4,200 scientists have been recruited in the funded projects, about 25% of them from other countries. A total of €1.9 billion will be available to universities in the first two selection rounds between 2006 and 2012, 75 percent of which will be provided by the Federal Government.

In order to administer these projects in June 2007 the Federal Government and the Heads of Government of the Länder agreed on the Establishment of a Joint Science Conference (Gemeinsame Wissenschaftskonferenz – GWK). Based on Article 91b Basic Law the Joint Science Conference was established by a formal Agreement in September 2007 and started operation on 1. January 2008. Ministers and Senators of the Federal Government and the Länder responsible for science and research as well as for finance are Members of the Joint Science Conference. The Conference deals with all questions of research funding, science and research policy strategies and the science system which jointly affect the Federal Government and the Länder. Whilst preserving their own competences, the members of the GWK strive for close coordination on questions of common interest in the field of national, European and international science and research policy with the aim of strengthening Germany's position as a location for science and research in the international competition. The members of the Joint Science Conference act jointly in cases of supraregional importance in promoting (1) institutions and projects in the field of non-university scientific research, (2) scientific and research projects at institutions of higher education, and (3) the construction of research buildings at

institutions of higher education, including large facilities, in accordance with detailed definitions of this agreement.

3. Information Technology (IT)

The second field of recently enlarged Bund-Länder-entanglement is the matter of information technology of the administration, which should be harmonized standardised not only between Bund and Länder, but also with the local level of government. In mid-2009 the Federal Diet decided to improve "trust, security and data protection" as well as "E-Government and E-Business". At that time three major steps in this field have already been taken: the development of a Federal E-Government program, the issue of electronic personal identification documents, and De-Mail project. The first success of these initiatives was the introduction of a single telephone number (115) for all German administrations. But there was a lack of legitimacy of that kind of "extra vires"-cooperation in a grey zone.

The constitutional door for a "go ahead" has been opened by the amendment of a new article 91c in the Basic Law, which states: "(1) The Federation and the *Länder* may cooperate in planning, constructing, and operating information technology systems needed to discharge their responsibilities. (2) The Federation and the *Länder* may agree to specify the standards and security requirements necessary for exchanges between their information technology systems. Agreements regarding the bases of cooperation under the first sentence may provide, for individual responsibilities determined by their content and scope, that detailed regulations be enacted with the consent of a qualified majority of the Federation and the *Länder* as laid down in the agreements. They require the consent of the Bundestag and the legislatures of the participating *Länder*; the right to withdraw from these agreements cannot be precluded. The agreements shall also regulate the sharing of costs. (3) The *Länder* may also agree on the joint operation of information technology systems along with the establishment of installations for that purpose. (4) For linking the information networks of the Federation and the *Länder*, the Federation shall establish a connecting network. Details regarding the establishment and the operation of the connecting network are regulated by a federal law with the consent of the Bundesrat". Thus, the E-Government in Germany is based on three pillars: technical and procedural standardisation, innovation by cooperation between different administrative levels and bodies, a Federal/State-responsibility for enacting specific E-Government laws aimed at simplifying processes for electronic procedures in and amongst administrations.

The details of the IT-cooperation are regulated in an interstate treaty between the Bund and the Länder ("IT-Staatsvertrag"), which got in force on April 1, 2010 and established a common "IT-Planning Council", consisting of the IT-Representative of the Federal government, of 16 IT-Experts of the Länder, and of 3 representatives of the municipalities with advisory functions. The Council coordinates the cooperation between the Federation and the Länder on issues of information technology, adopts IT interoperability and IT security standards, and manages projects on ICT-supported governing and administration (E-Government projects) assigned to the IT Planning Council. A decision of the Council needs the consent of the Federal member and a majority of the members of the States. In other words: The Federal member can block every activity of the Council.

On September 24, 2010, the Council promulgated a "National E-Government Strategy" with 20 goals: (1) barrier-free access for all potential users of service, (2) user-friendly service (3) easy access to public administration, (4) all administrative matters should be dealt with from start to finish via internet, (5) all members of the public administration have to acquire e-competence, (6) cross-level, client oriented optimization and seamless digitization of process chains, (7) businesses should also manage their administrative matters electronically, (8) federal, state and local cooperation regularly uses ICT, (9) data minimization and data security, (10) users can request information about the processing of their data, (11) administrative action and implementation of procedures and legislation are transparent and secure, (12) promoting participation by citizens and businesses, (13) participation by citizens and businesses will have a visible impact, (14) federal, state and local public administrations support the capacity for innovation and openness to change, (15) Germany seeks a leading role in e-government research, (16) e-government makes a significant contribution to environmental sustainability, (17) the expansion of IT is appropriately and simple, (18) content, basic services, applications and infrastructure can be bundled and re-used, (19) international standards, especially for interoperability, are applied, and German will play an active role in the EU and internationally in defining these standards, (20) e-government also functions during crisis situations. Judging this strategy one may have some doubts, whether it is not only very bureaucratic, but also a little bit too ambitious.

4. Finance (Debt Brake)

It is well known that the German Länder depend in financial matters almost completely on the federal level of government. In a comparative study of the OECD on fiscal autonomy of sub-national units in federal states Germany is

ranked below Mexico and even Austria. In the past the most important source of Länder revenues independent from the center has been public borrowing. But the "Stabilization Pact" of the EU requires in the long run balanced budgets. Thus, one of the aims of the Federalism Reform II was to limit the power of running up debts for all spheres of government. When the Reform Commission presented its report to the public on June 23, 2008, it was clear that a debt brake for the federal government as well as for the Länder will come and shall be enshrined in the constitution. The new dispensation in Article 109 par. 3 states as follows: "The budgets of the Federation and the *Länder* shall in principle be balanced without revenue from credits. The Federation and *Länder* may introduce rules intended to take into account, symmetrically in times of upswing and downswing, the effects of market developments that deviate from normal conditions, as well as exceptions for natural disasters or unusual emergency situations beyond governmental control and substantially harmful to the state's financial capacity. For such exceptional regimes, a corresponding amortisation plan must be adopted. Details for the budget of the Federation shall be governed by Article 115 with the proviso that the first sentence shall be deemed to be satisfied if revenue from credits does not exceed 0.35 percent in relation to the nominal gross domestic product. The *Länder* themselves shall regulate details for the budgets within the framework of their constitutional powers, the proviso being that the first sentence shall only be deemed to be satisfied if no revenue from credits is admitted".

Whereas the limit of 0,35% of the GDP for the Federation in general was agreed, the limitation to zero for the budgets of the Länder created a lot of disputes and controversies not only in the Reform Commission, but also in the public. At first the Federal Minister of Finance had offered to the Länder a leeway of 0,15% of the GDP of the Länder in their entirety. At the same time five Länder needed urgently financial support in order to avoid bankruptcy. The federal government promised them some "consolidation aid" out of the federal budget, but only under the condition, that other Länder also contribute to this program. The wealthier Länder like Hessia, Baden-Württemberg or Bavaria declared ready to do so, but attached also conditions to their willingness. The poorer Länder must reduce their debts and should not be able anymore to borrow money on their own. The Premier of Bavaria, speaker of this group, proposed 2020 as fix term and the beginning of the zero rule expecting that other Länder would reject this suggestion. Surprisingly enough, the majority of the Commission agreed. This was the hour of birth of the zero rule for the Länder. The Federation has to present a balanced budget already in 2016.

Thus, the Federation and the Länder have a number of years to adjust their fiscal position. In addition, in the coming years, the richer Länder and the Bund will assist the poorer Länder to cut back their stock of debt by providing

an annual amount of € 800 million to them. The zero net borrowing limit for the Länder will then become effective in 2020. The federal government is expected to respect the new debt brake for the first time in 2016. Deep recessions and natural disasters would, however, permit higher borrowing, provided there is a 2/3 majority in the parliament; also, conjunctural fiscal balances will be tolerated under the condition that they are "symmetric". Although all technical details are not totally clear (including the interpretation of the exceptional regimes for permissible deficits), a special "Stability Council" was established to monitor conjunctural borrowing and repayments.

Although I agree with the debt brake in substance, the zero rule for the Länder raises a lot of serious constitutional questions, because it abridges the budgetary autonomy of the Länder and gets in conflict with their constitution making power. Article 109 par. 1 of the Basic Law still guarantees to the Länder autonomy and independence in budgetary matters. It states: "The Federation and the *Länder* shall be autonomous and independent of one another in the management of their respective budgets". How can the Federation, bound by such a clause of strict budget separation, intervene in the budgetary policy of the Länder and urge the Länder to change their constitutions? Not to be misunderstood, I agree with the need of clear debt brakes on both levels of government. But the Länder must have the right to decide on their own how to establish and frame a debt brake and whether or not it should be inserted in the constitution. If the federation will decide on tax cuts (with the consent of the majority of the Länder in the Bundesrat), a single Land cannot avoid a decrease of their revenues and has not anymore a financial "emergency exit". Even if a Land meets the requirements of Article 109 par. 3 BL and has neither debts nor an unbalanced budget, it is not allowed to borrow money for investment purposes or to finance exceptional events (like sport championships or world fairs). This example illustrates not only a "governing from center" in financial matters, but rather a kind of budgetary "dictatorship" of the Federation. Furthermore, it is not reasonable and from my point of view unconstitutional as well. In order get a decision of our Federal Constitutional Court in Karlsruhe, I applied for a court order on behalf of the parliament of Schleswig-Holstein, but the bench did not admit this case, because only the governments of the Länder should be entitled to represent the Land before the Court; Länder parliaments don't have any standing in such a Federation-Länder-dispute. Thus, an important constitutional problem of the financial relations between the Federation and the Länder remains unsolved.

5. Conclusion

The three described examples: education, information technology and finance demonstrate clearly, that our main subject "governing from the centre" is a very familiar feature of German politics. It reflects the existence of a non-federal society in a federal state. This incongruence between decentralized political institutions of the Federal Republic of Germany and the unitary structure of the German society led to pressure for public policies for the whole country. Empirical examination shows the impact the non-federal German society had in defining public policies, in particular education, in all-German terms. Contrary to institutionalist perspectives, it was not the federal structure which moulded society into the system set up by the *Basic Law*; instead the federal structure gradually changed. Demands for a more centralized political system were shared across the political spectrum.

In a non-federal society, nationwide policies were seen as the natural solution to all-German problems. In the absence of territorially based societal distinctiveness, diversity in the provision of public policies was seen as unnecessary and inefficient. Consequently there was an overall pressure to standardize, harmonize or, better put, to "nationalize" public policies. This does not necessarily mean that all political actors were in consensus over the content of public policies, but that Germany and all German citizens were their frame of reference rather than their respective Land. Empirical evidence shows that political affiliation played no role in the choice of a nation-wide approach to public policy. Regardless of political affiliation and level of government, all German decision makers tended to view educational policy as a nation-wide concern. The same happens as shown at present with information technology and the responsibility for financial restrictions on public borrowing. In such an atmosphere of demands for uniformity and centralism in the whole civil society every attempt to reform the federal system in Germany is from the beginning a difficult task and often an undertaking of limited success. With regard to these impeding sociological circumstances the two major reforms of our federal order in 2006 and 2009 appear in a much better and favorable light. This hidden, but very important underlying obstacle should be taken into account by all critics blaming the politicians for the poor outcome of the reforms.

Governing from the centre: Federal-state relations in Ethiopia

Yonatan Tesfaye Fessha

1. Introduction

More than a decade has passed since Ethiopia has embarked on the road to federalism. Since the adoption of federalism as the preferred form of government in Ethiopia, an important feature of the governance package are the policy documents that are regularly issued by the federal government. The policy documents, which are adopted and implemented by government officers, both at federal and state levels, cover a wide range of areas. They also cover areas that, pursuant to the Constitution,[1] would normally fall under the jurisdictions of state governments. Matters like elementary education that are regarded as the exclusive competence of state governments are often the subject matter of these important federal documents. This gives an indication of a federal government that governs from the centre. The question is whether the power of the federal government to dictate comprehensive policies on wide range of areas that have to be implemented nationally has its basis in the constitution or the political practice. Put broadly, the question is whether the relationship between the centre and the regions is asymmetric and, if so, what is the extent of this asymmetrical relationship. The focus is on the intervention powers of the federal government, both formal and informal.

Primarily designed to address ethnic claims, the Ethiopian federalism is generally regarded as dual federalism with competences largely compartmentalized between the federal and regional governments. The absence of a long list of concurrent competencies reinforces the argument that Ethiopia has opted for a dual federalism, thus, suggesting less interaction between the two orders of government. This paper shows that the description of Ethiopia as dual federalism could, however, be misleading. Both formal and informal points of interaction contradict the seemingly compartmentalized functions of the two levels of government. The Constitution leaves the door ajar for the federal government to intervene in regional affairs. This was further concretized in a federal legislation that outlines the circumstances and conditions under which the federal government can intervene in regional affairs. More

1 Constitution of the Federal Democratic Republic of Ethiopia, Addis Ababa, 1995 (hereinafter referred to as Constitution).

importantly, the Regional Affairs Bureau within the office of the Prime Minister, which is now replaced by the Ministry of Federal Affairs, further extends, in the name of developmental assistance, the arms of the federal government into regional domains. The dominance of the political landscape by a single party and, hence, the absence of political pluralism, has also important implications for the federal-state relations. From this web of complex relation is emerging a federal government that is, in fact, leading from the centre - an observation that is particularly true for the so-called 'underdeveloped regions'.

With the view to demonstrate this particular feature of federal-state relations in Ethiopia, this paper discusses the constitutional framework for the relation between the federal and regional states. It discusses the rules that provide for federal intervention. It identifies the informal interactions that dominates the relations between the two orders of government and analyses the implication of the political landscape for federal-state relations.

2. Brief introduction to Ethiopian federalism

The 1995 Constitution states that the Federal Democratic Republic of Ethiopia comprises the Federal Government and state members, establishing a two-tier federal government (Article 50(1), Constitution). The federation is divided into nine states and two self-governing administrative cities. The legislative arm is comprised of two houses, which consist of the House of People's Representatives (HPR) and the House of Federation (HF) (Article 53, Constitution). The HPR, the lower house, is a directly elected body. On the other hand, the HF, the upper chamber, is a body that can be elected directly or indirectly by state parliaments and consists of representatives of ethnic groups. The HPR is declared by the Constitution as 'the highest authority of the Federal Government' (Article 50(3), Constitution).

The Constitution is silent on the structure of state governments. It leaves the matter to state constitutions. Establishing a state administration that best advances self-government is a responsibility left to each state (Article 52(2)(a), Constitution). The structure of government units below the state administration is also a matter left to the states. The Constitution simply declares that adequate power shall be granted to the lowest units of government to enable the people to participate directly in the administration of such units (Article 50(4), Constitution). As a result, government units with various powers and functions have been established in different states. The common element is that all state governments have established three-tier structures (i.e., Zone, Wereda and Kebele). The status and powers of these government units, however, varies from one state to another.

3. Powers and functions

Many students of Ethiopian federalism argue that traces of the federal government leading from the centre is already evident in the division of power that the constitution outlines for federal and state governments. Aberra Jembere (1999:191) has, for example, concluded that the Constitution "gives so much power to the Federal Government that very little is left to the states". Andreas (2003) similarly remarks that member states do not have a significant legislative role. For him, the authorities of the regional states are limited to areas of cultural and executive power. By suggesting that the powers left to the states are only executive powers, he argues that the Ethiopian federalism "consists chiefly in administrative decentralisation" (Andreas 2003: 167).The suggestion is that the constituent units are no more than implementing agents of the federal government, with the latter exercising control over policy and legislative decision making. As division of powers between the federal Government and the constituent units is one important area where the constitution can provide a guarantee for each level of government to lead in their respective jurisdictions, the focus on the formal division of powers, both in terms of the area of competence and scope of power granted to constituent units, is appropriate. With this in mind, the ensuing paragraphs discuss the division of powers between the federal and state governments, which is outlined in articles 51 and 52 of the Constitution.[2]

The powers of the Federal Government are explicitly provided for in the Constitution. The long list of federal competencies reveals that areas that usually fall within the ambit of the central government in most federations do so as well in the Ethiopian case. Examples include foreign affairs, defence, customs and excise duties, national currency and monetary policy, the central bank, citizenship, immigration, criminal law, international trade and commerce (Articles 51 and 55, Constitution). Following the territorial principle, the Constitution also confers on the federal government powers over matters that involve the territories of more than one regional state, including interstate commerce, all kinds of transport linking two or more states, utilisation of land and other natural resources, of rivers and lakes crossing the boundaries of the federal state or linking two or more states. It is also responsible for enacting labor, commercial and penal codes (Articles 51 and 55, Constitution). The long list of federal competencies contrasts with the brief explicit list of regional competences, namely enacting state constitutions, development planning, civil service, police and administration of land and other natural resources in accordance with federal laws. Powers not explicitly reserved to the

2 The remaining part of this section is adopted from a broader work on federalism in Ethiopia.

federal government alone or concurrently to both levels of government are vested in the regional states. However, the 21 item list of federal competences might create the impression that little room is left for the states to enact legislation; that the long list of federal competencies hollows out the residual powers of the regional states. These arguments might be further reinforced by provisions of the Constitution which entrusts the Federal Government with the power to "establish and implement national standards and basic policy criteria for public health, education as well as for the preservation of cultural and historical legacies" (Article 51(2), Constitution).

Although article 52 of the Constitution seems to provide the Federal Government extensive powers, a careful reading of the Constitution suggests that the powers of the Federal Government in those areas are, in fact, limited to setting national standards and outlining basic policy criteria.[3] Once this is noted, it becomes clear that the regional states can exercise power in a number of areas. This is owing to the extensive areas of competences that are not covered by the seemingly exhaustive list of powers of the Federal Government. These include, among others, intra-state transport, state roads, criminal matters not covered by the federal legislature, state tourism, health services, agriculture, disaster management, housing, state roads, intra-state trade, vehicle licensing, fire fighting services, traffic regulation, electricity, liquor licenses and other matters. The regional states can exercise control over these and many other areas that are not explicitly assigned to the Federal Government. This indicates that member states of the Ethiopian federation, in contrast to what many argue, enjoy legislative autonomy in many areas.

The legislative autonomy of the regional states also benefit from the fact that there seems to be little or no concurrency between the two levels of government in the Ethiopian federation. No explicit list of concurrent powers is provided in the Constitution with the single exception that a concurrent power of taxation exists for enterprises which the federal and state governments jointly establish, companies, large scale mining, petroleum and gas operations. Furthermore, unlike many federal constitutions (see the Constitution of South Africa (See section 44(2) South African Constitution), Spain and India), the Ethiopian Constitution does not provide for conditions under which the central government, under normal circumstances, is allowed to interfere in the legislative powers of the states. Phrases like 'national interest' or 'national uniformity', which are often used by constitutions to allow the Federal Government to interfere with the jurisdiction of constituent units, are lacking. This signals that the states are allocated final decision-making powers over matters

3 The exception is that the federal government is allowed to enact law on the utilisation of historical sites and objects.

that are allocated to them. In other words, the legislative powers of the states are full and exclusive. This brings the division of powers adopted by the Constitution closer to the dualist division of power model where powers are exclusively delegated to one or more orders of government. This dualist nature of the division of power is further entrenched by article 50 of the Constitution which imposes a duty on both governments to respect each other's constitutionally defined powers. This model of division of power enhances the autonomy of subnational units.

The autonomous sphere of the regional government is not, however, immune from constitutionally mandated federal interventions. The constitutional mandate of the federal government to interfere in the affairs of state government is further outlined in a national legislation, namely Proclamation No 359/2003, which provides for System for the Intervention of the Federal Government in the Regions Proclamation, *Federal Negarit Gazeta*, 9th year No. 80 Addis Ababa 10 July, 2003).

4. Federal intervention: Constitution and proclamation

Both the constitution and the proclamation outline three circumstances under which the federal government can intervene in the regions. The first ground for federal intervention is the deterioration of security situation in the region (Article 51 (4), Constitution). The federal intervention includes, according to Article 51 (4) of the Constitution, the deployment of federal defence forces, which, according to the Constitution, include the Federal Police and the National Defence Force.[4] However, the federal government can deploy its forces only when it is requested to do so by the concerned regional administration, suggesting that the power to determine the existence of activities that point to the deterioration of the security situation rests with the regional government.[5] The limited power of the federal government in this particular type of inter-

4 The force has the power to take "the necessary legal measures to bring to justice those who participated or suspected of participating in deteriorating security situation". The use of force has to be 'proportionate to enable to arrest the deteriorating security situation and maintain law and order'.

5 The request of the region for federal intervention, which must be directed to the federal Prime Minister, must be done through the Ministry of Federal Affairs. It is not, however, clear whether the Ministry plays any other role than serving as conduit of the request from the region to the Prime Minister. Most probably, the rationale behind the involvement of the Ministry has to do with the fact that the latter is responsible for coordinating "the implementation of decisions authorizing the intervention of the Federal Government in the affairs of regional states" (Article 21(4), Proclamation establishing MOFA).

vention is further evident from the fact that the mission of the force deployed shall be terminated at the request of the regional government, which, presumably, can even be before the federal government declares that the deteriorating security situation has been arrested.[6]

Unlike the first type of federal intervention, there are circumstances in which the request or consent of the constituent units is not a requirement for federal intervention. This takes us to the second ground for federal intervention, namely intervention in case of violation of human rights. In this particular case, two requirements must be met to allow federal intervention. First, there must be a violation of human rights. A mere violation of human rights is not, however, sufficient to warrant federal intervention. Not all violations of human rights justify federal intervention. The extent of the violation is also important. It must be further established that the violations are so serious that the regional law enforcement agency and judiciary are unable to arrest the act.[7] In as much as the constitution and the proclamation allow the federal government to intervene without the consent of the concerned state, they also limit the measure that the former can take in case of intervention on the grounds of human rights violations. The intervention does not entail the deployment of federal forces. The Proclamation limits the intervention of the federal government to giving 'directives to the Region to arrest the acts of violations of human rights and bring to justice those who violated such human rights" (Article 11, Proclamation). As we shall shortly notice, however, this same situation may give rise to a more extensive form of federal intervention.

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6 The supervisory power of the federal intervention seems to rest with the HPRs as the Prime Minister has to submit regular reports to the latter concerning the 'activities carried out by the forces in the Region'.

7 The intervention begins with an investigating team that is dispatched to the concerned region to look into alleged violations of human rights. Comprised of members from the HPRs, the investigating team must submit a report to the HPRs, specifying the 'concrete evidence that describes the act of the violations of human rights in the Region, the source of the problem and persons responsible for it'. Furthermore, the report must specify measures taken by the Region to arrest such violations of human rights and indicate whether or not such Region will be able to arrest the act. Based on the report submitted by the investigating team, the HPRs, if it believes that the matter requires the intervention of the federal government, can call a joint session with the HF and present a 'report with justification to the joint session of the necessity of the intervention of the Federal government'. Both the constitution and the proclamation are not clear on the decision making process. It is not, for example, clear on whether the joint secession is used to vote on the report or if it merely serves as informative or consultative session that simply lends legitimacy to the decisions of the HPRs. Clarity with regard to the role of the HOF is essential given the fact that the House is designed, albeit indirectly, to protect regional interests.

It is a threat to the constitutional order that gives rise to a more extensive form of intervention (Article 62(9) Constitution). What constitutes a threat to the constitutional order? The failure of the regional government to comply with the directives of the federal government mentioned above (i.e. directive to arrest the acts of violations of human rights and bring to justice those who violated such human rights) is regarded, according article 12 of the proclamation, as an act that endangers the constitutional order and, hence, warrants federal intervention without the request or consent of the subnational unit. Armed uprising, disturbance of peace and security of the Federal Government as well resolving conflict between regions by resorting to non-peaceful means are the other three circumstances that are deemed to pose a threat to the constitutional order, thereby, warranting federal intervention. But the activities or acts that endanger the constitutional order and warrant federal intervention are not limited to the four acts mentioned above. It includes any activity or act that is 'carried out by the participation or consent of a regional government in violation of the Constitution or the constitutional order'. In such cases, the federal government can intervene in the region without the request or consent of the latter. It is the HOF that has the power to take measures that 'must be capable of arresting the situation that has endangered the constitutional order'.[8]

From the foregoing, it is clear that what makes this ground of intervention particular is that the regional administration itself is complicit in the acts that pose a threat to the constitutional order. The regional administration must either have participated in the act or it must have given its blessing to the acts. Without such involvement on the side of the regional administrations, the acts would not be any different from the two other grounds that give rise to the relatively less extensive forms of federal intervention mentioned above. It is also this particular fact that justifies federal intervention although the duty to defend the constitutional order rests with both federal and regional governments.

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8 In terms of procedure, the HOF can kick start the process of intervention either on its own initiative or after receiving relevant information about an act that endangers the constitutional order, which could be from any person, juridical or physical, including the HPRs. As it is the case with intervention based on the violations of human rights, the intervention must be preceded by an investigation that must be conducted by the federal cabinet upon the request of the HOF. The Cabinet, if convinced that federal intervention is necessary, must submit the report to the HOF indicating that peaceful means to settle the causes which endangered the constitutional order 'has been left out' and that the grounds for intervention have been met. Based on the report, "[t]he HOF is expected to make its decision not only on whether to intervene but also the type, level and timing of the intervention" (Nahum, 76).

A look at the possible measures that the federal government can take indicate that the threat to the constitutional order, unlike the other two threats that form the basis for federal intervention, allows for an intervention that is extensive both in nature and scope. As it was the case with the intervention in relation to deteriorating security situation, the HF can give directives to the Prime Minister to deploy police or national defence force or both. More importantly, however, the Proclamation allows for a more intrusive intervention by giving the HF the power to suspend both the state council and the highest executive organ of the state. The HF can then set up provisional administration that is accountable to the federal government and that will basically take over the responsibilities of the state executive (Article 14, Proclamation).[9]

The major protection for safeguarding the autonomy of member states from such intrusive intervention is that the intervention has to be first permitted by the HF. In fact, it is only the HF, without involving the HPRs, which can order federal intervention if a member state, in violation of the Constitution, endangers the constitutional order (Article 62(9), Constitution). This is consistent with the Constitution that makes the HOF the 'ultimate defenders of the constitutional order'. It must also be noted that the provisional administration cannot administer the region indefinitely. The Proclamation states that the term of the provisional administration must not exceed two years, subject to a once-off six month extension by the HOF. The continuous administration of the region by the federal government is also subject to the quarterly and other reports that the Prime Minister has to submit to the HOF regarding the conditions of the region.[10]

5. Federal intervention: constitutional basis to lead from the centre?

As the foregoing reveals, the federal government enjoys the power to intervene in the regions in three specific circumstances. The question is whether

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9 The provisional administration, which may, upon the recommendation of the Ministry of Federal Affairs, constitute of the Federal Government Personnel, will have the power to lead and coordinate the executive organ, including assigning the Heads of the Provisional Administration as well as ensuring the enforcement of law and order. It has also the power to approve a plan and budget of the region. The provisional administration will be responsible for bringing to justice the individuals and officials that are responsible for the situation but it is also responsible to speedily facilitate conditions for the regional Government to resume its office by restoring the constitutional order.

10 The HOF can also employ other mechanisms including the setting up of a team to monitor the condition in the region. The supervisory power of the HOF over this particular form of federal intervention extends to giving 'directives where there are matters that require corrective measures based on the findings of the study and evaluation'.

both the Constitution and the proclamation allow for an intervention that is 'of limited character and with specific goals' without encroaching on the autonomy of regions to a level that is not necessary or permit a federal intervention that would effectively allow the latter to govern from the centre. The intervention powers of the federal government can be analysed in terms of the substantive ground that are deemed to warrant intervention and the procedural rules that regulate those interventions.

A glance at the grounds for federal intervention would reveal that they are, generally speaking, related to grounds that often give rise to the declaration of the state of emergency. The deterioration of security situation is often one such case. Although one may be inclined to argue that the deterioration of security situation should only have given rise to the declaration of state of emergency by the relevant regional government and not the federal government, it must be noted that the intervention is only allowed if the situation, according to the opinion of the regional government, cannot be controlled using the regular mechanism that are available to the regional government. In any event, the intervention takes place only upon the request of the regional government. This, in fact, raises the question whether the act of the federal government can even be considered as intervention in the proper sense of the term. Intervention by definition refers to "a unilateral act of interference by the Federal government into the affairs of the regional government". In this particular case, federal intervention is permissible only upon the request of the regional administration. Arguably, it can at least be safely concluded that intervention based on the first ground doesn't pose a threat to subnational autonomy. It is premised on the recognition that the obligation to maintain the security of the region primarily rests with the regional government itself.

What could be problematic is the intervention based on the violation of human rights. Although, here again, the intrusive nature of the intervention seems to be limited by the fact that the ground will only give rise to the issuance of a directive by the federal government, it must be noted that the same ground can give rise to a more extensive form of intervention that would gradually see the replacement of the regional administration by a federally appointed provisional administration. That happens when the regional administration fails to comply with the directives of the federal government. This indicates the serious consequences that might follow a federal intervention based on the violation of human rights. It is likely that this ground can be potentially used and abused by the federal government to interfere with unfriendly regional administration. The only consolation is that, as indicated earlier, the intervention must be authorised and supervised by the HOF, the body that presumably represents, albeit indirectly, the interest of the regions.

A look at the two grounds of intervention mentioned above seems to suggest that the substantive grounds that give rise to federal intervention look very narrow and, to some extent, specific. The grounds for federal intervention seem to be generally related to security or security related concerns. The failure of the subnational government to discharge its constitutional responsibilities in other fronts does not seem to illicit federal intervention. Unlike in South Africa, the failure of the regional administration to deliver effective service does not, for example, give rise to federal intervention. Likewise, serious problems related to financial emergency are not mentioned as a ground for federal intervention. On the other hand, the fact that the third ground for federal intervention, namely a threat to the constitutional order, is broadly formulated suggest that the federal government can easily use and abuse its power to advance federal interest and encroach on regional autonomy. A federal position that insists on linking failure to deliver services or financial emergency to a threat to the constitutional order cannot be excluded. Given the extensive nature of intervention that the existence of this ground gives rise to, the manner in which the ground is formulated could, therefore, be problematic.

In terms of procedural requirements, the fact that federal intervention can be terminated either by the state itself or the HOF signal procedural safeguards against federal intervention that goes beyond the objectives it is meant to achieve. It is not, however, clear why the HPRs, the lower house of the Ethiopian parliament, is given prominent role in approving, regulating and supervising federal intervention that are authorised as a result of security and human rights related concerns. As an institute that, albeit indirectly, represents the interest of the regional governments, the HOF would have been the more appropriate or relevant institution.

From the forgoing, a constitutional supremacy that allows the national government to lead effectively from the centre in wide range of sectors is not evident. The absence of extensive concurrent powers and overriding clauses and the fact that the intervention powers of the national government are limited to situations that are akin to state emergency indicate that the region, under normal circumstances, have enough space to exercise control over their jurisdictions. For any keen observer of Ethiopian federalism, however, that is far from reality. The constitutionally envisaged matrix of federal-state relation is not congruent with the behavioural relation that characterises the relation of the two levels of government, a relation that effectively portrays a federal government that leads from the centre.

6. Governing from the party structure

Many have urged the need to look beyond the constitutional division of power in order to fully understand the operation of the federal system. Different variable are deemed to mediate the constitutional formula and the political practice that characterises federal system. The fiscal relationship between the two orders of government is, for example, regarded as having central influence in the operation and maintenance of federal systems. But as Burgess (2006) has noted, one important variable whose significance for the operation and maintenance of federal systems is well established is political parties and party system. The structure of parties often determines the type of relationship that exists between the central government and the subnational units, whether that is relationship of equal partners leading in their respective jurisdictions or a relationship of dominance and subordination that undermines the federal features of the system. William Riker (1964: 129-130), in one of his most often quoted paragraph, stated that

> "[t]he federal relationship is centralized according to the degree to which the parties organized to operate the central government control the parties organized to operate the constituent governments. This amounts to the assertion that the proximate cause of variations in the degree of centralization (or peripherilization) in the constitutional structure of a federalism is the variation in degree of party centralization....There are strong a priori arguments for the validity of this assertion of a causal connection".

The proposition, it seems, is that the extent to which the federal government and the subnational units differ from each other in partisan composition determines the reinforcement or compromise of the federal bargain. (See also Burgess 2006). It must also be noted that the dominance of the political/governance landscape by a single political party might not necessarily be problematic for the maintenance and operation of the federal system. What is rather important is how the dominant party is organized. As Miller noted, "politics within each party is as important as those between them" (as quoted in Burgess 2006:152). What is also important is the degree of party centralization. The question here is whether the party itself is federalized. In this view, the problem is traced not only to the dominance of the ruling party across the political landscape but to the structure of the party itself.

The story of the Ethiopian federalism experiment, albeit short, is a story of a federal system within a dominant party state. For more than two decades now, the federal system is dominated by a federal government that is controlled by the Ethiopian People's Revolutionary Democratic Front (EPRDF),

a coalition of four ethnic-based parties. The four political parties reflect the four numerically dominant ethnic groups and the subnational units that are regarded as the 'homelands of these ethnic groups'. Basically, these are regional based parties. The fact that the ruling party is a coalition of ethnic based parties that are assumed to have their stronghold in the subnational units might suggest a party structure that promotes the autonomy of regional states.

However, a close look at the way in which the coalition functions betrays a structure that undermines the division of power that envisages two levels of government governing their jurisdictions with little or no interference. At the centre of this is the policy of 'democratic centralism' that guides the modus operand of the ruling party. Democratic centralism reserves decision making on important matters of policy to the highest decision making body. Members of the party and particularly office holders at all level must adhere to these decisions. The centralized nature of the ruling party is evident from its constitutive act. The constitutive law states that "all organizations that come under the EPRDF umbrella are those which are led by democratic principles and those which respect democratic centralism" (Article 1 (e) 8, EPRDF Constitution). The member organizations have the duty to implement, in their regions, the decisions of the EPRDF at national level.[11] Furthermore, "members will not have distinct political and ideological existence outside the Front" (Article 6, EPRDF Constitution). Furthermore, the federal government offices and cities accountable to the federal government should be accountable to the office of the EPRDF (Article 5, EPRDF Constitution).

What is problematic, for our purpose, is that a dominant party that is guided by democratic centralism undermines the federal feature of central-regional relationship. This is because, under such system, decisions are made by the Central Committee of the ruling party and members of the coalition are expected to follow and implement those decisions. As Assfea notes, "[t]he central committee of the ruling coalition generates specific plans of action, often through the chairman himself, which then form the basis of the EPRDF's five year plan, to be implemented across the country. The five-year plan then becomes the basis for the plans of policies of state governments" (Assefa 2006, 157). Party discipline ensures that every member of the coalition toes the lines of the central committee. This means decision is concentrated in one institution at the national level, namely the Central Committee of the ruling party. That same decision is implemented by officials at each level of gov-

11 However, the rule leaves a room for each member organization to modify the programme and the general plan of the Front in order to suit the conditions of their respective regions (EPRDF, Article 4 (b)).

ernment. The way the ruling party functions is indifferent to the federal structure that, by definition, multiplies 'centres of political decision making'.

7. Governing 'the less developed regions' from the centre

What about the other four regions which are led by parties that, formally speaking, are not members of the coalition? These regions are governed by ethnic-based parties that are not formal members of the coalition. In the quarters of the ruling party, these parties are often referred to as affiliated parties, referring to their relation with the EPRDF. Others refer to these parties as parties created under the tutelage of the EPRDF. These parties are also subjected to the same criticism that is directed against some member parties of the coalition. They are regarded as 'controlled ethnic-based organisations' that are created on behalf of the various ethnic groups in the country. As they are created under the direction of EPRDF, they are hardly regarded as independent parties and neither are their leaders who are appointed to national institutions including the cabinet. The fact that the parties are deemed to have been created under the tutelage of the EPRDF casts doubt on their operational autonomy. This suggests that the peripheral regions are also subject to the decisions /influences of the ruling party that functions according to the principle of democratic centralism and enforces strict party discipline.

More importantly, however, the peripheral regions are subject to different form of intervention; a form of intervention that is not at least extensive in the regions that are led by the members organization of the coalition. This is mainly attributed to the fact that the regions were considered as the main concern of national institutions that were established, formally and informally, to coordinate the relationship between the regions and the centre.[12]

A semi-structured approach to federal-state relationship developed following the adoption of the federal constitution in 1995 in a form of the Office of Regional Affairs (ORA) at the office of the Prime Minister. Led by a senior EPRDF cadre, the office was an ad hoc agency that was vested with the responsibility of coordinating federal-regional relations. The office "was designed to assist states in general and, in particular, to enhance the capacity of 'peripheral' states to take advantage of their constitutional rights to administer their own affairs" (Assefa 2006, 153). However, what has emerged from the activities of the office in the regions is a relation of domination of the federal arm and the subordination of the regions to the office. The instruments of con-

12 As Hagmann and Khalif (2006: 35) notes, "federal interests are ensured through subtle dealings within and outside the official channels linking federal and regional organs".

trol involved the deployment of the so-called advisors to each region, whose role did not appear on organisational maps. Without 'formal decision making positions', they advised the local elites (representatives) and they were believed to be 'the most influential local decision maker' (Tronvoll 2002, 164). With reference to the Somali regional state, Samatar (2004, 1147) explains that "the regional advisors openly participated in parliamentary deliberations at the highest decision making level in the region, despite the claim that the advisors were serving at the regional leaders' discretion". Operating in less formal manner and with no legal framework, "these advisors virtually ran the regional governments and were an obstacle to self-determination" (Assefa 2006, 154).The fact that real power lies with the officials of the ORA was also evident in the fact that petitions from members of the general public were directed to the officials of the ORA as opposed to the locally elected leaders and representatives (Asnake 2009, 237).

The year 2001 can be considered a political watershed in the history of EPRDF and, in particular, TPLF, the most influential member of the EPRDF coalition. Following the culmination of the war against Eritrea, the TPLF was engulfed by a political crisis that pitted key members of the Central Committee of the TPLF against the Prime Minister and his supporters. It was reported that "some dissidents of the TPLF used their positions within the ORA to enlist the support of the regions they controlled against the PM" (Asnake 2009, 239). Following the victorious emergence of the Prime Minister from the crisis and the expulsion of the dissidents from the TPLF, one of the major causalities of the 'reform' process that ensued immediately after the crisis was the ORA, which, according to the Prime Minister, displayed a blunt disregard for the autonomy of the regions (Asnake 2009).

With the introduction of the reform process that, among other things, saw the axing of the ORA, the expectation was that the Ethiopian federal experiment would be liberated from the unitary/centralized tendencies of the federal government. In actual fact, however, some of the reforms that targeted the organization of regional governments represent, in many respects, the continuity of a federal government that is leading from the centre. One of the major reforms that followed the 2001 crisis involved the organization of the state governments. Prior to 2001, the President of the state government also served as the head of parliament, suggesting weak separation of power between the two arms of government. A decision was made to remove the state president from the legislature and replace it with an office of a speaker. What is important for our purpose is the uniformity with which almost all regional constitutions were amended by their respective parliament to cater for this specific change. As one author has noted, "[t] he reforms were undertaken in a top down manner", leading him to aptly conclude that "the EPRDF's promise of renewal

were not meant to reforming the asymmetrical nature of centre-regional relations" (Asnake 2009, 239).

The continuation of the same mode of central-regional relationship is also evident in the fact that a new ministry was established to take over the functions of the ORA: the Ministry of Federal Affairs. The initial indication was, however, that the new Ministry represents a break from the principal-agent relationship that characterised the federal-regional relation that was mediated by the ORA. The first Minister of the MOFA stated that

> "the federal government would not become a patron or a boss to the regions. The support, which we provide, would depend on the needs of the regions. The strategies, policies or programmes that we adopt will be first discussed with the regions. The regions would have a chance to provide their input. Then they would own and implement the programmes".

A relation between equal partners was what was promised; a discontinuity from the 'domineering tradition of the ORA'. What has really changed was that the MOFA, unlike its predecessor, decided to no longer have advisors that are stationed in the regions on a semi-permanent basis. It has, nevertheless, continued the practice of deploying "technical advisors". Officials of the Ministry of Federal Affairs "were dispatched to 'advice' regional presidents and bureau heads in the country's peripheral regions" (Hagmann and Khalif 2006, 36). The only change is that the officials, rather than being stationed in the regions, 'regularly shuttle between their headquarters in [the capital] and the capital of the respective regions'. Their role has not changed either. In many respects, their contribution to regional governance goes beyond providing advice. For instance, in its annual work plan for the year 2002/03, the Department of Democratisation planned to 'strengthen the regional councils of the four regions by creating a party and government structure which is capable of providing strong leadership' and 'revise and endorse the Constitutions of the regions". This signifies the top down approach that characterised the role of the MOFA in the management of centre-regional relationship.

The top down approach is also evident in the decentralisation process that swept the regions, which saw the transfer of power from the regions to the lower levels of governments. This 'second level decentralization' was practically an institutional prescription that was ordered by the Democratization Department of the Ministry and had to be swallowed by all regional governments, albeit reluctantly. The process required the transfer of powers and functions from the regions to the lower levels of government. Focusing on the four regions, the Department stated:

> "The implementation of the new vision on good governance in the four regions requires a woreda and kebele focused bureaucratic structure. The structure that prevails in the regions so far does not give adequate powers to the lower levels of government. Power has, therefore, been concentrated around the executives of the regions and the zones. This has to be changed. In view of this, MOFedA plan, in 2003, to establish a woreda and Kebele focused bureaucratic structure" (MOFedA 2002c:18 as quoted in Asnake 2009, 242).

The role of the ruling party in the appointment and dismissal of regional leaders is also another indication of a government that leads from the centre. This is about a federal government that intervenes in the most direct way and undermines the accountability of the subnational government to the subnational electorate. This is not only contrary to the dictates of the constitution but also the federal arrangement. As indicated earlier, the Constitution is silent on the structure of state governments, leaving the matter to state constitutions. A survey of the constitutions of each state, however, reveals a common government structure across the states that link the accountability of the regional government to the regional electorate. The legislative authority of a state resides in its state legislature, whose members are fully elected by the population of each state. The executive authority of a state is vested in the president of each province, who is elected by the state legislature from among its members (Articles 125–141, Constitution).[13] Members of the state cabinet, including the president, are responsible to the state legislature for the exercise of their powers and the performance of their functions.[14] The state constitutions, to use the words of choudhry (2009), "create a system of political accountability between the [state] electorate, the [state] legislature, the [president] and the [state cabinet]".

However, a simple observation of the regional politics would reveal that accountability to allegations of corruption, mismanagement and misuse of public resources takes place not only through the state political structures but in a form of the so-called 'peace and development conference' that are often organized at the concerned region. In these forums, the federal authorities are often expected to play the role of arbitrator in the domestic dispute of regional politicians. In practice, these conferences are often dominated by the domi-

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13 Like the national Prime Minister, the president exercises the executive authority together with other members of the state cabinet.

14 Finally, states have also established State Supreme, High and first-instance courts (Article 78(3) of the Constitution). State Supreme Courts have the highest and final judicial power over state matters.

neering central-regional relations.[15] The interference in the state political affairs is committed by national politicians. This represents more than a mere intervention but a 'seizure of [state] power by a national institution'. In fact, the actions of the national government represent double harm. This, first, represents the appropriation of the power of the regional electorate by political parties. An accountability that should be directed to the regional electorate is now directed to the national politicians. It therefore represents harm to the principle that insists on making elected representatives accountable to the electorate.[16] But most importantly, for our purpose, it represents harm to the federal structure of Ethiopia. These types of interferences, as Choudhry (2009, 75) explains, do not only disrupt "the accountability of elected representatives to voters" but also harm the federal structure "which entails the accountability of elected [subnational] office-holders to provincial voters". This is leading from the centre because political powers that belong with the state electorate are now seized by national politicians.

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15 In one event, the deputy prime minister of the federal government 'dismissed the entire regional government and had many of its members imprisoned for corruption" (Young, 336). The same situation is noted in the other three regional states where the federal officers or EPRDF cadres are involved "reviewing appointments and dismissals" (Young, 343). In some cases, this happens on the invitation of the regional authorities who often find it difficult to unite politically as it has been the case in the Somali regional state. Of course, this does not change the fact that the involvement of the federal authorities has, in any event, increased the influence of the federal authorities on regional government, thereby, undermining regional autonomy. Another important mechanism that the federal government uses to influence regional authorities is what is called gem gema, which means criticism and self-criticism or evaluation. This is a system that dates back to the struggle days of the current leaders. As noted by Medhane and Young, "gem gema was designed to critically assess every aspect of the Front's programme, the quality of its leadership, and the personal conduct of all its members; publicly at great length" (Medhane and Young 2003, 394). As Hagman and Khalif (2006, 36-37) notes "Gem gema is used in meeting, particularly of the ruling party, whereby officials are made to admit to committing unlawful acts, including corruption and other conduct unbecoming of a government official". Regional authorities are regularly subjected to this mechanism. There is no doubt that the mechanism, which creates on the part of regional officials a public record of maladministration, wrongdoing or unlawful act, makes the latter "vulnerable to public ridicule and susceptible of federal pressures" (Hagmann and Khalif 2006, 37).

16 It must also be noted that those that interfere in the regional affairs and steer the state governments are often, as indicated earlier, politicians that functions outside 'the formal institutions of government'.

8. Conclusion

From the foregoing, it is clear that the nature of the relationship between the centre and the regions has not changed with the dissolution of the ORA. Its replacement, the MOFedA, represents, in many respects, the continuation of the institutional control that its predecessor had perfected. Although the dominant role of the federal government in all the regional states is evident, the intervention of the federal authorities in the four regional states is disproportionate. This, as noted by many, indicates the emergence of a two-tiered system of federalism in Ethiopia. The four regional states 'receive a disproportionate share of central government material and human resources" (Young). At the same time, they are also subjected to intense supervision and intervention of the federal government.

The need to give special attention to the plight of these regional states is already evident from the Constitution. Article 89(4) of the Constitution clearly indicates that the federal government can engage in preferential treatment in terms of providing assistance to the regional governments. The federal government is mandated to provide 'special assistance' to regions that are least advantaged in economic and social development. There is no qualm that the federal government, in its relation with the regions, has gone beyond the duty of providing 'special assistance'. It has severely undermined the constitutionally envisaged autonomy of the states.

However, the discussion about the involvement of the federal government in administration of these regions must be seen in the context of the economic and political development of the regions. These are regions that are characterised by significant levels of underdevelopment. More importantly, these regional states have no record of experience of modern administration and continue to suffer from lack of skilled personnel. In the context of such underdevelopment, the mere intervention of the federal government should not be surprising.[17] As noted by Riker, the more subnational units are asymmetric, the more federal government is urged to intervene in the affairs of the regional sates with the view to achieve some level of symmetry. The important question is the extent to which federal intervention should be tolerated.

The tentative conclusion is that federal intervention in Ethiopia has went not only beyond the constitutionally sanctioned limits of centre-regional relationship but also beyond what is deemed imperative by the underdevelopment of the regions. The intervention, it seems, has failed to realise that subnational units that are plagued by lack of skilled human resource and history of bureaucratic administration must be allowed to learn from their mistakes. For

17 Some like Young have argued that centralised administration is the only viable course.

that to happen, federal intervention, when it is allowed, must be limited and specific to give the regional administration enough space to mature and develop efficient in-house bureaucracy so that it can, overtime, effectively discharge its responsibilities. In short, the interference must be enabling and not controlling.

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Unfunded Mandates: Directing Subnational Governments

Nico Steytler, Jaap de Visser and Robert Williams

1. Introduction

Unfunded mandates are an extreme manifestation of the phenomenon of governing from the centre; the federal government through various strategies imposes national mandates on states and local government at the expense of the latter. Unsurprising in federal systems, state and local governments object to unfunded mandates because, first, they shrink their policy space, and, second, limit their expenditure choices, and ultimately subnational governments' accountability to their electorates. They establish a hierarchy of authority that sits uncomfortably with federal notions of self-rule by subnational governments. Despite principled objections, unfunded mandates are in the main constitutional; they reflect the soft edges (or systemic weaknesses) of the federal allocation of powers and functions. Attempts to curb their incidence have thus focused on asserting the division of powers or functions either legally or politically. Where reliance is placed on politics, successful outcomes from the perspective of states and local government depend much on the balance of forces operative at that time.

This argument is developed in the context of three very different federal or federal-type countries that have sought to deal with unfunded mandates. The USA, reflecting the classical clear division of powers between federal and state governments, enacted the federal Unfunded Mandate Reform Act in 1995. This follows on a number of state initiatives on the issue. South Africa, with a highly centralised federal system, has sought, through legislation in 2001, to protect local government from national and provincial unfunded mandates. Australia, with a similar division of powers as the USA, has sought to protect local government (a constitutionally unprotected level of government) from federal and state imposed unfunded mandates through a non-statutory intergovernmental compact in 2006.

Despite constitutional differences, remarkably similar responses to unfunded mandates are encountered. Given this finding, the argument advanced in this paper may also find wider application in other federal systems.

2. Definitional questions

The nomenclature used to refer to unfunded mandates varies from country to country. In Canada, for example it is referred to as service responsibility "downloading",[1] in Australia as "cost shifting"[2] and in the United States and South Africa as "unfunded mandates". While definitions of unfunded mandates emphasize costs and shifts in responsibility, there is much contestation about the details and reach arising from the interests of the defining body. A broader definition is proffered by state and local governments who are subject to federal intervention, while a more narrow definition is advanced by federal governments. The contest over definition (and the resultant impasse) will well illustrated by the Australian attempt at pinning this concept down.[3]

2.1 Contested definitions

In Australia the federal House of Representatives Standing Committee on Economics, Finance and Public Administration[4] struggled to get a consensus view of unfunded mandates, or cost shifting. Not surprisingly, local governments defined the concept broadly. The Australian Local Government Association (ALGA) identified at least three forms of cost shifting. The first is where local authorities are required to provide services that previously were done by other spheres of government.[5] A variation on this theme is where local governments are "required to be the sole provider of new and innovative services that have no historical funding precedent".[6] The second is where the federal or state governments require local government to provide concessions or rebates on their revenue resources (mainly property rates) without compensation. A variation of this kind of unfunded mandate is where the supervising governments control the fees and charges that local governments are permitted to apply and do not index such fees and charges to increased costs in the provision of the services concerned. The third is where the supervising gov-

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1 See McMillan 2006, 52.

2 Sansom 2009, 20.

3 See also in the USA, the National Conference of State Legislatures recent comments on the Unfunded Mandate Reform Act, http://www.ncsl.org/StateFederalCommittees/BudgetsRevenue/MandateMonitorOverview/tabid/15850/Default.aspx (accessed 15 September 2011).

4 In a report entitled *Rates and Taxes: A Fair Share for Local Government* (2004).

5 House of Representatives Economics Committee 2003, 25.

6 House of Representatives Economics Committee 2003, 25.

ernments require that local government "undertake costly compliance activity".[7]

Although the Committee acknowledged the need for an agreed definition, supported by a robust methodology,[8] no definition was offered. It seemed, however, that it was sympathetic to ALGA's broad definition by, in addition to the shifting of responsibilities and functions, recognised the following five types of cost shifting:[9] The first is when the superior government withdraws or reduces funding once a programme has been established. The local authority can discontinue the programme but then "suffer the political odium of cancelling the service".[10] The second is the transfer of assets without supporting funding. The third is the imposition of concessions and rebates on local taxes without compensation payments. The fourth is increased regulatory and compliance requirements. The final one is the lack of indexing service fees and charges when the superior government controls increases. The Committee also defined unfunded mandates negatively; they do not include any activities that local government voluntarily undertakes, including where such services are already provided for by another sphere of government.[11]

The Australian Government, although accepting the thrust of the Committee's recommendations,[12] adopted a narrow definition of cost shifting. In the Inter-governmental Agreement Establishing Principles guiding Inter-Governmental Relations on Local Government Matters, concluded between the federal government, the six state government, the two territories and ALGA,[13] a minimalist approach was followed. In the preface to the Agreement it was recorded that the Agreement "does not attempt to define cost shifting but addresses it by obtaining in principle agreement from governments that when a responsibility is devolved to local government, local government is consulted and the financial and other impacts on local government are taken into account."[14] The Agreement makes it also abundantly clear that

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7 House of Representatives Economics Committee 2003, 25.

8 House of Representatives Economics Committee 2003, 27.

9 House of Representatives Economics Committee 2003, 30.

10 House of Representatives Economics Committee 2003, 30.

11 House of Representatives Economics Committee 2003, 26.

12 [Australian] Government response to the Report of the House of Representatives Standing Committee on Economics, Finance and Public Administration, (www.aph.gov.au/house/committee/efpa/localgovt/govres.pdf, viewed 29 May 2011).

13 Signed on 12 April 2006.

14 Preface to Inter-governmental Agreement Establishing Principles guiding International Governmental Relations on Local Government Matters, 12 April 2006.

it applies only to the shifting of "services or functions" which does not include "the provision of information and reporting to meet public governance requirements, an increase in community standards or consequential impacts on local government of generally applicable legislation or policies."[15]

2.2 Statutory definitions

While in an intergovernmental agreement definitional issues can be fudged, statutory definitions have to be more precise as they have legal consequences. The US Unfunded Mandate Reform Act of 1995, enacted after weeks of bitter debate, is instructive for what it excludes rather than includes. In terms of UMRA, a mandate arises from an enforceable duty imposed on states, local authorities, tribal authorities or the private sector or from a reduction or elimination of prior funding for compliance with such a duty. Importantly, certain mandates are exempted from the UMRA, including legislation or a federal regulation that –

(a) enforces constitutional rights of individuals;

(b) establishes or enforces an statutory right that prohibits discrimination on a list of grounds;

(c) requires compliance with accounting and auditing procedures with respect to grants provided by the federal government;

(d) provides emergency assistance or relief at the request of a state or local government;

(e) is necessary for national security or the ratification or implementation of treaty obligations;

(f) is designated as emergency legislation by the President and the Congress; and

(g) relates to old-age, survivors and disability insurance.

An unfunded mandate does not arise when the duty is a condition of federal assistance or from participation in a voluntary federal programme.

The second requirement is that a mandate must be accompanied by costs. In considering costs, only direct costs are taken into account. A cost also arises when the federal appropriations are reduced or eliminated for a mandate previously imposed and funded. Furthermore, certain thresholds must be crossed before the UMRA applies. The costs must exceed $50 million (in

15 Art. 16.

1996 and adjusted annually for inflation) in any of the first five years of its implementation for states or local governments (and $100 million for the private sector). The threshold for federal regulations is $100 million (in 1996). The direct costs refer to the aggregate amounts that all state, local and tribal authorities would spend on implementation (or the case of federal legislation, lose in respect of limitations on revenue raising powers). A bill is also subject to the Act when it is not possible to determine the cost of the bill. Where the costs threshold is breached but the legislation authorises appropriations to cover the mandate, the Act does not apply.

The proponents of the UMRA have critiqued the definitions for not going far enough: the cost estimates are restricted to direct costs only. Furthermore, the calculation of costs relates only to each individual mandate and not the aggregate impact of a range of mandates.[16] The uncertainty of a mandate's scope adds to the difficulty. Second, the CBO mandate report is on the initial Bill and does not cover changes during the legislative process. Third, the exceptions to the rule confine the UMRA to a narrow band of mandates.[17] All of these criticisms have continued to be levelled at the UMRA even as recently as in February 2011 Congressional hearings on its effectiveness.

In South Africa an even more restricted definition was adopted, restricting it to the transfer of functions. The concept of unfunded mandates is further restricted to local government because of its limited application to provinces, as will be alluded below. The Local Government: Municipal Systems Act of 2000 was amended in 2001 to include provisions to regulate the transfer of functions to local government, ostensibly to avoid unfunded mandates.[18] The Act does not, however, accurately define the evil it intends to avoid. It prescribes procedural requirements that apply to legislative or executive processes that 'assign a function or power' to local government or a municipality. The closest to a definition is the instruction on the transferring organ of state to ensure funding and capacity building to accompany assignments that (1) impose a duty, (2) fall outside of the municipality's original constitutional powers and (3) have financial implications.[19]

While the definition clearly includes the explicit imposition of new functions on local government it does not extend to the reduction of funding or revenue generating powers, the regulation of compliance requirements or the

16 Anderson & Constantine 2005, 5.

17 Posner 2007, 390.

18 Ss 9, 10 and 10A Local Government: Municipal Systems Act 32 of 2000 (Municipal Systems Act).

19 S 10A Municipal Systems Act.

filling of service delivery gaps, left by national and provincial governments. It also does not include the phenomenon whereby local discretion concerning municipal function is curtailed by means of onerous service delivery standards or policy directives that result in 'underfunded' mandates. A key example is the national policy on free basic water, with municipalities expected to fund the free provision of water.

South Africa's progressive Bill of Rights with its resource-intensive socio-economic rights throws up a further complication that eludes the definition of the Municipal Systems Act. This is the question whether fundamental rights, such as the right of access to housing and primary health care, result in unfunded mandates. National and provincial governments are allocated constitutional responsibility for these functions but municipalities are often the first port of call when citizens claim their constitutional rights. This definitional aspect may be solved by the courts, which have generally voiced contempt at intergovernmental bickering over the state's responsibility to care for the destitute.[20]

2.3 Concluding remarks

In view of the consequences that may flow from a definition, it is likely that it would always be a contested terrain between the different levels of government. State and local governments push for a broad concept while the federal government seeks to narrow the ambit of possible consequences. The US legislation comes the closest in recognising a broader concept of unfunded mandate which includes limitation on the revenue raising measures. Even this broad definition has been criticised from not being inclusive enough as monetary limits are placed on financial impact and the cost of regulation is also excluded. Although organised local government in Australia has argued for the recognition of the broad definition, the measures taken to curb unfunded mandate work with a narrow definition, confining the concept to the shift in responsibilities and functions, an approach that is also evident in South Africa. The inevitable consequence of a lack of consensus on definition has

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20 See, for example, *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another* 2011 (4) SA 337 (SCA) in which the Supreme Court of Appeal did not accept the City of Johannesburg's argument that the Constitution does not make it responsible for providing alternative accommodation of people evicted from private land. In a sequel to this debate, the Constitutional Court is expected to rule on a similar question involving Tshwane Municipality. The proceedings were summarised by one of the Justices as the "rather unedifying spectacle [of] watching the different spheres of government trying to put the responsibility [to provide alternative accommodation for evicted residents] on someone else".

meant that it is difficult to agree on the extent and cost of unfunded mandates.[21]

3. Constitutional framework

Given the apparent wide incidence of unfunded mandates, the question arises as to how, in a federal system, one level of government can impose mandates with cost implications on another. How is it constitutionally possible?

Even the US, the classic example of a tight division of powers, reveals the soft underbelly of federalism. Despite the so-called doctrine of state sovereignty, and except in the single instance of *New York v. United States*,[22] federal policies that are within federal competence will "preempt" or displace contrary or conflicting state or local policies even if those are also within state and local competence. This is the direct result of the US Constitution's declaration that valid federal law is the "supreme law of the land." This reality led over the years to proposals and "soft" requirements for a "Federalism Impact Statement" to be attached to federal legislation that would have some impact on state powers. The political function of requirements such as these and the UMRA is to stimulate (or even require) a separate debate on the question of interfering with state powers, in addition to the necessary debate on the wisdom of the proposed federal policy itself. One problem is, of course, that federal legislators who used to oppose federal "interference" when they were state or local officials often "change their tune" when they go to Washington.

Despite what one would expect, the United States Supreme court has been quite disposed to find conflicts between federal and state law even where it is

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21 The estimated costs are considerable, however calculated. In Australia ALGA offered an inexact estimate for 2002 of between Aus$500 million and Aus$1.1 billion (House of Representatives Economics Committee 2003, 26). No comprehensive assessment of the cost of unfunded mandates has been done in South Africa. However, in 2011, the Financial and Fiscal Commission found that the six metropolitan municipalities spent an additional amount of R3,819 billion in 2008/09 and R4,194 billion in 2009/10 in the provision of mandates which the municipalities regarded as unfunded, namely health care services, libraries, housing services, museums and roadworks (Financial and Fiscal Commission 2011, 272). In the US, the National Conference of State Legislatures (NCSL) has claimed that Congress has shifted at least $131 billion in costs to states over the past five years, according to NCSL's Mandate Monitor. The Mandate Monitor uses a definition of "unfunded mandate" that is broader than the one included in UMRA (National Conference of State Legislatures, http://www.ncsl.org/StateFederalCommittees/BudgetsRevenue/MandateMonitorOverview/tabid/15850/Default.aspx (accessed 15 September 2011).

22 505 U.S. 144 (1992).

not obvious, thus sweeping away large bodies of state law. Sometimes, but not always, these decisions result in unfunded mandates (where the states must follow federal rather than state law) that may not have even been intended by the federal Congress. Interestingly, in such circumstances neither the UMRA nor the narrow constitutional limit of *New York v. United States* will serve to provide any protection. There would not even be any obvious reason for anti-unfunded mandate lobbying by state and local governments because the mandate is not in the clear text of the federal law but rather is discovered by the Supreme Court in ambiguous statutory language as a matter of statutory interpretation.

Although somewhat beyond the scope of this paper, because they are not actually "mandates," it should be mentioned that the attachment of conditions ("strings") to the receipt by state and local governments of federal funds. This is a widespread practice of the federal government in the US. In addition to the familiar federal competencies like regulating interstate commerce and providing for the common defense, the Constitution also authorizes the Congress to "provide . . . for the general welfare."

Through this power, Congress "offers" funds to the states and local governments, conditioned upon their compliance with detailed federal statutory requirements, both substantive and procedural. Often, these federal funds are offered for purposes, like education, health care, etc., that are beyond the federal Congress' specific, enumerated competence. This way the Congress accomplishes indirectly (state and local governments do not have to accept the funds or the conditions) what it may not accomplish directly. It governs from the centre. Often the federal funds do not pay entirely for the function, or there is an additional requirement of state or local "matching" funds to be provided out of state and local resources. Because it is extremely difficult politically (almost impossible) for state and local governments to "just say no" to the offered federal funds, the federal conditions are very close to mandates. Once the federal funds are accepted, the conditions do become mandates, sometimes remaining partially unfunded.

The United States Supreme Court has said that such federal conditions attached to the "voluntary" acceptance by states and local governments of federal funds must reflect some truly national purpose, but has never struck down a federal funding condition. Lawyers for state and local governments do not even make the argument anymore. More recently, however, the Supreme Court has refused to enforce a federal funding condition that it viewed as not "clearly" articulated as a binding and enforceable requirement, so that the state did not realize it was taking on a legal obligation (mandate). Using an analogy to the negotiation of a contract, the Court stated that Congress must provide a "clear statement" that conditions are binding and enforceable

against state and local governments. This way, the recipients of the federal funds can evaluate whether it is a good "deal." In that case, state compliance with the "conditions" would have cost far in excess of the federal funds it received.

In the USA there is one constitutional constraint on federal mandates on the states, whether they are funded or not. In *New York v. United States* the Supreme Court ruled 6-3 that even though it was within federal competence to require states, through mandates and incentives, to deal with radioactive waste, an additional provision that required states to "take title" or legal ownership to radioactive waste within their borders was unconstitutional. "Either type of federal action," wrote Justice Sandra Day O'Connor, "would 'commandeer' state governments into the service of federal regulatory purposes, and would for this reason be inconsistent with the Constitution's division of authority between federal and state governments." The US Constitution's Tenth Amendment protected states against this form of extreme coercion. She continued: “Where Congress encourages state regulation rather than compelling it, state governments remain accountable to the people. By contrast, where the Federal Government compels States to regulate, the accountability of both state and federal officials is diminished.” Despite these strong statements by the Court in 1992, no other mandate that is within federal competence has been held to be a similar unconstitutional coercion of the states.

In a highly centralised federal system, such as South Africa, a neat division of powers and functions is neither provided nor envisaged in the Constitution. With regard to the provincial sphere of government, the national Parliament may legislative at will with respect to the list of concurrent functions in Schedule 4 (subject to a qualified override). In the case of exclusive provincial competences listed in Schedule 5, the national Parliament may intervene in listed circumstances. There are thus few limitations on the national Parliament to impose mandates. Yet, it would make little sense as provinces do not have their own sources of revenue which could fund additional functions. With 97 percent of their income derived from national transfers, there is little incentive for the national government to burden them with additional tasks, the payment for which would come in any event from the national pockets.

With respect to the South Africa local government, both the national and provincial governments may impose mandates on local government. Both the national and provincial government may regulate the local government matters listed in Schedule 4B. With respect to the list of competences in Schedule 5B, provincial legislatures may also regulate these functional areas (and the national government under certain conditions). Furthermore, both the national and provincial legislatures may assign any of its legislative competencies to

local government. The same applies to the assignment of executive powers, but then the agreement of the municipality concerned must be obtained.

Cost shifting also pushes the constitutional envelope in Australia, where the imposition by the federal government of mandates also affects local government. The division of powers between the federal and state governments, following the US model, allocates a list of competences to the Commonwealth (federal government), with residual powers falling in the domain of states. However, the Commonwealth powers are concurrent with state powers except for a few exclusive federal functions, such as custom and excise duties. In these concurrent areas the federal legislation prevails. As local government is not listed as a federal matter, it falls within the domain of the states. Yet, federal interference in local government is increasing, including the imposition of unfunded mandates,[23] which prompted the intergovernmental agreement between the federal, state and local governments to deal with the issue.

Despite being constitutionally permissible (and not per se challengeable as being unconstitutional), unfunded mandates run against the grain of the federal ideology. The principal critique is that cost shifting undercut the core federal notion of subnational governments being accountable to their constituencies. The advocates of the UMRA initiative argued that the separation of regulation (imposition of the mandate) from the funding (responsibility of the state or local governments) did not foster accountability, because it confused the public which level of government was responsible. It also inevitably displaces the priorities of the subnational governments to make way for the federally imposed mandates. The second argument is that federal mandates trample on the federal hierarchy when the federal government interferes in local government which is seen as the domain of state governments.

4. Management and control of unfunded mandates

The response to unfunded mandates has been varied. The strongest control measures have been the prohibition of mandates. The most common approach has been political – to highlight the issue in the political domain and let the prevailing political forces determine the outcome.

23 See Sansom 2009, 22-25.

4.1 Legal sanctions

The first attempts to deal decisively with unfunded mandates are to be found in the state constitutions in the US. Early efforts to constrain state-imposed, and unfunded, mandates were contained in ordinary legislation enacted by state legislatures (an interesting apparent limitation on their own power) under strong pressure from local governments and taxpayers. It soon became apparent that these limits were ineffective because succeeding state legislatures were free to ignore them under the doctrine that one legislative body can not bind a future legislative body. In other words, a later state law imposing an unfunded mandate was just seen as an exception or amendment by implication, to the earlier law limiting unfunded mandates.

Undeterred, advocates of limits on unfunded mandates sought, with considerable success, to entrench the limits in the state constitution itself. This approach would, of course, limit future legislatures (one of the primary functions of American state constitutions). Also, this approach would draw in the courts as interpreters of such limits, transforming the issues surrounding unfunded mandates into questions of state ("subnational") constitutional law. Thus, state-level politicians could not only claim credit for the enactment of policies and requirements without the more-difficult task of providing funding, they could also seek to avoid responsibility by hiding behind court decisions striking down the enacted policies and requirements.

Zimmerman reported in 1995 that 15 states amended their constitutions during the late 1970s-early 1980s and again in the early 1990s to curb unfunded mandates. The following methods were used:

(a) Prohibiting the imposition of some or all types of state mandates;

(b) Requiring reimbursements of all or part of the costs associated with the mandates;

(c) Delaying the implementation date of a mandate;

(d) Authorising local governments to ignore an unfunded mandate;

(e) Requiring a two thirds vote of each house of the state legislature for imposing a mandate;

(f) Authorising the governor of a state to suspend a mandate; or

(g) Providing that the implementation date of a mandate is delayed.[24]

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24 Zimmermann 1995, 88.

An example comes from the Michigan State Constitution:

> The state is hereby prohibited from reducing the state financed proportion of the necessary costs of any existing activity or service required of units of Local Government by state law. A new activity or service or an increase in the level of any activity or service beyond that required by existing law shall not be required by the legislature or any state agency of units of Local Government, unless a state appropriation is made and disbursed to pay the unit of Local Government for any necessary increased costs. The provision of this section shall not apply to costs incurred pursuant to Article VI, Section 18 [judicial salaries]. [25]

This clause seeks to define unfunded mandates, provides an exclusion, and provides a remedy. Yet, as noted by Zimmerman, it has led to extensive litigation with, in the end, the courts determining what are and are not unfunded mandates. Unintended consequences may follow as is illustrated by the New Hampshire experience with its state constitutional provision:

> [Mandated Programs] The state shall not mandate or assign any new, expanded or modified programs or responsibilities to any political subdivision in such a way as to necessitate additional local expenditures by the political subdivision unless such programs or responsibilities are fully funded by the state or unless such programs or responsibilities are approved for funding by a vote of the local legislative body of the political subdivision.[26]

When the New Hampshire legislature, at the urging of firefighters, enacted a law providing that certain kinds of cancer were "deemed" or "presumed" to arise from the workplace and therefore be covered by the workers compensation program, a law otherwise clearly within state legislative competence, it was challenged. Local governments that employed firefighters contended that the law would result in an increase in insurance premiums they would have to pay for workers compensation coverage, and because there was no state funding provided, this was an unconstitutional unfunded mandate. The New Hampshire Supreme Court, relying on the "spirit" of the provision, and the obvious intent of the voters who ratified the amendment, struck down the law. Few observers at the time the constitution was amended would have predicted this result.

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25 Article 9 section 25 of the Michigan state constitution (inserted in 1978), quoted in Williams 2006, 849.

26 Art. 28-a.

The state of New Jersey took a different approach to enforcement of state constitutional bans on unfunded mandates. Perhaps after seeing litigation such as in Michigan and New Hampshire, the following state constitutional provision was adopted:

> The Legislature shall create by law a Council on Local Mandates. The Council shall resolve any dispute regarding whether a law or rule or regulation issued persuant to a law constitutes an unfunded mandate. The Council shall consist of nine public members . . . . The decisions of the Council shall be political and not judicial determinations.[27]

Thus, the New Jersey provisions take the matter from the courts. The Council has enforced the constitutional ban and has invalidated a number of laws, particularly in the area of mandates to local school districts.[28] A successful challenge by even a single school district invalidates the entire law.

A further 16 states used ordinary statutes to provide local government relief from such mandates.[29] Additional methods used include the following:

(h) State legislatures appointed legislative committees to receive complaints regarding unfunded mandates, determine their merit and then propose amendments to the offending legislation;

(i) A sunset provision is added, requiring a study of the impact of a mandate before the mandate is imposed;

(j) New state mandates are pilot tested in selected local authorities with the state assessing the cost of the mandate; and

(k) The state legislature could authorise the governor or another body with the power to suspend a mandate and refer the matter to the state legislature with recommendations.[30]

Zimmermann points out that the results were mixed. Michigan State has not once provided for reimbursements in the 15 years since the adoption in 1978 of the constitutional provision providing for reimbursement.[31] However, the Michigan Supreme Court did hold the state liable for damages when it re-

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27 Article VIII, Section II, paragraph 5(b).

28 See http://www.state.nj.us/localmandates/.

29 Zimmermann 1995, 92.

30 Zimmermann 1995, 109.

31 Anderson & Constantine 2005.

duced its proportion of state funding of a school programme.[32] In Louisiana, where a two thirds majority in the legislature was required for a mandate, it effectively put an end to unfunded mandates.[33] However, some argue that the progress in limiting unfunded mandates was more attributed to good relations between the state and local government rather than the constitutional provisions.[34] Overall, Zimmermann concluded that the constitutional and statutory provisions have reduced the incidence of burdens being placed on local governments through state mandates.[35]

In this context it is instructive to refer briefly to the major reform initiative of 2006 in Germany which also resulted in a constitutional prohibition on the federal government from imposing mandates on local authorities. Articles 84(1) and 85(1) of the Basic Law were thus amended by adding the following sentence to each: "Federal laws may not entrust municipalities and associations of municipalities with any tasks." The outcome is thus that the transfers of tasks would come from Länder only.[36] Länder constitutions have also contained some provisions to limit unfunded mandates. The underlying principle is that of "connectivity", requiring Länder to transfer not only administrative tasks to local governments but also the financial means necessary to execute the tasks. These reform measures are only prospective; they have not affected existing federal mandates on local government which are still causing much of the financial distress among local authorities.

4.2 Political sanctions

In contrast to judicial remedies is the intergovernmental political approach followed in the USA at federal level, South Africa and Australia.

In the US the object of the UMRA was not to place a ban on unfunded mandates but to promote decision-making by compelling the Congress and federal agencies to consider the cost of imposing mandates on states and local and tribal governments. It was thus called the "stop, look and listen" approach to mandates.[37]

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32 Williams 2006, 850.

33 Zimmermann 1995, 104.

34 Anderson & Constantine 2005, 18.

35 Zimmermann 1995, 109.

36 Gunlicks 2007, 120.

37 Posner 1997, 53.

The principal measure of countering an unfunded mandate is to provide Congress with information about the cost impact that federal legislation may have. The principal player in this process is the Congressional Budget Office (CBO); it must prepare so-called 'mandate statements' which must identify and describe federal mandates in proposed legislation, quantify, where possible, the direct cost of such mandates. In addition the CBO must provide an estimate of anticipated indirect costs and secondary effects.

The procedural device provided by UMRA is that a law that creates an unfunded mandate (as defined in the Act) is out of order, but may be overruled by a majority vote. The CBO statement is part of the legislative process, and any bill or joint resolution is out of order unless there a CBO mandate statement. Any member of Congress may raise a point of order (stopping the bill) but such procedural device can be overridden by a simple majority in the committee before which it serves. This procedural device, although weak, forces the committee to consider the matter. Here again is evidence of the doctrine that one legislature may not bind a future legislature.

Posner points out that the UMRA was not designed to be self-executing; the effectiveness of the UMRA would

> "ultimately rest on the commitment of the Congress itself to sustain the Act's objectives of self-restraint because there is very little about the process that is automatic. First, a member of Congress must formally raise a point of order to trigger that covered unfunded mandates are out of order."[38]

Posner thus describes the UMRA not as "an impenetrable barrier, but more of a 'speed bump' that could promote accountability which could embarrass mandate proponents and rally opponents."[39] It is thus noted that the procedure "discourage[s] (but does not prevent) the imposition of unfunded federal mandates".[40]

In the case of mandates imposed by federal agencies, the Congressional Office of Management and Budget's (OMB) Office of Information and Budgetary Affairs monitors compliance. The UMRA also allows limited judicial review of compliance by federal agencies where they fail to prepare a written statement on the costs, compelling them to prepare such statement.

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38 Posner 1997, 54.

39 Posner 2007, 395.

40 Anderson & Constantine 2005, 3.

It has been argued that legislative awareness of unfunded mandates has reduced the incidence of unfunded mandates. It allows affected governments to lobby against them, restraining the federal government to some degree.[41] When they are imposed, then it is either with the consent of the affected governments or as a deliberative choice.[42]

In practice it was reported that during the first decade of the UMRA the CBO reviewed over 5 200 bills, resolutions and legislative proposals, of which 12 percent contained an intergovernmental mandate. Of those nine percent would have exceeded the threshold, but in the end only five bills, where the costs of the unfunded mandates exceeded the statutory threshold, were passed. A point of order was raised in this period 12 times in the House of Representatives but never in the Senate.[43]

It has been suggested that the UMRA has been successful as it has allowed state and local governments access to information on which they could lobby.[44] In the USA the lobbying and political involvement of state (and to a lesser extent, local) governments in federal government decision making was famously referred to by Herbert Wechsler[45] as the "political safeguards of federalism." In other words, built into the federal constitution's structure of the national government are various formal roles for the states themselves and for representatives from the states. These formal roles can also be seen as providing for what Clark calls the "procedural safeguards of federalism."[46] The United States Supreme court even relied for a short time on such political safeguards in lieu of legally enforcing the limits of federal authority over the states, but later abandoned this approach.

The UMRA adds to these formal constitutional roles by providing supplemental information, transparency and process requirements in the context of unfunded mandates. The pre-existing political safeguards of federalism worked best when the interests of the states were identical, or where they spoke with "one voice." By contrast, when the states had differing interests, and did not present a united front, their political protection was weak.[47] The UMRA, therefore, provides supplementary requirements of information, de-

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41 See Posner 2007, 390.

42 See Posner 2007 on the agreement of states and local governments to the imposition of unfunded mandates.

43 Anderson & Constantine 2005, 11.

44 Anderson & Constantine 2005, 17.

45 Wenchsler 1954.

46 Clark 2008.

47 See Posner 2007.

liberation and procedure (point of order), in the context of unfunded mandates, where the states and local governments would likely have basically similar opposition.

South Africa has followed a similar approach in protecting local government from national and provincial mandates; on the basis of independent information, the national and provincial governments must consider its intended course of action. In terms of the Municipal Systems Act an organ of state seeking to assign a function to local government or to a municipality is instructed to follow a detailed consultation procedure. A financial assessment must be solicited from government's chief intergovernmental fiscal advisory body, the Financial and Fiscal Commission, and, on the basis of this assessment, consultations with organised local government and key ministries must take place before the assigning legislation may be tabled in Parliament or a provincial legislature. Furthermore, the draft legislation must be accompanied by a memorandum, detailing a three-year project of the financial implications, a disclosure of possible financial liabilities or risks and a plan for the funding of additional expenditure to be incurred by the relevant municipalities. If the assignment fulfils the definition of an unfunded mandate (the imposition of a duty, falling outside of the municipality's original constitutional powers and having financial implications), the substantive requirements of "appropriate steps to ensure sufficient funding, and such capacity-building initiatives as may be needed" become applicable. The noble objectives of this scheme may not have been realised as yet. Unfunded mandates are a reality (albeit overstated) and there is no record of these statutory proceedings ever having been used in preparation of legislation or executive action that assigns functions to local government. For example, the Disaster Management Bill was passed in 2002 without following the above procedures even though it imposes duties on municipalities (e.g. to establish a disaster management centre and appoint a manager for it) that fall outside of its constitutional mandate and have financial implications. The substantive requirements of funding and capacity building seem to have been adhered to as municipalities appear to be satisfied with the funding arrangement made to support the municipal disaster management activities required by the Act. However, it points to an enforcement deficit which may be attributed to Parliament's failure to include in its legislative procedures a protocol on compliance with the Municipal Systems Act.

The Australian approach to the problem also echoes the intergovernmental political route. The federal Parliamentary Committee saw as a part of the solution to cost shifting the definition of responsibilities of each sphere of government and then how each should be funded.[48] Furthermore, local govern-

48 House of Representatives Economics Committee 2003, 30.

ment must be involved in the negotiations before the shifts are made. The main recommendations of the Committee were to resolve the matter along intergovernmental relations route. The first step was a federal / states / local government intergovernmental agreement which identifies the roles and responsibilities of local government in delivering federal and state programmes, and the allocation of federal and state resources to fulfil those responsibilities.[49] It further recommended that in such an intergovernmental agreement cost shifting should be recognised as a problem, that funds should follow the devolution of responsibilities, that unwarranted financial restrictions on local revenue raising powers be reduced, and that a local government impact statement be developed that identifies the financial impact of federal and state legislation.[50]

The main principle that the Agreement contained was that when the federal or a state government "asked or required" local government to provide a service, "any consequential financial impact is to be considered".[51] While existing financial relations were not affected by the Agreement, future arrangements are to be governed by a set of principles. First, where the federal or state government seeks, through non-regulatory means, that local government provides a service or function, the right of local governing bodies to say no to such approaches should be respected. If there is agreement, the financial arrangements should then be negotiated.[52] Where a responsibility or function is imposed by legislation, the federal or state government must consult with the relevant organised local government body "and ensure that the financial implications and other impacts for local governments are taken into account."[53] The Agreement further stipulates that a local government is "responsible for funding functions it chooses to undertake in an area of responsibility of other spheres of government, in addition to funding its existing core functions."[54] Thus, any voluntarily assumption of a function or service, lies to the account of the local government. As the Agreement was only the in-principle agreement, it also provides a framework for sector specific agreements for the devolution of a responsibility or service, where the emphasis is placed on clarity of the tasks to be performed by each sphere of government and the accompanying financial arrangements.

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49 Recommendation 1.

50 Recommendation 6.

51 Art 3.

52 Art 8.

53 Art 10.

54 Art 11(iv).

Evidence on the success of the intergovernmental relations agreement to curb cost shifting is not readily available. In terms of the Agreement, its functionality had to be evaluated not more than five years after its commencements. This stipulation has not been adhered to as the five year period has already expired on 12 April 2011.

4.3 Concluding remarks

The methods of curbing or containing unfunded mandates are two-fold. The first, radical, intervention is to impose a clear prohibition on the imposition of unfunded mandates as was done by some states in the USA and in Germany on the federal legislature. The more common approach is to admonish the transferring legislature or authority to stop, assess and consider before imposing a mandate. This has been the approach by the US Congress and also underpins the Australian intergovernmental agreement. The US UMRA further institutionalises and formalises the financial impact assessment on state and local governments, while the Australian intergovernmental agreement has not done so. South Africa has developed a statutory scheme that similarly institutionalises the evaluation of financial impact before assignment. It suffers, however, from uncertainty as to what triggers the procedure; there is in practice confusion surrounding the definition of an unfunded mandate, resulting in a general lack of enforcement.

5. Conclusion

Unfunded mandates have been a recurring theme in three very different federal systems. They reveal how central power can be exercised in the realm of subnational governments – a true case of governing from the centre. It reveals a power hierarchy that manifest itself in both the definition of unfunded mandates as well as the measures available to counter them. The definitions used in official discourses have favoured the federal government, limiting the applicability of any restraining measures. The magnitude of unfunded mandates remains thus contested.

The incidence of unfunded mandates also reflects this power hierarchy. The level and extent of unfunded mandates would be a significant indicator of the relative weakness of a subnational government. It is then often local government, occupying constitutionally and politically, the weakest position in the federal hierarchy that is burdened with new responsibilities.

So far the responses of these federations to the problem of unfunded mandates, pushed onto the agenda by affected subnational component units, fall

into two imperfect categories: a binding legal response which has some positive effects but carries with it the problems of imprecise definitions, unintended consequences, and ultimately, judicial management of the problem; and a political response that avoids rigid definitions but relegates component units to an interest group, albeit with increased informational and procedural resources, that must oppose the merits of a proposed federal policy because of its associated unfunded mandate.

Because neither of these options has solved the problem, and because under some circumstances unfunded mandates may be good thing (where policy concerns outweigh federalism concerns), further research should be undertaken on a broader range of federations along the following lines. First, what are the drivers that prompt federal government to download some of its responsibilities? Second, what circumstances (whether constitutional or political) facilitate unfunded mandates? Conversely, what circumstances inhibit the shifting of costs? Is it a question of clarity on the division of powers and functions, as suggested by the Australians? Is it a matter of gaining access to another sphere's independent sources of revenue, and when they have none, as in the case of South African provinces, there is no interest? Third, are there new mechanisms developed that reinforces the federal ideal of self-rule more effectively?

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Constitution and Fiscal Constitution. Central Government Influence on the Federal System in Argentina

Miguel Angel Asensio

1. Introduction

It is possible to assert that all constitutions have established original frameworks or stated fiscal intergovernmental formulas for the articulation of the functioning of the federative financial system. Some of them have undergone changes over time. In the Argentinean case, the reform of 1994 laid out a structure where the revenue sharing system was legitimated, and among other aspects, certain requirements and attributes to be met when approving national budgets were given prominence.

The paper will deal with several of these topics. Before and after the previous mentioned date important decisions were made at the legislative level and they have been introduced in the federal operation, connoting a strong influence of centralist criteria on the functioning of the system. For instance it could be mentioned, the transfer of educational services to provinces without the matching resources (unfunded mandate), the education financing law, the fiscal responsibility law, the treatment of the budgetary surpluses and taxation on exports, among others.

These aspects show both a more centralist evolution of the fiscal constitution than that envisaged in the national constitution, and the consolidation of mechanisms introduced by law, upon which the national influence is decisive, hand in hand with substantive vertical and horizontal imbalances and a deeply rooted presidential culture, which is reflected also in the quantitative outcomes emerging from the actual structures of revenues and expenditures among the different levels of government.

2. Federal finances and the tax sharing logic

Given the nature of federal states, where there are at least two levels of governmentwith the authority to rule over the same people, the national government and the state or provincial government, this fact involves providing both with the necessary resources matching the roles assigned for them by their

own Constitutions. Hence the different methods used in each case to produce those financing schemes.

However, it is not always evident that the existence of those two spheres of power is inseparable from the so-called *federal principle*. To a classic author like Kenneth Wheare, this principle "requires the country's general and regional governments to be independent from one another within their respective spheres, they must be coordinated among each other, not subordinated"[1].

Dissecting the preceding statement, at least five characteristic features clearly arise: there are two spheres of government, those spheres imply roles specific to any of those governments, both function independently from each other, thus they are not linked by relations of subordination and lastly there must be an essential coordination between each other under the provisions of the same Constitution.

Accordingly, federal finances must safeguard such precepts. Therefore, "both the general and regional governments each must have under its own independent control enough financial resources to carry out its exclusive functions. They must be financially coordinated with each other"[2].

In this respect, the founders of American federalism, urged by Hamilton, had clearly pointed out that just as the states should be capable of controlling the means to provide for their needs, so the national government should have a similar authority with regard to the needs of the Union. Thus after reserving for the national government the import duties and banning taxes on exports, the budding American Constitution would legitimize concurrence in internal taxes. Even within a mixed scheme, for there being "separate public treasuries", a significant "tax concurrence" would be authorized.

Along the same lines, it has been rightly pointed out that there is not just an issue with resources, but, contrary to what a usual oversight causes to happen, there is at least a double issue, involving a balance between functions and resources. Again Wheare would clearly state that "as assigning roles is not easy, once carried out, it will be even more difficult to allocate resources in the hope that the future experience proves roles and resources to jointly increase or decrease, adjusting smoothly with each other"[3].

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1 See Wheare, Kenneth (1964), p. 93. Inspired by the same source R. Vishwanathan (2007) would recall recently that "federalism is the political outcome *when a number of states seek unity without unification,* … to enter a constitutional contract preserved by an independent judicial authority, and made operational through an upper house".

2 Wheare, K., op. cit., p. 93. The bottom line of this discussion dates back to Hamilton, Madison and Jay's "The Federalist", Papers XXX to XXXV, inter alia.

3 Wheare, K., op. cit., p. 94.

In the original federalisms, therefore, the question would be to what extent the constitutions from those systems had given the general and regional governments, respectively, independent powers to obtain resources with which to accomplish the respective tasks connected to the areas of responsibility of each. The above mentioned, admitting that, within its temporal dynamics, it is hard to achieve an automatic adjustment of liabilities and income. This leads to the issue of functional plastics compared to financial plastics. Evolving or changing functional settings, should be in keeping with a flexible financial scheme, which is one of the inherent difficulties in the federative constructs.

The classic commented upon in this part would then ask himself, before analyzing the patterns of big federations, to what extent … in constitutions, the general and regional governments have been given … independent powers to obtain resources to comply with their functions, what budgetary autonomy those governments have been granted, and to what extent these independent powers have proved to be suitable for each one?[4]

But Wheare himself would raise a very significant issue for countries such as Argentina, which is the one related to *transfers*. In the federations whose constituent units have a very different fiscal capacity due to major horizontal imbalances, these transfers become essential, but *in order to be consistent* with the aforementioned federal principle, *they should be freely available*.

Although it involves not a minor inconvenience with regard to shared fiscal responsibility, they fully preserve the fiscal autonomy of the recipients. Therefore, even though the original Argentine Constitution didn't provide for sharing among its modern methods, the "fiscal constitution" has adopted it eight decades ago, with sharing or apportionment mechanisms increasingly redistributive and with strong subsidisation elements[5].

It should be recalled that in Argentina, with cases from abroad in mind such as the American model, and domestic ones such as the Constitution of 1826 itself, a formula of relative separation drafted in 1853 and consolidated in 1866 would be arrived at, materialized by a partner with the relevant resources of the time, those originating in customs duties, that would be subject to a partial dispute regarding their export aspect, in any of the "stages" of the process[6].

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4 *Ibidem, ibidem,* p. 94.

5 Carl S. Shoup would state that tax sharing, if it strays from strict "devolution", should be regarded as a "grant" (Shoup, Carl S., 1980).

6 This would happen with the Constitutional Reform of 1860. The distribution of direct and indirect taxes has a specific approach in the Constitution of 1826, which also provided for refundable grants to provinces. The Customs Law of the Provisional Director

Table 1: The argentine financial formula in the middle ofthe 19th century7

Category	1853	1859[8]	1860	1866
Import Duties	National	National	National	National
Export Duties	National	National	National until 1866, ending later on.	National
Direct Taxes	Provincial	Provincial	Provincial	Provincial
National Grants	To Provinces with Deficit	Buenos Aires Budget for 5 years	Idem to 1853 + Bs. As. Budget	Idem to 1853.
Other Resources		Bank in Bs.As.	Bank in Bs.As.	Bank in Bs.As.
Public Lands	Nation/Provinces		Nation/Provinces	Nation/Provinces

Afterwards, as a result of the amendments of 1890 it occurred a new strengthening and increase of national funding by means of indirect taxes, till the tax reforms of 1930's decade would lead to the adoption of the afore-mentioned tax sharing system, as a common "bag" or "pool" to supply for the requirements of the two levels. A "concurrence of shareable outputs" would be brought about, *not a concurrence of tax collection powers*, that would be surrendered by the provinces.

Being in fact, and as opposed to the separation system, a resource centralization system, tax sharing has represented the core of the debate ever since and its consideration played a significant role in the context of the Argentine constitutional reform of 1994[9]. The brand new Magna Carta provided for the

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Urquiza, of 1852, had provisions for the provincial sharing of the customs duties (see Asensio, M.A., Anales AAHE, 2008).

7 Taken from *References and phases in the making of the Argentine federal financial formula of mid-19th century,* IF-AND/Córdoba, 2007, see for further reference.

8 Pact of San José de Flores.

9 When we refer to sharing of only one tax, we'll be dealing with sharing "in a strict sense of the word". When a group of taxes is shared, a "tax union" will be formed, ac-

passing of a new law on the subject, but that provision has not been accomplished for over twelve years now. Furthermore, requirements on public spending included in the national budget were incorporated (federalizing that expenditure), in particular under Article 75[10].

3. Rising problems and the "common pool" scheme

But the last decades of the 20th Century and the first decade of the present one involved the existence of very different issues from those arising out of a primary construct such as that of the mid-19th century. And in that context, the existence of a common pool or bag of resources scheme, implied in sharing, would prove to be affected.

In a federal system two main spheres of authority with their own requirements and pressing needs coexist. In that perspective, it is known that central governments would feel uncomfortable collecting shared resources from which just a fragment will be deposited in their coffers. That is why in some cases, Brazil for instance, the trend towards creating "non-shareable" taxes or left out of the "pool" is a major enticement. If that is in turn not feasible, it will be sought to affect the conformation ofthe pool itself, on the one hand, or to reduce its content, on the other hand.

In Argentina, as we'll see below, such things were said to have happened, driven by the dynamic of the junctures that had ensued both by the end of the 20th century and in the beginning of the 21st century. They were connected to specific issues, some of which will be briefly mentioned, splitting them in those before and after the 1994 National Constitution.

Among the former, two will be mentioned. A key aspect refers to the *social security system*, funded through employers' and employees' contributions, named by economists as "taxes on wages". This system, as it is noted, is sensitive to the development of the economic cycle and to the trends in the economic turn-over and the employment level. In the Argentine case, owing to international competitiveness, efforts were made to play down its importance, in order to make industrial costs cheaper, which required shifting the financial burden towards the remaining taxes.

As stated before, the rise of a social security system short of funding, introduced a third party that seemed to have been neglected before because it performed as another sphere – strictly speaking responsibility of the federal

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cording to Dino Jarach, producing in a way the mentioned centralizing result. See Jarach, Dino (Several Editions).

10 See Hernández, Antonio M. (2008 and 2010).

government – that funded itself with its own wage-based contributions. When the privatization of this system took place, it meant a major collateral transformation of the pre-existing tax sharing system based on the "pool" idea. When realized, the rate or volume of shared taxes the provincial governments were able to gain access to would be reduced.

Another relevant aspect was *the transfer of education services to the provinces*. At the beginning of the 1990 decade, there were still primary or elementary and secondary schools dependent on the Nation. This is a wage-intensive activity, which demanded keeping up an adequate funding. In such an instance, the decentralization of those services to the provinces was brought about according to a procedure that entailed affecting the bulk of resources that they receive as a whole under the tax sharing law. Such transfer of functions didn't match up, at that time, with a correlative transfer of resources, analogizing a sort of "unfunded mandate".

4. New allocations.From the "common pool" to the "punctures in the bag"

The above stated requires further explanation on the working of the tax sharing system in Argentina. The bulk of shared taxes is subject to two main divisions or allocations. The first one, between Nation and Provinces, is known as "*primary* distribution" and matches sharing rates set out in the law. There is a second one, among the provinces. From the provinces aggregate, rates also set out in the law are allocated to each province. This second allocation is referred to as "*secondary distribution*".

Table 2: Phases or "moments" for allocating shared resources

Phases	Identification	Distinctive features
1	Tax Revenue Mass	Shareable resources[11].
2	Primary Distribution	Pro rata between Nation and Provinces
3	Secondary Distribution	Pro rata among each Province

The two preceding actions demanded like interventions, which affected in the former case the first pool and took the shape of a detraction prior to its con-

11 Except exclusive national resources, like taxes on foreign trade.

formation. It was therefore a pre-primary detraction. In the latter case, the operation involved a detraction prior to the secondary allocation. It was then a pre-secondary detraction. If we're talking about pools or bags, these surgical procedures represented "punctures" in those bags or purses. The outcome pursued was to change the balance of resources among the federal spheres, with a reduction in the case of the provinces.

These decisions were not alien to a diversity of major unresolved imbalances, linked to situations originated in the "lost decade", the emergence of hyper-inflationary phenomena that occurred in a peacetime economy and the surmounting of a political instability and fragility process that forced a constitutional president to leave office before the end of his term[12].

Both the retirement insurance program reform and the indicated school transfers[13], were manifestations of a wider macroeconomic adjustment. This had included a change in the monetary system that involved the adoption of the convertibility regime, which depended critically on fiscal balance. This fact accounted for the consecutive adjustments to regulate the access to the "pool" and the opening of the sluice gates that controlled the financial flows towards the actors.

Within that framework, the fiscal pacts or agreements between the Nation and the Provinces regulated that alteration, which, without modifying the legal rates of tax sharing with the provinces, changed them *de facto* introducing "precoparticipations", detractions and other devices, making up the so-called "labyrinth" or "distillery"[14].

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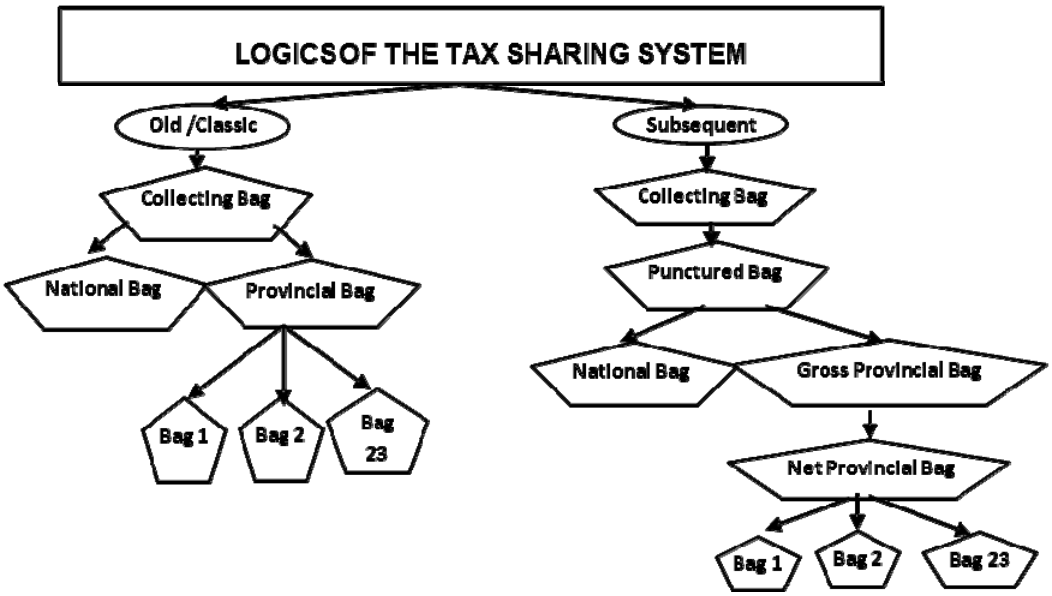
12 Before the end of the 20th Century, vertical imbalance imposed revenue sharing, and horizontal imbalance a redistributive apportionment, besides a third party, the social security system, was legitimized and the joint fiscal frameworkwas aware of the unmistakable presence of the external debt payment obligations, both conditioning the size of the national budget deficit. On taking into consideration these last two categories in the consortial-type single till scheme, usually not visualized.

13 The frequent omission about the social security subsystem being an essential component of Argentina's fiscalsystemor public financial system was redressed when its introduction "within" the federal funding formula made it apparent. The same in the case ofthe pervasiveness of the debt services within the national budget, aspect which is inescapable for the "consortium manager". For a focus in this respect see H. Senado de la Nación, Comisión de Coparticipación de Impuestos (2001).

14 The "labyrinth" idea can be also found in Bird, R. M. (1993).



To those devices we refer when we mention the change from a "full common bag logic" to "punctures in the tax resources bag or bags", from which both primary distribution from Nation to Provinces and secondary distribution among Provinces derive. However, as has been pointed out, it was carried out through what is known as the "age of pacts" which started in the early 1990 decade, which ultimately and paradoxically legitimized the "two spheres of power" mentioned in the 19th century, although further restricting one of them[15].

Almost half way, the 1994 Constitution was sanctioned, when that process had already started; it didn't mean a hindrance to that process and at any rate it validated it[16]. The Constitution didn't fail to recognize "winners": the provinces which own subsoil natural resources, the Buenos Aires conurbation, the national government itself sharing the indirect taxation and not immediately, the Autonomous City of Buenos Aires and the group of the municipalities, which would be granted autonomy under the provisions of the above mentioned Magna Carta[17].

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15 Those pacts or agreements were signed by the Nation and the Provinces, with what the latter – in return for a minimum of transfers – accepted such interventions.

16 As it has been stated before, when the 1994 Constitution was passed, the distribution of the powers to levy taxes on fuel had been changed and the two Federal Pacts from 1992 and 1993 were legally binding. The first one provided for the detraction for the tax financing of the social security system and the second one affected the tax powers pertaining to the provinces.

17 See Asensio, M. A. (2000).

5. Allocating more resources for education

From the events, interventions and measures that followed the sanction of the 1994 National Constitution a few – of many – that are relevant will be mentioned. The first will be, once again, a reform in the *funding of education*.

As anticipated, in the literary work of developed federal countries reference to the so-called *unfunded mandates* has been traditionally made. That is, provisions that allow for decentralization even for states or provinces but don't include precise regulations about funding. This has been persistently pointed out in the case of USA. The referred transfer of education and health services in the 1990 decade, making up a "pre-secondary" allocation, implied earmarking from the provincial share the necessary funds for the funding of those added functional obligations.

Taking into consideration an unquestionably important and sensitive area, the Educational Financing Law was passed, which as such established binding *funded* mandates, which were wedged in within the degrees of freedom granted to the provinces with regard to services under their purview and which characterized the federalism accepted until the end of the past century.

Indeed, according to an incontrovertible overall aim, appearing once more reinforced by international studies which although are partially conflicting in some instances place Argentina in a position of great concern as regards education, the corresponding regulatory superstructure changed, moving away from a "federal" law in order to enact a "national" law, with a specific financial operation.

Regarding this matter two points at least seem worthy of analysis, the progressive movement towards a unitary view over a consolidated, decentralizing-type one originating in the previous phase and in some respects in the National Constitution, on the one hand[18], and the adjustment to a federative approach with regard to the resources, on the other[19].

The first aspect involves an attempt to recover ground in an area where there had been a shift towards a "Ministry without schools" logic, clearly strengthening the provincial role except in the university field, towards an-

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18 Article 5 of the National Education Law states that "The Nation State *establishes* the policy on education and monitor its enforcement…". Article 15 points out that "The National Educational System *will have a unified structure* all over the country that guarantees its order and consistency...". Among other things, it should be assessed its correlation with the provincial constitutional assignment defined in Article 5 of the Magna Carta.

19 The Educational Financing Law Nº 26.075 and the National Education Law Nº 26.206.

other one where the Nation again sets the pace for the jurisdictions that are supposed to have missed the target, that lack enough capabilities or need some guidance on the subject, notwithstanding the pre-existing coordination mechanisms.

Here a centralist view clearly arises, where it is assumed that those capabilities there exist in the center, which further validates a Ministry more inclined to intervene than to offer guidance, and which are non-existent in the periphery. This obviously contrasts with models like the American, where the building of their education system was achieved in a decentralized fashion, for a long time there wasn't a national Secretary to deal with the topic and where just as in Canada, even the Universities themselves revolve around the states or provinces.

Table 3: Allocation of Resources. Tax Sharing and Educational Financing Law

Jurisdictions	F.T.S.L.[20]	E.F.L.[21]
Provinces (not B.A and ACBA)	80.07	62.58
Province of Buenos Aires	19.93	32.17
A. City of Buenos Aires (ACBA)	–.–	5.25

In the second aspect, the financial one, and from a particular interpretation of Article 75 of 1994 National Constitution, the "specific purpose allocation" approach was adopted to make use of shareable resources in order to implement a national decision – accepted yet not without hesitation – by the provinces.

To that effect, GDP rates were set to be reached in the aggregate spending on education of the two jurisdictions (Nation and Provinces) and both the national share (40%) and the provincial share (60%) must be detracted from the respective portions of the shareable amount.

The adopted formula strays from the logic of specific purpose allocations that the Law Nº 23.548 were meant to thwart and that were ratified by the

20 Federal Tax Sharing Law.

21 Educational Financing Law.

1994 Constitution. Actually, an item was created of compulsory expenditure to be detracted en bloc from funds otherwise used for other purposes. We are assailed at once by the change in the German logic in its *Finanzausgleich,* which stresses the fact that the Lander have budget sovereignty on the use of their resources[22].

In the meantime, tax collection still yielded a composition that showed a significant imbalance in the fiscal power of the central government compared with provincial governments, which is shown as follows:

Table 4: Composition of the Argentine Tax Collection (Nation + Provinces)[23]

Entries	Years 2001/10 (1. Half) [24]	Years 2001/10 (2. Half)	Total Sharings 2001	Total Sharings 2006
I. National	17.50	23.57	82.78	85.12
I. Provincial	3.64	4.12	17.22	14.88
Total	21.14	27.69	100.00	100.00

The Table above broadly shows the new setting. The tax aggregate collection has increased in a significant way compared with the GDP, driven by the recent economic expansion. However, owing to the composition of taxes, such increase is overwhelmingly concentrated on the National Government.

From a share payment prior to the tax sharing distribution which not including municipalities was clearly higher than 82% in the first half of the 2001/2010 decade, another one exceeding 85% is achieved in the second half of the same period. In turn, while the national tax burden reached nearly 35%, the one based on taxes on foreign trade pertaining to the National Government and that includes the increased export duties, grew nearly fivefold[25].

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22 See Krause-Junk, G. and Muller, R. (1993).

23 Based on figures of the Dirección Nacional de Investigaciones y Análisis Fiscal. Municipal tax collection is not included.

24 Figures measured as a percentage of GDP. The same with regard to figures related to the second half of the decade.

25 If we refer exclusively to export duties, the result is that between 2001 and 2007 they increased tenfold. It raises a question about the long-term sustainability of national fi-

6. The Fiscal Responsibility Law as an "Intrusive" Regulation

As it has been stated in other works[26], Argentine provinces have traditionally set in their Constitutions limits for controlling indebtedness. The most usual guidelines were setting a percentage limit in relation to revenue to the debt servicing, which ranged around 20%.

The Fiscal Responsibility Law also introduced an Institution-Body that dualized the Argentine institutional scheme leaving behind the "hostile" environment towards the central government represented by the Federal Board of Taxes and creating a "pro-central" space which allows the National Government a decision-making predominance.

The Argentine law being discussed, reduced the degrees of freedom of the provinces to set their budgets and actually restricted such budgetary sovereignty, which it had managed to carry out as well by imposing the above-mentioned debt limits different from those established in their own constitutions, and that meant within the Fiscal Responsibility Law another centralizing measure of dubious constitutionality. And let's hasten to add that the potentiality of such goals is not under assessment – it should be subject to another analysis – but instead the place that federalism holds as a system, or at least a view of federalism – not the centralistic one – in this setting.

Argentina had already passed a Fiscal Solvency Law before Brazil did in 2001. However, in 2004 a thorough and more comprehensive system was approved, understood as a set of rules of good fiscal conduct essentially aimed at improving transparency and controlling spending and indebtedness at the subnational level. From that point of view, the law exudes an asymmetrical conception where the prevailing actor isn't placed in a position similar to the last ones[27].

But the "institution-law" was followed by an "institution-body". Indeed, the Federal Council on Fiscal Responsibility was created to enforce the Law, where the voting rules would place the central level in a predominant position which it had lacked in the former body competent in matters of "allocation of resources", the Federal Board of Taxes[28]. The outcome is the emergence of a

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nances if external factors change, which luckily seems unlikely in the very short term regarding the preparation of this paper.

26 See Asensio, M. A. (2006).

27 This system has been amended in a flexible fashion concerning the debt probabilities of treasuries, among other things, provisionally, just upon completion of this work.

28 In this institution changing criteria have already existed for weighing up their "independence" potentialities in terms of the powers established by the Law Nº 23.548.

dual body structure, in which each body performs independently, but where an improved coordination instance hasn't been established as would result from a Federal Council of Economic and Fiscal Coordination like the one put forward by mid-1990s[29].

7. Budget and "fiscal dividend".

It has been mentioned before and stressed that tax sharing is just one of the methods – decisive, by the way – that can make up or be the expression of an authentic system of financial coordination and is also one among the mechanisms to transfer resources to the "partners" within a federative agreement.

Is within that framework that in Argentina the Budget is given such prominence. It can be stressed once more that the so-called *budgetary transfers* or use of resources from national budget items can clearly or substantially change the allocation of funds ratios established in the *tax transfers* comprised within the tax sharing.

Consequently, the Nation and the Provinces (and through these their municipalities), "receive" a "mix" of resources consisting of both types of fiscal resources. That after contributing in a very unbalanced way to that national budget with taxes like the detractions on exports, levied in certain provinces whose "fiscal balances" can strongly deteriorate by the application of those mechanisms[30].

With such prospect in mind, not considering the National Budget properly, for the preparation of which the new Argentine Constitution criteria can also be applied, may involve a partial understanding of the federal funding system in Argentina.

Indeed, in its Article 75, subsection 8°, the National Constitution lays down that the budget must take into consideration as guidelines the objectivity, equity and solidarity and give priority to the achievement of an equal degree of development, quality of life and equality of opportunity all over the national territory. In short, it forces the consideration of the serious regional imbalances, which when it comes down to fiscal matters reflect horizontal imbalances.

Such quality is a key trait in the renowned Australian CGC, though historically it seems to have been the source of some tension.

29 Project of the Federal Board of Taxes.See FBT (1996).

30 The study and the methods for measuring the "fiscal balances" have been highlighted even in not strictly federal cases, like that of the Autonomous Communities in Spain.

For that reason, here it must be mentioned the issue of the "fiscal dividend", which though it is known in other federations,[31] has taken on a significant standing in the Argentine case. By that we mean the increase of revenue resources collected beyond the level initially assessed within the original Budget approved by the Congress.

Particularly, such surplus is produced as a result of a real and effective behaviour that is better than the one planned regarding the revenue collection. This supplies the national government with an extra amount of fiscal resources that can be allocated without a new parliamentary debate.

From this debate, if it actually holds, a different territorial allocation of the national budget or a geographical distribution more favourable in federal terms may result. In that perspective, the "tax transfers" would be further supplemented by the allocations that were decided for the budgetary spending.

On calling upon powers included in the Financial Administration Law, the Executive reallocates those resources without new study and congressional debate, where at least in the Senate, in particular, "federalizing" criteria could be applied to that surplus of funds, not always unforeseen, observing the before mentioned constitutional provisions.

8. Centralization *without* seeming *punctures.*

A short reference is appropriate here to a subject vastly discussed, even in International media[32], about a particular taxation on foreign trade. We refer to tax deductions on exports.

Taxes on foreign trade are not comprised within the common resources, but make up an exclusive revenue source of the central government. Unlike USA, however, in Argentina is not only feasible to levy taxes on imports but on exports as well.

This brings about several kinds of issues for the provinces. At first it reduces their economic revenue, namely that from the production and exports sectors located geographically in the provinces; secondly, they don't share the fiscal revenue which otherwise they would do if only those companies' profits

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31 The debate has been intense in the Canadian case. In this federation considerable surpluses were gathered yearly at the end of several budget years that as such were allocated unilaterally by the Prime Minister. Although they were substantially applied to pay off debts, a new consensus was necessary to regulate its use, as authors like K. Kernaghan and G. Inwood have pointed out.

32 See Bermúdez, I. (2010).

would be subject to taxation through corporate taxes, given that it shares the common pool subject to sharing[33].

However, based on the original constitutional provision, the national government uses an escape route that put it in absolute possession of those resources, which affect a particular group of provinces. In addition, through widespread consumer subsidy schemes, redistributes this and other revenue in highly populated urban areas, particularly the Buenos Aires Conurbation.

As can be appreciated, there won't be in this case directly *punctures* in the bag of common resources, but indirectly instead, because the volume of revenue collected from income tax, which provinces do share, is cut down.

It remains for consideration, despite not having become effective so far, whether such detractions are in keeping with the spirit of the original provisions of the Constitution, in times when it could already be observed how export taxes would actually affect the provincial funding possibilities[34]. The former, regardless of the possibility that through legal channels, accepted by all the parties, the sharing of those resources with the provinces would be established. The outcome is a resource framework where centralization has clearly increased.

9. Final reflections

The former are explicit expressions of the central government influence and intervention in the balance of power of the Argentine federal system, where the national sphere has clearly widened to the detriment of the provincial sphere. Among other aspects, it has been apparent in decisions similar to those of the unfunded mandates, cuts in the provincial budgetary powers, centralistic use of national budget surpluses and regulations of the subnational financial activity.

Actually, a great deal of the national regulations and measures reflect the need to achieve a new balance between the group common rules and the own sub central rules, involving its process of creation and formation, which even honouring Alberdi's interpretation ends with its alteration and disregard[35].

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33 If this tax is abolished or substantially reduced, producers should pay higher income taxes, which as such make up the shareable bulk and could be allocated to the group of provinces in the shares legally established.

34 It would obviously involve a ruling by the Supreme Court of Justice of the Nation.

35 We can recall Alberdi's emphatic references. Alberdi, once designated as "the Argentine Hamilton", considered that the provinces transferred no power in the original Con-

It demands the need of a framework where federal fiscality and financial coordination are properly reconciled with an authentic federalism. Modern federalism, undeniably, improves and gets richer with organizational elements while attenuating perhaps political elements. But even as an organizational method, it has logics that need to be looked into and respected. It should be repeated that, otherwise, Argentine inertia can still lead to a horizon in which federalism is just the painless designation of unitarism[36], or, that the federative front serves as an elegant attire for its systematic denial.

stitution, and that in his "Senate of the Provinces" could take part in the common rules, through their representatives in the Second Chamber.

36 Here, as in other sections of this work, refer to Asensio, M. A. (2008 and 2011).

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The Role of the Political Culture of Non-central Government for the vertical (lack of) influence of the Federation and how it affects cantons and communes in Switzerland

Nicolas Schmitt

There is a limit to the extent of country which can
advantageously be governed
or even whose government can be conveniently
superintended, from a single centre[1].

However federalism as a core principle in Switzerland is sacred
and the cantons jealously guard any attempts to limit their freedom[2].

1. Introduction

Switzerland is a rather small country; nevertheless, it has an extensive federal structure. Nowhere else do states, or cantons, of such tiny size have such extensive political and fiscal autonomy and power. Moreover, nowhere else do the people have such extensive direct political rights. There are possibilities for initiatives and referenda in all three spheres of government: local, canton, and federal. In the last twenty years, about 50 percent of all referenda worldwide have taken place in Switzerland.

According to Ronald Watts[3], Switzerland belongs – with Canada – to the most decentralized federations. Therefore, in order not to insist so much on the vertical influence but on the contrary to show an example – that can be interesting for other federations – where member states still enjoy a certain number of powers, the goal of this essay is to describe several aspects of the

1 John Stuart Mill, *On Liberty and other Essays* (1861), edition 2010, p. 244.

2 The principle of federalism in Switzerland - How federalism works in Switzerland: http://www.justlanded.com/english/Switzerland/Articles/Culture/The-principle-of-federalism-in-Switzerland.

3 Watts, R, *Comparing Federal Systems*, 3rd ed., Montreal 2008, p.176 - 177.

Swiss system in order to show that (and to explain why) Swiss cantons are not so much kept by the "golden leash" of the central power.

One of the problems federations have to face is the trend toward centralization. Ideally federations should represent a constant research of balance between centralizing and decentralizing elements. But in the reality, it is obvious that centralizing elements tend to be stronger. Participants to the Meeting which took place in Speyer complained that "governing from the center" became an always more invasive method of government. Member states have to face an increasing lack of power, and therefore, as it seems to be the case in Germany, also a certain lack of identity.

This essay tries to counterbalance this dark description and to remind that it is possible for member states to preserve their institutional integrity. But as we shall see, this Swiss illustration is coming from a country which is supposed to be one of (if not "the") most decentralized federation in the world. It shows that the preservation of cantons' powers is not only a constant fight, but that it requires a quite unusual level of political culture. And despite all these elements, Switzerland has also experienced a deep process of centralization throughout the xxth Century, to the point that Jean-François Aubert could write in 1969 in his famous book on Swiss Constitutional Law that cantons were only the shadows of what they were in 1848, at the time of the birth of modern Switzerland. By the way, this resembles very much the history of the European Union. In 1848, all powers belonged to the cantons, the federal administration in Bern remained tiny, and politicians who accepted to quit the prestigious cantonal administration to work for the new federal government were considered with mistrust. It is the same with Brussels, all major politicians prefer to concentrate their career in their countries, and only "second class" politicians come to Brussels. In Switzerland, the situation has changed with the time, and it will probably be the same the day the European Union becomes a full-fledged federation.

Some of these positive elements are linked to history, some are entirely factual, others belong to a certain "political culture", many derive from the fiscal federalism… All of them could be (and in fact have been) the topic of several books, but we shall just quote them briefly. It means that in this essay Switzerland is not presented as a model, but as a shopping center where several elements can be found, bought and who knows transferred in another country in order to deepen the roots of its decentralized foundations.

Nevertheless, the increasing weight of the central government remains paradoxical. One should not forget that, among many federations which failed (Soviet Union, Yougoslavia, Tschekoslovakia, West Indies, Rhodesia-Nyassaland etc.), their collapse was due to an excess of decentralization tendencies, to the point that the federation "exploded". It is hard to find the case

of a federation which disappeared because of an excess of centralization, which means that the federation transformed itself into a unitary states. As a matter of fact, the xixth Century Latin-American federations proved very centralized because of political troubles, lack of democracy, military dictatorship, but they remained "dormant" federations and now, like Sleeping Beauty, they come to life again after the "sweet kiss" of democracy.

2. Some basic features of successfull decentralization in general

Walter Kälin, who is famous for his work in favor of Human rights but seemingly has been also inspired by the virtues of decentralization, has written an interesting research[4] concerning the factors which are conducive to the creation and existence of strong local and regional (also: decentralized) governments and those which hamper such a development. According to him and to the experiences made in countries in different parts of the world, some general conditions for successful decentralization can be deduced:

– A first necessary condition for strong local government is security of existence. Clearly, local governments cannot perform properly if their existence is in jeopardy by the ability of authorities on higher levels of government to dissolve them or their Councils easily at any time. In Switzerland, cantons have a long history, and the bottom-up creation process of the federation guarantees their existence even more than the Constitutional provision (Art. 1).

Art. 1 *The Swiss Confederation*

The People and the Cantons of Zurich, Bern, Lucerne, Uri, Schwyz, Obwalden and Nidwalden, Glarus, Zug, Fribourg, Solothurn, Basel Stadt and Basel Landschaft, Schaffhausen, Appenzell Ausserrhoden and Appenzell Innerrhoden, St. Gallen, Graubünden, Aargau, Thurgau, Ticino, Vaud, Valais, Neuchâtel, Geneva, and Jura form the Swiss Confederation.

Art. 53 *Number and territory of the Cantons*

[1] The Confederation shall protect the existence and territory of the Cantons.

[…]

4 *Decentralized Government in Switzerland*, 2000.

– The success of decentralization efforts depends to a very large extent on the availability of sufficient resources and the possibility of using these resources autonomously. In Switzerland, the financial constitution allows for a very decentralized management of public finance at cantonal and local level.

– Accountability and transparency at the local level must be guaranteed. In Switzerland, direct democracy at all levels of the State guarantees that citizens (we speak of "the sovereign people") have always a say in the important matters and counterweight the central power if necessary.

– The success of decentralization efforts depends, to a large extent, on a clear vision regarding the position and function of local governments and on a strong political will to implement that vision. It also depends on the willingness of both the central and the local level to see each other as partners in an ongoing process. In fact, the whole Swiss system tends to clarify and reinforce federalism and the mutual position of both Confederation and cantons. The new allocation of powers and financial equalization, a huge legal task which ended only a few years ago, represents a good illustration of this endless quest.

– Finally, without a strong legal framework setting out the powers, rights and duties of local governments clearly, it is often impossible to know who is responsible for what. This allows central authorities to interfere easily with local affairs and leaves the local authorities with no possibility of stopping such interference. In Switzerland on the contrary, political culture and direct democracy ally themselves to preserve the rights and duties at the decentralized level.

But these factors remain purely technical. Experience, however, suggests that such an approach might not be sufficient in a potential balance of power, and that both the *constitutional framework* applicable to the center as well as the *political culture* prevailing at that level are more important for the well-being of the local level as might seem at first glance.

In fact, this brief essay should remind that all elements previously listed have driven to a specific political culture which represents – in last analysis – the best way to preserve the cantonal powers.

3. Some basic reflections regarding Switzerland

The basic constituent elements of Switzerland are the twenty-six cantons that founded the federal state in 1848. We shall not insist on Swiss diversity here,

as it is not the goal of this essay and (almost) everybody knows these topics[5]. But it is not useless to remind that the Swiss complexity is enshrined into a very small country, with 41'284 km2 and hardly 8 mio inhabitants (this figure has been reached in 2012). Because of their long history (most of them go back to the middle-age) and the tradition of decentralization, cantons have preserved strong and differentiated identities, even inside themselves. People living on the North, South, East or West of a Swiss canton, or in the plain or in the mountainous part of the canton, can present strong differences, even if the distance between them represents hardly a handful of kilometers. Each canton has its own constitution, parliament, government, and courts. In these recent years, for economy and efficiency reasons, many cantonal parliaments have reduces the number of their seats. They have currently between 46 and 180[6], while the canton governments have 5 to 7, exceptionally 9 members. All of these are directly elected by the people and all governments are collegial. At the federal and at the cantonal level, it is impossible to find "one" head of state, prime minister of chief of government.

They were twenty-five at the time of the foundation of the Federal State, and the fact that only one new canton has been created in 164 years proves the stability of the system. Article 3 of the Federal Constitution states that they "are sovereign insofar as their sovereignty is not limited by the federal Constitution; they shall exercise all rights which are not transferred to the Confederation." [7] The Confederation has authority only in those areas in which it is empowered by the federal Constitution (e.g., foreign affairs, defense, customs, and monetary policy). Tasks that do not expressly fall within the scope of the Confederation are handled by the cantons. By the way, it explains why a large part of the Swiss Constitution is devoted to the allocation of powers between Confederation and cantons.

4. Historically

From an historical point of view, Switzerland has never pretended to be a nation, as no common religion or language was ever established. The Swiss include many adherents to both Catholic and Protestant religion. The Swiss do

5 See Nicolas Schmitt, *Swiss Confederation*, in John Kincaid and G. Alan Tarr (Eds), A Global Dialogue on Federalism, Vol. 1, McGill-Queens University Press, Montreal and Kingston/London/Ithaca 2005, p. 347.

6 http://www.ch.ch/behoerden/00215/00330/00392/index.html?lang=fr.

7 Swiss Constitution in English (not official) online: http://www.admin.ch/ch/e/rs/c101.html.

not have linguistic unity; German, French, Italian, and Romansh (even if it is at a very small size) are used in different regions of the country. Swiss nationalism was implemented primarily by its rivalry among imperial powers. The insurrection of the canton Neuchatel in 1856-57 shows that the threatening power of Prussia held the Swiss together, binding them with a feeling of nationalism. Other factors that fostered a certain form of nationalism in Switzerland include isolation in a mountain region and the Swiss determination to maintain their political independence.

Switzerland was rather a loose confederation of small independent States bound together by a large number of treaties. By the way, all cantons were not equal, neither were they linked altogether. The network of bounds was a legal nightmare. In 1848, these cantons decided to join in the creation of a federal state according more or less to the American model. There were two main grounds for this step: firstly, an inability of the old system to allow for reforms as only unanimous decisions which had to be ratified by all cantons were possible; and secondly a need to integrate, i.e. to create a common market allowing for the free flow of goods and the free movement of persons across cantonal frontiers. This also meant the introduction of a common currency. The main motive for this integration was the fact that the territories of the cantons proved to be too small to face the challenges of early industrialization and modernization in Europe. Building a railway system, for instance, required planning across cantonal borders. Once again, the similarity with UE is obvious.

However, in 1848, the cantons were not ready to give up their sovereignty entirely and to melt into a unitary state. Catholic and conservative cantons were especially reluctant to any form of state modernization, to the point that in 1844 they founded a separated alliance called *Sonderbund*. In 1847, Protestant cantons entered into war in order to dissolve this Conservative alliance. Fortunately, the war was short and ended with less than 100 casualties (contrarily to the dramatic War of Secession in USA). Catholic cantons lost the civil war and were obliged to enter the new federal state. But much like in the case of the European Union today, the cantons, in 1848, agreed to create a central authority to which they would delegate some – and only some – of their responsibilities. They retained the right to enact their own constitution. This means that they have the right to organize themselves: They all have their own parliament, their own government and their own judiciary. In addition, all cantonal constitutions grant their citizens the right to vote not only in elections but also in the case of a referendum. Further, they recognize the right of initiative which is the right of a certain number of citizens to make a proposal for some legislation that will then be submitted to a popular vote. Despite these common traits the specific solutions adopted by the cantons in their constitutions are extremely diverse.

This historical process is quite interesting, as it reminds that federalization "bottom-up" from the early beginning is more likely to preserve the powers of the member states. From that point of view, Switzerland is "a gift of history", as the country benefits from historical conditions which proved favorable. The good idea of the "Founding fathers" of modern Switzerland has been to preserve so far this native diversity and never try to create artificially a Swiss nation. Therefore the country is sometimes called "Willensnation" in German, a nation uniquely maintained by the will of its inhabitants to preserve their homeland. This lack of centralized unity has driven the famous artist Ben, during the World Fair in Sevilla, to put in front of the Swiss Pavilion a painting proclaiming: "Switzerland does not exist", a statement which has not been appreciated by some politicians.

5. Fragmentation of power

In this context, another element which is specific to Switzerland and allows for a lack of influence from the center is the extreme fragmentation of power. In a country which is 237 times smaller than Canada and whose population hardly equals those of the province of Quebec, the power is divided not only between 26 cantons, but also between more than 2'550 municipalities which enjoy considerable powers.

Even if Switzerland cannot be considered constitutionally as a three-tier federal state, as South Africa, *all cantons are divided into municipalities*, of which there are at present around 2'550. Their number is tending to diminish as some cantons have municipalities merging policies. About one-fifth of these municipalities have their own parliament; in the other four-fifths, decisions are taken by direct democracy in a local assembly. In addition to the tasks entrusted to them by the Confederation and the canton – such as the population register and civil defense – local authorities also have specific responsibilities of their own with regard to, *inter alia*, education and social welfare, energy supply, road building, and local planning. To a large extent, these powers are self-regulated. But the *scope of municipal autonomy is determined by the individual cantons and, therefore, varies widely*[8]. Basel-Stadt has two or three municipalities, Bern 388 in 2010. However, given the autonomy for local government provided in the canton constitutions, *neither the cantons nor the federal authorities have the right to interfere with local decisions*. The only exception occurs when the financial situation of a local community dete-

8 See Nicolas Schmitt, *Swiss Municipal System: Heterogeneity, Complexity, Topicality*, in Thomas Fleiner/Rafal Khakimov (Eds.), Federalism: Russian and Swiss Perspectives, Moscow 2001, p. 112.

riorates seriously. When this happens, the local budget has to be approved by the canton government. A famous – and fortunately seldom case – has been the financial collapse of Leukerbad/Loèche-les-Bains in Wallis/Valais[9]. The financially too adventurous municipality, which made bankruptcy, has to be managed directly by the canton. –

After decades of unwritten constitutional tradition, the 1999 constitution has expressly granted them political autonomy.

Art. 50

[1] The autonomy of the communes shall be guaranteed in accordance with cantonal law.

[2] The Confederation shall take account in its activities of the possible consequences for the communes.

[3] In doing so, it shall take account of the special position of the cities and urban areas as well as the mountain regions.

This autonomy is characterized among others by the following aspects[10]:

1. The right to exist, including the freedom to merge with other communes or to remain independent. Neither the cantons nor the federal government can merge communes or change borders against the will of the communes affected. Nevertheless, ten cantons have adopted legislations in order to accelerate the merging of municipalities[11]. Due to the strong local autonomy, it requires huge diplomatic efforts to push municipalities to merge, and direct democracy implies that citizens always have the last word. Sometimes, years of efforts are wrecked by a negative vote in one of the concerned municipalities, even if all others have agreed…

2. The freedom to choose, within the boundaries of cantonal legislation, their own political structure and administration. Again, the variety of solutions is large and depends on local political traditions as much as on population size.

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9 Daniel Lötscher, *Die Finanzkrise in Leukerbad, Seminararbeit in Finanzwissenschaft*, University of Fribourg 2002 http://www.unifr.ch/finwiss/assets/files/Diplom_Seminararbeiten/SeminarLoetscher.pdf.

10 See Wolf Linder, Swiss Democracy, p. 55ff.

11 Reto Steiner, *Collaboration intercommunale et fusion de communes en Suisse - Résultats d'une étude empirique et jalons pour une gestion systématique de la coopération et de la fusion*, Institut de l'organisation et du personnel, Université de Berne : www.iop.unibe.ch/Dateien/.../Kooperationen%20Franzoesisch.doc.

Small rural communes have very simple structures with the citizens' assembly as the legislator and an executive council whose members are hardly paid and work part-time; in addition, there is a communal secretary and maybe a few persons constituting an administrative staff. Here, the citizen's assembly decides on propositions submitted by the executive council of the commune and by ordinary citizens. All important communal matters can be the subject of discussion. In large communes (most of the time cities), there is usually a communal parliament which is elected by the people. However, important decisions of this parliament are submitted to a referendum and must be approved by the citizens. Larger communes also have a full-time government and a large administration with professional staff, which - in the case of the largest Swiss city - Zurich with its almost 1 Mio inhabitants – amounts to 18'000 persons (that is more than the total population of the smallest Swiss canton, Appenzell Inner-Rhoden).

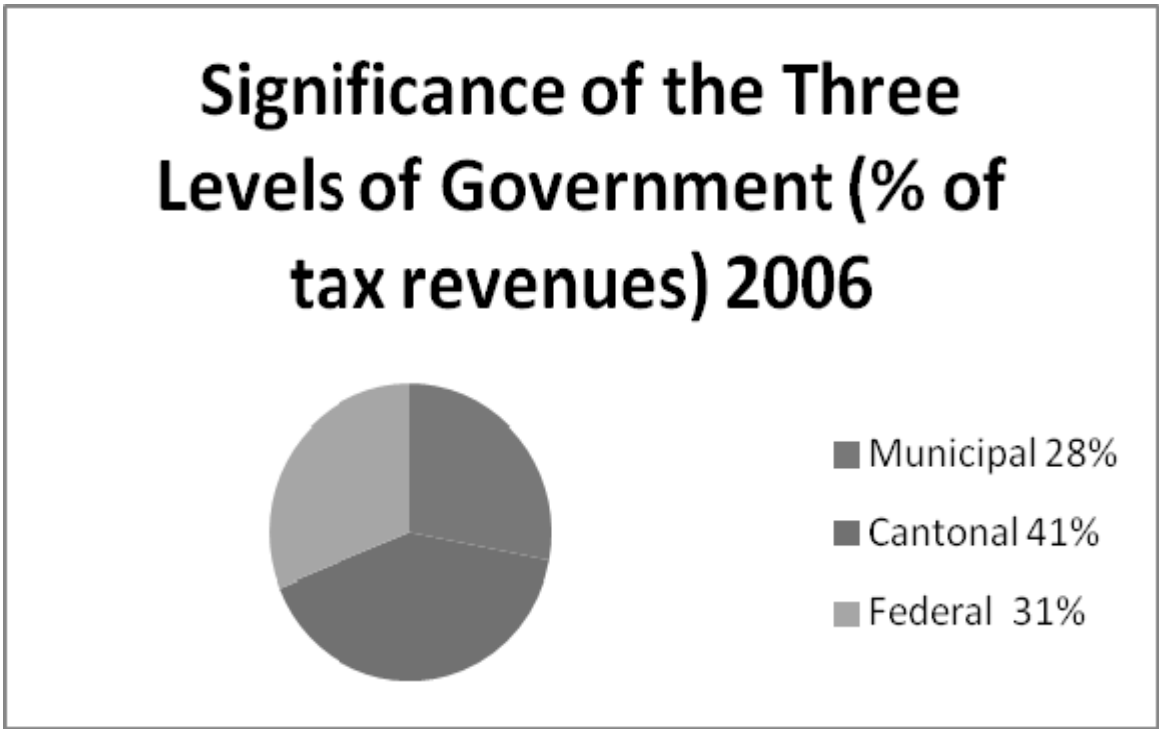
3. The freedom to legislate and to plan and implement, within the boundaries of cantonal legislation, those activities which belong to the responsibilities of the commune. For all those who know how local powers can be limited, they will consider that these responsibilities are quite extensive (even if variations can occur from one canton to another). They notably arise in connection with the following: constructing and maintaining local roads, developing local transportation – of course rather in urban communes, supplying water and in some areas electricity, collecting garbage and managing general sanitation, running of kindergarten and primary schools including construction of buildings and (sometimes) employment of teachers, planning of land use and issuing of construction permits, providing public assistance to poor people, regulating local police matters (cemeteries, fire brigade) and administering local taxes.

4. The right to impose taxes, namely an income-tax. The tax rate is decided by the commune itself, either at the citizens' assembly or in a vote on a referendum. Their share of total public expenditures is close to 30%; they also raise almost 30% of all public revenue and thus, at least theoretically, are able to finance themselves. They are also the cornerstone of the Swiss political system with its three layers of government. The size and population of communes varies enormously - the smallest having less than 100 inhabitants and the largest almost 400'000 inhabitants; despite this fact, all the communes are real local governments with elected authorities.

5. The right to act in all areas which are not covered by cantonal or federal legislation. This is a basic but efficient expression of the principle of subsidiarity according to which tasks should be carried out at the lowest level possible.

6. The right to judicial protection of autonomy: All these rights are not just of a theoretical nature as the Swiss Federal Tribunal protects the autonomy of communes much in the way it protects individual freedoms. Communes can therefore appeal to this court if their autonomy is violated by cantonal acts.

The best proof of the importance of the three levels of government in the country – and therefore of the difficulty to centralize the power – is the fact that the public budget is divided roughly equally between these three levels:



In such a situation, any attempt to centralize remains quite difficult. Of course, the xxth century has been marked by a constant transfer of powers from the cantons to the confederation, but these transfers have always been considered as necessary because of the small size of the cantons and for efficiency reasons. Moreover, these transfers require a constitutional amendment, and any amendment needs a double majority of the voters and the cantons. It means that a majority of cantons have agreed any loss of powers in favor of the central power. When the benefits of centralization do not seem obvious, citizens are more reluctant. In these last years, the trials to unify some elements of the school system through a concordate (an agreement between cantons) called HarmoS, have been widely criticized. –

6. Cantons' institutionalized participation – The best defense is a good offense

Cantons are less likely to lose their powers as their position is constitutionally well established. The upper chamber of Parliament, called Council of States, which was modeled after the American Senate, and in which each canton has two members, with the exception of Obwalden, Nidwalden, both Appenzell, Basle City and Basle Country which have only one[12], should defend the cantons' interests. But it is not so much the case. There have been changes to the election of the 46 deputies to the Council of States, due to the transfer of their election from cantonal legislatures to the people. They are currently elected by universal suffrage in each canton according to the procedure it has chosen (Art. 159, para. 3 CF). However, the deputies vote without instructions (Art. 161, para. 1 CF). The popular election of Councillors of States implies that they are not cantonal representatives; the Council of States is more like a balancing system of political weights. This was one of the reasons behind the creation of the Conference of Cantonal Governments in 1993. Traditionally, conferences comprised of the presidents and also of other members of the cantonal governments (e.g., those who are responsible for education, health, finance etc.) have been created. Such conferences have two purposes: first, they decide about arrangements between the cantons in areas in which the cantons have sole responsibility but need some coordination; second, they represent the interests of the cantons in political discourse in the national arena. In order to be always more efficient, cantons have created in 1993 the "Conference of cantonal Governments", a kind of lobbying agency in charge of defending the interests of the cantons.[13] "The best defense is a good offense". Cantons do not wait for the Confederation to infringe on their powers to defend themselves. This lobbying has allowed cantons to get some new participation rights enshrined in the 1999 Constitution[14].

If, in making a new law, the Confederation interferes too much with the cantons' interests, the cantons can launch a referendum if at least eight of them demand it. The first (and unique so far) such referendum was held in

12 This is a remaining of the former so called „half cantons". Note that most of the Swiss themselves are not fully aware that "half cantons" do not exist anymore. The only remaining of their existence if the fact that six cantons have only one member in the "Senate" and count for half a vote in the case of constitutional amendments.

13 http://kdk.ch/int/kdk/home.html.

14 Art. 45, Participation in federal decision-making; Art. 55, Participation of the Cantons in foreign policy decisions.

May 2004[15], when the cantons opposed a tax reform (called "tax pack") that would have changed the base for the taxation of owner-occupied houses and apartments. Supported by the right wing parties, this reform was supposed to lower the taxes for families, but in fact it would have created serious losses for cantonal finance. The referendum was successful, and the reform was rejected. Since then, the federal finance minister has been much more hesitant to mingle with issues that touch canton interests.

Besides this unique arrangement, it is clear that direct democracy also helps to secure the system. Whenever the people themselves decide public issues, especially issues in relation to the tax burden, they are more prepared to accept the decisions and to contribute their share. There is clear evidence that tax evasion is lower when the people have more direct political rights. As mentioned in the introduction, there are large discrepancies between the Swiss cantons: there are some small and rich cantons, like Zug, Nidwalden, and Schwyz, and others that are relatively poor. The rich cantons spend more money per capita than do the poor cantons, but they are nevertheless able to have *ceteris paribus sic stantibus* lower tax rates. Moreover, the discrepancies have increased in the recent past. In order to keep the country together and to prove that cantons' independence does not exclude solidarity, a system of fiscal equalization is necessary.

The former fiscal equalization system was quite inefficient and, therefore, has been reformed. The reform, which entered into force in 2008, consists of four elements:

1. About 13 tasks and financial responsibilities that were previously the joint responsibility of Confederation and cantons, have been separated ("*Kompetenzentflechtung*"). For instance, national roads (highways) belong to the Confederation from 2008 onwards, and the later has the exclusive competence about financing, building and maintenance. On the other hand, everything concerning special schools and disabled persons belongs from now on to the cantons. Nevertheless, most tasks still are common responsibilities.
2. New kinds of collaboration between the federal and canton governments and new kinds of financing have been introduced. The traditional system of matching grants has been replaced by a system in which the cantons get all the financial means that are necessary for those tasks for which the Confederation controls strategic issues and the cantons control implementation. Objectives for these tasks have to be fixed and described in an intergovernmental contract.

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15 Nicolas Schmitt, *Le référendum des cantons – «Standesreferendum»*, in Bulletin de Législation, 4/2003.

3. There are new forms of collaboration between the cantons, with cost compensation. If some cantons agree to collaborate on tasks they cannot perform by themselves (e.g., because they are too small), and if their activities have benefits for other cantons, the federal government can require reluctant cantons to participate if at least half of the cooperating cantons ask for such an intervention. The idea is to prevent free-rider behaviour.
4. The fiscal equalization system (in the narrow sense) has been reformed. The new system consists of three building blocks.

   First, there is revenue equalization. Its objective is to provide at least 85 percent of the average financial means for all cantons. About 70 percent of the US$ 1'445 million the "poor" cantons get is provided by the Confederation, and the remaining 30 percent is provided by the "rich" cantons.

   Second, there is a cost equalization scheme, financed by the Confederation: about US$165 million for geo-topographic burdens and another US$165 million for socio-demographic burdens.

   Third, there is a "cohesion fund." The idea behind this fund is that "no canton with a weak financial capacity which today benefits from equalization, should suffer from worse conditions in the new scheme." Two-thirds of this fund's money come from the Confederation and one-third from the cantons. There is full payment for the first eight years, and then a decrease of 5 percent each year for twenty years. Thus, this transition fund will exist for twenty-eight years.

The main difference between the old and new systems is twofold. Firstly, there is more division of power between the different spheres of government, and there is a stricter correspondence between the tasks the cantons have to perform and their financial means. This should avoid the famous "unfunded mandates" which seem to play a negative role in the centralizing effects participants to the Spire Conference have complained about. Secondly, the incentives for the cantons to care about their own tax base by, for example, attracting new firms is strengthened. Thus, there is hope for efficiency gains that might eventually lead to a reduction of the tax burden.

The Swiss people accepted the constitutional changes necessary for this reform in November 2004. In the meantime, the corresponding law passed the parliament and entered into force on January 1st, 2008.

7. Fiscal federalism of course

Last but not least, according to the principle « He who pays the piper calls the tune », an interesting part of the preservation of cantons' autonomy is linked to the fiscal federalism.

A number of economists and political scientists have been concerned with the normative question of an optimally designed federalist constitution. In addition to arguments for a vertical separation of powers, brought forward by Montesquieu and de Tocqueville, James Madison already emphasized that a decentralized provision of public services best helps satisfying different needs arising from local or regional particularities: "the great and aggregate interests being referred to the national, the local and in particular to the State legislatures" [16]. Wallace E. Oates argues that decentralization is appropriate if residents in different sub-federal jurisdictions have different tastes for public services[17]. A uniform provision of the service at the federal level would leave both, the residents who want more of a public good and the residents who want less of a public good, worse off. Consequently, he proposes his Decentralization Theorem as a guideline for the distribution of fiscal competencies among different tiers of government: In the absence of inter-jurisdictional externalities and economies of scale in the provision of public services, decentralization of government activities is preferable.

We shall not enter into the details of fiscal federalism here, as it would bring us into too technical, and even mathematical, topics[18]. Nevertheless, the extensive fiscal autonomy of the cantons has two consequences.

First, as it implies fiscal responsibility, there exist in the cantons special constitutional and statutory rules to enforce sustainability of canton (and local) public finances. *Fiscal referenda* as well as the so-called *debt breaks* play a prominent role.

Second, the strong *fiscal competition* arising among the cantons endangers the coherence of the country. Thus, the fiscal equalization system we already mentioned has been institutionalized in 1959 and reformed in 2008.

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16 Federalist Papers, N° 10.

17 Fiscal Federalism, New York 1972, p. 11.

18 Those who are interested can read several works written by Bernard Dafflon, probably the best specialist of this topic in Switzerland. His bibliography is large, among others (in English): *Decentralization: A Few Principles from the Theory of Fiscal Federalism*, Paris 2009; *Fiscal Federalism in Switzerland: A Survey of Constitutional Issues, Budget Responsibility and Equalization*, Fribourg 1997; *Accommodating Asymmetry Through Pragmatism: An Overview of Swiss Fiscal Federalism*, in Fiscal Fragmentation in Decentralized Countries, Cheltenham 2007, p. 114.

Let's have a look at some peculiarities of the federal fiscal system, which are alien to most other federal systems: the *fiscal referenda, debt breaks*, and *strong tax competition*, along with the brand new fiscal equalization system.

8. Taxes

All cantons have their own income and property taxes; in 2002[19] the federal share of all income and property tax revenue was only about 21.5 percent. Cantons are free to decide not only on the tax rates but also on the tax schedule as well as on how progressive these taxes are. In deciding this, however, the governments and the parliaments of the cantons are not autonomous as they have to ask the citizens whether or not they accept changes in the tax law.

The income tax as an example[20] - in 2009, income tax on private persons has brought:

Confédération (IFD):	8'529 mio francs
Cantons:	22'809 mio francs
Communes:	17'206 mio francs
Total:	48'544 mio francs

In 2009, this amount represented 42.4 % of all Swiss taxes, which amounted globally to CHF 119'400 Mio. Income tax is by far the most important source of revenue for public sector, and the part of cantons and municipalities represent much more than the part of the Confederation[21].

Inside Switzerland, however, there are strong economic discrepancies[22]. In 2005, the income per habitant was CHF 115'178.- in Basle-City and CHF 38'070.- in Jura. Such large discrepancies could create tensions in the fiscal system and make financial equalization unavoidable. Nevertheless, such differences are inherent to any federal system, especially in Switzerland where

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19 Gerhard Kirchgessner, *Swiss Confederation*, in Anwar Shah (ed.), The Practice of Fiscal Federalism: Comparative Perspectives, Global Dialogue on Federalism, Volume 4, McGill-Queen's University Press 2007.

20 *Aperçu de l'impôt sur le revenu des personnes physiques*, edited by the Conférence suisse des impôts CSI, to be found on the Net.

21 See also : *Mémento statistique - Les finances publiques 2011* : http://www.efv.admin.ch/f/downloads/oeff_finanzen/Taschenstatistik_f_web.pdf.

22 http://translate.google.ch/translate?hl=fr&langpair=en%7Cfr&u=http://www.bfs.admin.ch/bfs/portal/en/index/themen/04/02/05/key/pro-kopf-einkommen.html.

the strong identity of each canton make acceptable for its citizens to pay more than in other cantons in order to preserve their "native" living environment.

9. Allocation of powers

The federal Constitution assigns specific tasks to the Confederation; for all other matters cantons are supposed to be responsible. However, many powers are shared, because in many cases the federal government has legislative responsibility but the cantons execute the legislation. This leads to a strong imbrication between the levels of government ("*Entanglement of powers*"). For instance, joint responsibility applies to areas such as education. This is a canton task, which means that the cantons are, in theory, responsible for all the universities.

University policy reveals another specific trait of the Swiss system. The majority of the cantons are far too small to have their own university. In addition to the two federal institutes, ten cantons have universities, all of which are public, and students' fees are rather low. To finance the universities, the cantons have agreed among themselves that the canton from which a student comes has to pay a certain amount of money to the canton in which he or she is studying. So part of the financial burden of the universities is spread across the country without the intervention of the federal government. Such inter-canton cooperation is to be enforced by the new system of fiscal equalization[23].

The possibilities for the national government to interfere with canton or local policies are quite limited. On the one hand, this situation creates problems, as there are many areas in which the Confederation is in charge of strategic (and legislative) matters but the cantons are in charge of operational or executive matters. If the cantons do not behave appropriately, the federal government has hardly any means to force cooperation. This is relevant, for example, in environmental policy. By way of illustration, if the Confederation sets limits for the emission of some pollutants, and if these limits are violated in certain areas, there is hardly anything the federal government can do about it. It cannot, for example, force the canton governments by withholding grants or revenues from tax sharing or by any other fiscal means. This situation is known as the "implementation deficit" (*Vollzugsdefizit*). But on the other hand of course, cantons preserve a remarkable autonomy. It explains why the principle of "federal faithfulness" is supposed to play an important role in Swiss politics (enshrined in the Constitution): due to the lack of (institutional-

23 See Peter Hänni op. cit. for a first statement about this new programme.

ized) coercitive measures, the Confederation has to take care of cantons' opinion in order to implement its policies.

Art. 44 *Principles*

[1] The Confederation and the Cantons shall support each other in the fulfilment of their duties and shall generally cooperate with each other.

[2] They owe each other a duty of consideration and support. They shall provide each other with administrative assistance and mutual judicial assistance.

[3] Disputes between Cantons or between Cantons and the Confederation shall wherever possible be resolved by negotiation or mediation.

Therefore the consultation process, also enshrined in the Federal Constitution: when the federal authorities wish to pass a new law, the latter has to be submitted to all milieus which are concerned, like cantons, political parties, leading experts, organizations etc. It allows to estimate the support (or the lack of support) for any new legislation. If a large majority of cantons consider that the new law is inappropriate, the Confederation will amend its draft or even – if the opposition is strong – withdraw it.

The other side of the coin is that the cantons (and local communities) could be deprived of any say in national politics; the national government and Parliament are free to take decisions. But cantons continue to play a role. On the one hand, whenever the Constitution has to be changed (a question that usually comes up several times a year), a majority of citizens at the national level and a majority of cantons have to approve the amendment. On the other hand, new participation rights for the cantons have been enshrined in the 1999 Constitution. Furthermore, eight cantons can ask for a referendum in order to erase a new law which has been adopted by the federal parliament.

In conclusion, we can say that contrarily to several other federations, in Switzerland all three levels of government *still* enjoy a comfortable amount of power[24].

24 See among others Wolf Linder, *Schweizerische Demokratie: Institutionen, Prozesse, Perspektiven*, Bern 1999,p. 140; with reference to Jürg M. Gabriel, *Das politische System der Schweiz* , Bern 1990, p. 97.

10. Fiscal referenda and Public revenue

Contrarily to the Swiss federal Constitution, a special feature of the *cantonal* constitutions is the existence of a *fiscal referendum*. If it is mandatory and the outlay for it exceeds a certain limit, the canton's citizens have to be asked whether they agree to the project in question. This is also the case if the referendum is optional and if a given number of signatures are collected. The limit that is specified can be different for nonrecurring expenditures and for recurring expenditures. All cantons have such a referendum. Because the citizens know that sooner or later they will have to pay for the projects that are carried out by the canton or local community, this acts a restraint on overly ambitious projects.

A study made in 2000[25] reveals that fiscal referendum exists in almost all cantons (20 on 26). Following the Swiss tradition, there are great differences among cantons. Fiscal referendum can be compulsory or optional. There are also differences if it concerns recurring or non-recurring expenditures. In order to avoid an excess of votes on topics that nobody contests, there is a tendency to limit the compulsory referendum (it is the same for the legislative referendum) and to replace it by the optional one. What is interesting is that the limit for the referendum is relatively low and corresponds in most of the times to less than 1 ‰ of cantonal income (excepted in LU 2.11 ‰ and JU 5 ‰). If the referendum is optional, the number of signatures to be collected in order to submit the expenditure to the vote is also quite low. Evidence shows that financial topics (although quite high) are usually accepted[26].

However, the existence of the fiscal referendum combined with the regulations for a balanced budget were insufficient to prevent public debt from increasing. Therefore, partly because they had carried debts for longer periods than had the others, *several cantons introduced new instruments within the past ten years in order to limit deficits*: St Gall (1994), Fribourg (1994), Solothurn (1995), Appenzell Outer-Rhodes (1995), Grisons (1998), Lucerne (2001), Berne (2002), and, the last one for the time being, Valais (2002) or

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25 Basically, the situation has not changed so far : Nicolas Schmitt, *Le nombre de signatures nécessaires dans les cantons suisses pour les initiatives et les demandes de référendum (Etat de la législation: 01.01.2000)*, PIFF Travaux de recherche N° 16, Fribourg 2000.

26 The Institute's National Center Newsletter presents all topics submitted to the vote; on 17 June 2012, citizens of Solothurn have accepted with 65% majority a credit of CHF 340 Mio for the cantonal hospital.

Neuchâtel (2005) [27]. These regulations are, in some cases, in canton constitutions, although they are usually in canton budget laws.

Another special feature of the Swiss fiscal constitution is the substantial autonomy of the cantons not only on the expenditure side but also on the revenue side of the budget. All the following elements are elements in which the Confederation does not play any role.

The main progressive taxes on personal and corporate income are state and local taxes. *The cantons have the basic power to tax income, wealth, and capital.* The municipalities can levy a surcharge on canton taxes. The federal government relies mainly on indirect (proportional) taxes, a value-added tax, and specific consumption taxes, such as the mineral oil tax. There is, however, a small but highly progressive federal income tax, which amounted to 29 percent of total federal tax revenue in 2002, while the cantons and municipalities rely on income and property taxes for about 46 percent of their total current revenue and 90 percent of their tax revenue. The federal income tax has a maximum marginal rate of 13.2 percent and an average rate of 11.5 percent. Owing to a basic tax exemption, the highest 3 percent of income taxpayers pay about 50 percent of the revenue of the federal income tax. Thirty percent of this tax is paid back to the cantons. The federal government can also rely on a source tax on income from interest, the so-called "*Verrechnungssteuer*", which has a rate of 35 percent.

As a consequence, *the tax burden varies considerably between the cantons* and, in some cantons, also between the municipalities. In the index of the burden of personal taxes for the year 2003, there were huge discrepancies between "rich" cantons, like Zug and Schwyz, and "poor" ones, like Obwalden, Uri, and Jura. It seems obvious that such discrepancies demand a fiscal equalization system. The former system was apparently not able to sufficiently equalize the situations and therefore, as we have seen, a new system has been implemented since 2008. But as the implementation is quite new, feedback is missing[28].

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27 Alain Tendon, *Petite histoire constitutionnelle du frein aux dépenses neuchâtelois*, SZJ/SRJ 104 (2008) p. 455.

28 See Peter Hänni, op. cit., for a first analysis. He considers that financial equalization *stricto sensu* can be considered as positive and brigs also more transparency in the financial flux. But on the other hand, in the future competence can tend to become again intricate, what could undermine the efforts made in this reallocation of powers. In the same sense, the political goal of reinforcing the intercantonal co-operation (and to make it even in some cases compulsory) could transfer powers to vague intercantonal organs to the detriment of cantons themselves, and therefore weaken federalism even though its goal was to strengthen it.

A strong tax competition takes place in Switzerland. Investigations show that the proportion of rich people in a canton is significantly influenced by the canton's tax rate. Choice of canton for residence often depends, for high-income earners, on the amount of income tax they would have to pay. Social transfers are less influential for the choice of residence. Thus, fiscal competition consists of tax competition rather than of transfer competition, and tax competition is stronger for self-employed than it is for dependent employees and retirees. Among local communities, the effects of tax competition are even stronger than they are for cantons.

From an international perspective, the Swiss tax burden is low compared with other locations in Europe and the United States. This holds even for the higher-tax Swiss cantons. In terms of the index of the effective average tax rate for people with an annual income of CHF 170'000.- the burden is considerably lower in the low-tax cantons[29].

The Swiss system of corporate income taxation appears to be quite complicated, *partly because of the canton and local competencies*. All in all, capital may bear seven different taxes: the corporate income tax on profits, the capital tax, the federal source-tax on interest and dividend income, an emission charge, the property tax, the church tax, and – in some cantons – a minimum tax if revenue from corporate income tax does not reach a certain amount.

11. Fiscal equity and the equalization system[30]

As mentioned above, fiscal competition in Switzerland leads to huge differences in the tax burden, as well as in the economic potential, between the different cantons (and, in some cantons, between the different local communities). This allows for the preservation of a strong cantonal independence and a lack of influence from the center. But as any excess is contra-productive and can lead to tensions, there is considerable redistribution within cantons and local communities. This clearly contradicts the usual textbook wisdom, which says that, in a federal polity, redistribution should be undertaken by the federal government.

The special design of the Swiss federal system does not inhibit income redistribution comparable to that of other European countries. The main reason

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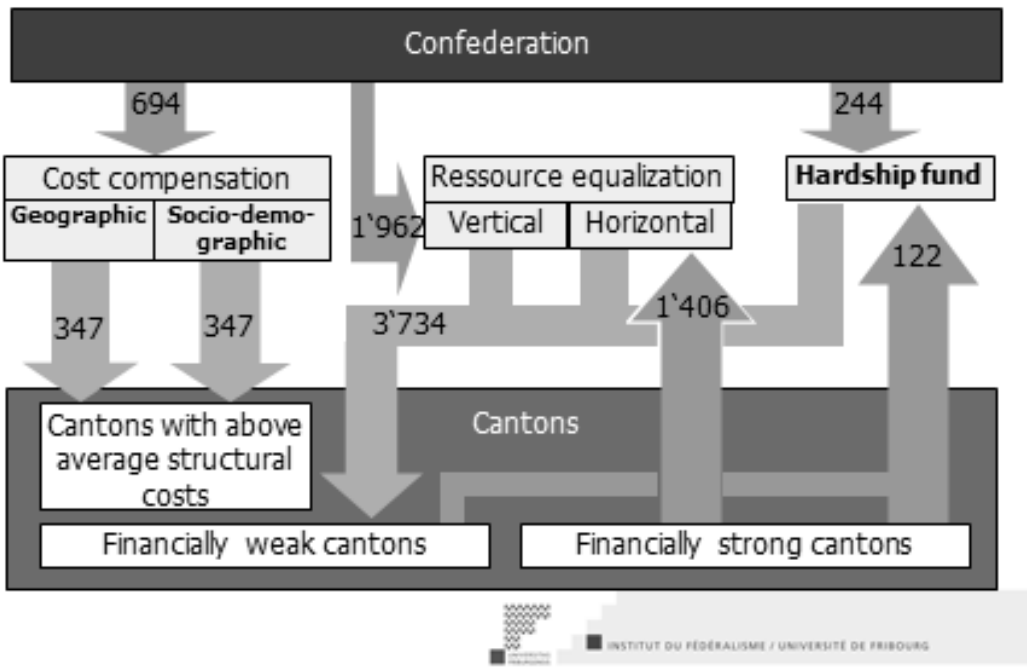
29 *Annuaire statistique de la Suisse 2012*, p. 407.

30 In order to know – almost – everything about the new system of financial equalization: http://www.efd.admin.ch/dokumentation/medieninformationen/00467/index.html?lang=fr&msg-id=15562.

for this is the existence of an institutional framework that ensures that "wealthy" people also have to contribute (at least theoretically, as really wealthy people can always find means for paying less than they should do). Moreover:

1. The federal income tax is highly progressive, and 30 percent of the revenue is paid back to the cantons, one part of it directly and the rest via the fiscal equalization system.
2. There is a federal source tax of 35 percent on interest and dividend income.
3. The federal government upholds the first pillar of the old-age pension system, which is financed on a pay-as-you-go basis and is highly redistributive. Contributions are proportional to labor income (without any limit), but the maximum pension is CHF 2'320.- for singles and CHF 3'480.- for couples. Today, about 60 percent of all senior citizens receive the maximum pensions, and the share receiving these is increasing.
4. There is a fiscal equalization system. This table shows the fiscal flow in 2010 and reminds that a strong position of cantons is not completely implacable with a certain form of solidarity.

Fiscal flows in the year 2010
(in CHF million)



Taking into account the splitting of the power in the country, there are also fiscal equalization systems within the cantons. As usual in Switzerland, they are very different between the cantons. Some are rather strict, while others allow for larger discrepancies between municipalities.

12. Fiscal federalism dimensions of the public management framework

Another element which prevents an encroachment of Berne at the cantonal level is the fact that in Switzerland, *agencies of the federal government are never involved in canton or local appointments, and there are no federal government restraints on subnational hiring and firing*. Nor is there an elite federal service that is appointed and rotated through subnational positions in the cantons. Consequently, canton and local governments have full autonomy in hiring and firing personnel. Within the restraints of the federal Constitution, the cantons and local communities have full autonomy and flexibility in the exercise of executive powers. There are no avenues open to the federal government for undermining local autonomy.

In France for instance, it is very common that candidates for national legislative elections are "parachuted" from Paris in the province. Some more or less famous politicians are sent into a local circumscription, using their notoriety to fight the incumbent belonging to another party. This system tends to centralize the political life around Paris. In Switzerland on the contrary the strength of the cantonal identity allow for a purely local administrative and political life and a completely decentralized organization of the political parties.

13. A strong identity

From time to time, there are new proposals to reduce the number of cantons in order to have larger cantons with less divergent structures. This would, of course, reduce many problems. For example, there would be no need for fiscal equalization between the cantons as the necessity for such a system arises mainly from the asymmetries between cantons. However, all attempts to merge various cantons have failed because voters have rejected them[31]. As Swiss citizens have a strong commitment to direct political rights, and as the

31 On 2 June 2002, a proposal to merge Vaud and Geneva has been rejected by the voters with a majority of about 80% in both cantons.

cantons are deeply rooted in the consciousness of the population, the chance for any merger between them is extremely low[32].

But new problems can arise. And before these problems begin to endanger cantons, the latter prefer to put them on the table. Every three years, a National Conference on federalism is organized to have a closer look at the current and future situation of the Swiss system. The Third National Conference on Federalism, which took place in May 2011 in Mendrisio (Ticino) [33] was devoted to another kind of problem that could play a role in the future: "Federalism and new territorial challenges"; its goal was to analyze the social, demographic, economic and cultural transformations which have marked Switzerland these last decades. As a matter of fact, most Swiss live in cities and urban areas which have to constitutional signification, as the new borders of civilization do not coincide any more with the traditional borders of the cantons. Facing this new reality, Confederation, cantons and municipalities have to redefine and reinforce national and transborder co-operations. The conference has analyzed the merits and limits of the institutional and political answers to all these elements which are so important in a federal state, as demographic evolution, economic growth, sense of belonging, territorial identity, efficiency and democracy[34].

14. Brief conclusion

Switzerland is a nation in which no common religion or language was ever established. The Swiss include many adherents to both the Catholic and Protestant religion. The Swiss do not have linguistic unity; German, French, Italian, and Romansh are used in different regions of the country. A certain form of Swiss nationalism was implemented primarily by its rivalry among imperial powers. The insurrection of the canton Neuchatel in 1856-57 reminds for example that the threatening power of Prussia held the Swiss together, binding them with a feeling of nationalism. It has been the same at the time of the birth of Switzerland, around 1291, with the fear of the German Empire; it has also been the same during World War II with the fear of III Reich. And in a certain way it is still the case today with the fear of Europe… The fear of a

32 Nicolas Schmitt, *Fédéralisme et modifications territoriales en Suisse: ouvrir la boîte de Pandore*, in Diritto Pubblico Comparato ed Europeo, 2010-III, p. 1107.

33 http://www4.ti.ch/generale/foederalismus11/francais/foederalismus/presentation/.

34 *Le fédéralisme face aux nouveaux défis territoriaux : institutions, économie et identité*, Actes de la 3ème Conférence nationale sur le fédéralisme, Lausanne 2012.

higher power can also be a good instrument against centralization from the top.

As the 2011 IACFS Conference was devoted to the influence from the top, the goal of this short essay was to underline that Swiss cantons keep as much sovereignty as possible. They still enjoy a wide range of constitutional powers, even in the field of fiscal federalism. They can levy taxes, they are able to manage their budgets, their debts, and even for the future problems of territorial adequation, cantons will play – alongside with the Confederation – the first role in (re)defining the best possible room for the citizens. This allows fully cantons to play their role of laboratories for tomorrow's federalism. Why? Because from the early beginning cantons have considered with an extreme reluctance any transfer of their powers to the center, and they have been able to institutionalize a very decentralized federal system, including a very fragmented power. In such a heterogeneous context, with about eight millions minorities and diverging opinions, it is obvious that centralization remains more difficult than in a quite homogenous nation like Germany or USA.

Moreover, during its long history, Switzerland has undergone much progress in order to establish a direct democracy in order to counterweight any trend toward centralization. "It is astonishing how little the rest of the world knows about the way Switzerland runs its politics. Even its next-door neighbors in Europe, though vaguely aware that it is a deeply decentralized country, do not really understand the other, more important part of the Swiss system -- the part that could turn out to be a model for everybody's 21st century democracy."[35]

35 Brian Beedham, United Press International, in a book review on Gregory Fossedal's *The road to full democracy*. http://www.upi.com/Odd_News/2002/11/13/Book-Review-The-road-to-full-democracy/UPI-32651037226387/.

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Italy: Financial Implications of the Transition to Fiscal Federalism. Fears and Hopes

Giancarlo Pola

1. Italy as it is today; and one step back

At the end of 2011 Italy can be described *(bibl.: Palermo and Woelk)* as a *devolutionary asymmetric federal system in the making:* "devolutionary" because in the last 60 years some powers have actually been transferred from centre to periphery, "asymmetric" because there are two types of Regions (the "Special", dating back to 1948, and the "Ordinary", created in 1970) and "federal in the making" because the principles of a genuine fiscal federalism *(for which see bibl.: Anderson; IEB's World Report)* were laid down almost 11 years ago in the Constitutional Act 3/2001 and have been specified by Delegation Law 42/2009, which translates into workable provisions and rules the broad dispositions of Act 3. Due to its "delegation" nature, Law 42 is being applied through eight "implementing decrees" *(decreti attuativi)* which separately take care of the various segments of the building (regional financing, municipal financing, etc.) *(for details: bibl. Pola,2009; Pola, 2010a).*

Now one step back. From year 2001 to year 2008 there was no progress in Italy's decentralization building, due to changes of governments and to failed attempts by Northern parties to produce one-sided laws; so that sub-central tax autonomy was kept practically frozen ("waiting for fiscal federalism"). Why then such a pressing for obtaining *fiscal federalism* in today's Italy? The answer could be the following:

– Italy's territories differ widely in wealth, income, public revenues and efficiency of public administrations ... Roughly, the dividing line is between North and South;

– in the last century Northern Regions have been the leaders in economic growth, but globalization and ageing is generating decline even for them....;

– ...so in the last 20 years that they have been claiming more resources not only for equity reasons, but also for sustaining the economy of the whole Nation.

The North's winning argument in the dispute which led to Law 42 *is the huge fiscal unbalances (or residua:* = tax payments - net expenditures, with no

pensions, no defense, no interests included) among territories: in year 2006 there were 6 Regions "net givers", among which: Lombardy, with 24,9 bn euros, Veneto with 8,7 bn, Emilia Romagna with 8,0 bn. The remaining 14 were "net takers", among which: Sicily, 13,9 bn; Campania, 10,8 bn; Puglia, 6,7 bn. A situation which recalls the German scenario after East-West unification.

2. The innovative provisions of Law 42/2009 and of its implementation decrees

The architecture of the new "federalistic" building of Italy is based on strictly similar principles for both layers of Italian government, i.e. Regions and Local Authorities (Municipalities and Provinces). The underlying philosophy and the principles can be summarized as follows *(for details, see bibl.: Ministero dell'Economia e delle Finanze)*:

– a more efficient performance in service provision of each layer of government due to a higher accountability of politicians and administrators;

– abolition of all grants from upper to lower levels and their substitution through revenues from taxes (whether own or shared), in the name of *tax autonomy*;

– a tax autonomy which is meant to stem from the newly introduced principle of "territoriality" of fiscal resources, which links the right of the administrators to spend to the existence of tax pre-requisites in the land where the taxpayers live;

– full financing of basic needs (provided the related services are produced at nationally standardized costs) like education, welfare etc. through taxation and *full* vertical or horizontal equalization; this provision regards some 80% of the sub-central budgets;

– financing of *non-basic* needs also through taxation and (fiscal capacity) equalization, with *no guarantee of full* equalization, however;

– altogether, no overall tax increase, but simply *a shift of the fiscal burden* from the centre to the periphery, which gains a *vertically guided and limited tax autonomy*. In other words, the portion of "free" expenditure which is not legally financed through equalization and whatever excess spending over standard needs in "guaranteed services" shall be financed through the higher level of tax flexibility envisaged by the law;

– in the *extreme cases of financial defaults*, provisions of *hard political sanctions.*

Wisely, *transition periods* of up to five years for the implementation of the most complicated innovations are envisaged (building of equalization schemes and new tax financing at the regional level, introduction of the new fiscal tools in lieu of the abolished transfers at the municipal level, etc.).

3. Some details of the new building

2.1 At the regional level

As said, in the new architecture different forms of financing are envisaged, according to the nature of expenditures. For Regions, the spending for the so called LEP (ELSs -essential levels of service which shall be guaranteed all over the country; in particular: health care, education, welfare) shall be fully financed through own and shared taxation and apportionment from the equalization fund ("complete equalization"). The full financing shall not be related to the costs really incurred into (historical expenditure), but to the “standard needs”, which is the *expenditure corresponding to an average good management*. Regional and local administrations are thereby forced to be efficient, otherwise they must resort again to fiscal leverage to get the necessary financing of the whole expenditure (and the citizens would judge them on the basis of this).

For all of the other expenditures of Regions (which are estimated to be equal to 15-20% of the overall amount of their budget) the equalization shall reduce the differences in the tax capacity per inhabitant of the various Regions but *will not guarantee the full financing* ("incomplete equalization").

Up to now (end 2011) the main practical application of the principles concerning the financing of Regions is the decision about the standard expenditure in health service, which in Italy is a publicly provided good devolved to Regions. Up to now it has been financed according to per capita criteria through VAT sharing. Regions' performances have proved very different and some have fallen into default, like Latium.

Health service is the main pillar of the Regions' "essential services", for which a draft decree sets the way to measure the standard costs. For each “essential service” standard cost is assumed as the weighted average of per capita costs in 3 Regions (1 of which must be in the Northern Italy, 1 in Central Italy, 1 in the South; moreover 1 Region must be a small one). The 3 Regions are selected by the Conference of Regions (a co-ordination body) out of 5 Regions which meet some specific efficiency criteria.

The Government proposed considering the 3 most efficient Regions. Regions prefer to expand the number of reference Regions and to introduce con-

ditions which lowers the target. The lower the target the easier is to get it for inefficient governments and the greater the financial premium for the most efficient ones.

Regions will get resources which equal standard costs of “essential services”. Thus, if the standard is set as the average of the 3 most efficient regions, only one (Lombardy) will get more resources than now. All other ones lose resources. Since benefits of cost cuts accrue to the Treasury, the real Government target appears to be to spoil Regions of “excessive” resources, not to redistribute resources from inefficient units to efficient ones (so fiscal federalism would appear to be a way to carry on the last decade policy as to sub-national governments).

In allocating resources to lower level units of government a “bottom up approach” (preferred by sub-central governments, mainly Regions) confronts itself with a "top down" approach. According to the "bottom up approach" sub-central levels of government would consider the quantity of resources required by a standardized basket of decentralized services valued according to efficiency costs, irrespective of its actual incidence on the Nation’s fiscal capacity.

According to the top down approach (preferred by Central Government) an affordable aggregate of local resources is established (as in the health care sector) and then apportioned to local governments according to the main drivers of local needs (population size and composition, etc.). The advantage of this method is a tighter control of public spending, while its drawback is the possible gap between needs and financial caps to available resources.

Provisionally, for the financial year 2011 an elementary top down method has been used to finance health care in the various Regions, irrespective of the "standard cost" criterion: the total available amount of money – compatible with the zero deficit – has been distributed according to the weighted population of each Region.

As for the *financing side* of the budget, law 42 guarantees that Regions (as well as local authorities) *can modify their taxes within the constraints* set by the State laws. They will be entitled to change the rates of their taxes and decide about deductions and allowances; also they will be entitled to change the rates of the surtaxes on the taxable bases of the State taxes. Moreover, they will be *entitled to set* new taxes on those taxable bases (very few indeed) which up to now are not subject to taxation from central government.

Table 1: The architecture: 1) details on the financing of Regions

Functions and related expenditure	**Associated financing tools**	**Equalization criteria**	**Type of equalising fund**	**Transition period**
Basic (compulsory) functions – health – education – welfare – local transport (capital)	Business tax (IRAP), income surtaxes or tax-sharing, VAT sharing, other regional taxes, portions of equalization fund	Complete funding based on standard costs of basic levels of services	Vertical	5 years
Non basic, discretionary functions	Own taxes, income surtaxes and portions of equalization fund	Funding depending on the fiscal capacity subject to incomplete equalization	Horizontal	5 years
Special functions	Special state subsidies, EU and national financing	Ad hoc territorial re-balancing		

2.2 At the municipal level

The municipal level is especially concerned by law 42 in two ways: 1) through the higher accountability concerning the self-financing of expenditures via own or shared tax revenues; 2) through the strengthening of efficiency and effectiveness of management, not only due to the fixing of parameters to local expenditure (standard costs and needs), but also to the envisaged reforming of the *compulsory minimum municipal sizes*.

The architecture here is quite similar to that pertaining to the regional level. There are *basic and non-basic functions* (provisionally coinciding with 6 main items of the ordinary municipal budgets), which need to be financed

entirely, whether through own or devolved taxes or through tax sharing. The self-financing will be guaranteed: i) *initially* (up to 2013) through the *existing* fully own taxes (such as the ICI, the tax on all types of immovables, except the owner's house) and the *partial devolution* of the yield of central taxes on immovables, whether already existing or newly introduced (e.g. the "one off" (central) tax on renting of immovables: the "cedolare secca"); ii) subsequently (from 2014) via the creation of new taxes, among which the most prominent will be the tax on the property of immovables (IMU), a sort of integrated municipal-services tax, widely seen as a surreptitious version of the ICI, the existing real estate tax on immovables. The rate of IMU will be 7.6 per thousand, as against the average 6.6 per thousand of the current ICI, and shall hit the residential property, in contradiction to the present situation. According to official estimates, IMU will provide initially some 11,57 billion euro, as against 8,5 billion of the current ICI. Other fiscal resources will be provided by the *earmarked tax*, the *tourism tax*, the "*service tax*": the latter being a long debated (ever since the 80's) symbol of local benefit taxation.

Table 2: The architecture: 2) details on the financing of Municipalities (and Provinces)

Functions and related expenditure	**Associated financing tools**	**Equalization criteria**	**Type of equalising fund**	**Transition period**
Six basic functions: Administration, Education, Transports, Environment, Police, Welfare	Own-devolved Taxes, own taxes, surtaxes, shared regional and central taxes, equalization fund	Full equalization up to standard expenditure on the six basic ff.	Vertical and horizontal, complete, on standardized expenditure	3 years as "Experimental Balancing Fund" + (minimum) 2 more years
Non basic, discretionary functions	Own taxes, tax sharing (no surtaxes) and portions of equalization fund	Depending on the fiscal capacity subject to incomplete equalization	Horizontal, but incomplete	5 years

The need for increasing the box of taxing tools of municipalities targeted to the self-financing of basic functions stems from the strongly stressed *abolition of the grants* from upper levels of government. From the following table it can be seen that the amounts of the involved budget items for the "transition" years 2011 and 2012 are (for municipalities located in "Ordinary" Regions only) in the order of 11 billion euros. This is the size of the devolution of central tax sources to municipalities in Italy at the moment.

Table 3: Abolished grants and their substitutes

	Year 2011	**Year 2012**
Shared central taxes on transfers of immovables	1329	1354
(Central) stamp duties on renting of immovables	708	711
(Central) income tax on land property	5790	5167
Shared "cedolare secca"	527	746
2% VAT	2889	3024
Total devolved central (new municipal) tax revenue= to abolished grants from central level	**11243**	**11002**

Source: Ragioneria Generale dello Stato

Two basic steps are envisaged from now (2011) on: i) a transition phase covering the years 2011-2013, during which the shared or totally devolved central taxes yield will be allocated to a so called „Experimental Re-balancing Fund", mainly distributed to the 7300 municipalities according to the specific "historical" needs of each municipality; ii) a subsequent 2-5 (?) -years phase, where the "complete" equalization (jointly performed by State and Region) will cover the "standard expenditure needs" (no longer "historical expenditure"!) associated to the six basic functions (see box) covering some 80% of the budget, while the "incomplete equalization" will concern the residual por-

tion of the budget. The standard expenditure needs *are being empirically quantified* by an ad hoc enquiry based on cluster analysis due to be completed by 2013.

A *summary of the transition* from today's pre-federal situation at the municipal level to tomorrow's federal setting (with regard to the budget financing via *existing and devolved central taxes*) is here presented:

Table 4: The planned target for municipal financing

Transition period, 2011-2013:	**Stable period, from 2014 on:**
– 30% sharing of taxes on transfers of immovables – devolution of stamp duties on the renting of immovables – full devolution of the income tax on immovables – partial devolution of the "cedolare secca" – sharing of VAT – free municipal income surtax up to 0.8% – new tourist tax – new earmarked tax – ICI (tax on immovables, except owner's house), up to 0.8%	– 30% sharing of the one- tax on transfers of immovables – 30% sharing of residual taxes on transfers of immovables – IMU propria (unique tax on all sorts of immovables), 0.76% – IMU additional or service tax (on refuse collection and purely public services) (to be defined within year 2011) – income surtax (newly defined) – tourist tax – earmarked tax

The adopted tax system yields a *very uneven distribution of tax revenues* which will greatly advantage (once it will be fully operational) the *main cities* and the *holiday resorts*, while providing *very unstable revenues* to small towns, where real estate transactions are sporadic. This is why the Experimental Re-balancing Fund has been conceived and planned, until the Equalization Funds start up in 2014.

One comment on the above described scenario: as the tax base of IMU is given by non-residential property and industrial and commercial buildings and land, the suggestion is that the future *local* fiscal federalism in Italy *will certainly, but not excessively, be depending on business taxation*, as it is now in the United Kingdom with the rates. Such a consideration becomes stronger

recalling that for an unknown number of years IMU will co-exist with the main regional tax, IRAP, paid on the gross value added of firms and public bodies. The law 42 *explicitly mentions the future abolition of IRAP*, but… will it happen? There are many doubts about that! So, if Italy's local governments of the future want to foster local industrial or commercial development, for the moment they could do so through a suitable use of their IMU leverage.

3. The crossing of the reform with the financial crisis: a death in the cradle for fiscal federalism?

While the implementation mechanism of the "federal" reform was planned to produce rational and equitable *smooth reallocations* of resources among layers of governments and among units of the same layer, the fate is perhaps going to *deprive* altogether Italy's actors of the very resources they planned to use. In short, dark clouds are covering the initially shining sky of Italy's "federalism in the making" *(for less or more optimistic views see bibl.: Pedone; Pola 2010b; Rovelli)* The fears are those stressed in a very wise sentence written by an OECD team of experts: *"important reforms, also concerning relations among tiers of government, can be swept away by hard times as those we are living." (bibl.: OECD;* also: *IMF; Inman*).

Table 5: Deficit and debt as a % of GNP in some countries of Europe, 2009

Country	1	2	3	4	5
Austria	-3.5	67.5	-0.9	6.3	9.3
Belgium	-6.0	96.2	-1.0	11.0	11.4
France	-7.5	78.1	-0.3	8.2	10.6
Germany	-3.0	73.4	-0.8	29.1	39.6
Italy	-5.3	116.0	-0.4	8.6	7.4
Spain	-11.1	53.2	-2.6	11.5	21.7

Meaning of the columns:
1=Deficit TPS, 2=Debt TPS, 3=Deficit SCS, 4=Debt SCS, 5=DebtSCS/DebtTPS
Deficits and debts are calculated as a % of GNP
TPS= Total public sector, SCS = Sub central sector

Source: DEXIA, L'Europa delle Regioni e degli Enti locali, ediz. 2010/2011

These (end 2011) are certainly times of worsening financial crisis, which requires the *consolidation of public budgets* especially from countries afflicted by a huge public debt, like Italy *(for details see bibl.: OECD)*. But apparently the country is being over-punished: as Table 5 shows, Italy's performance concerning the sub-central deficits is not particularly negative as compared with Europe *(bibl.: Dexia-Crediop 2010, Dexia-Crediop 2011)*:

In addition, Table 6 confirms that a certain "stabilization" of the *sub-central* debt/GNP ratio during the years had already been reached. But since the responsibility of the (hopefully only potential) default of Italy stems from the *total* public debt which in 2011 has reached 120% of GNP, the warning from Europe and other international bodies has been very severe and pressing, so as to induce the Central Government to force the events and impose *re-balancing measures* to central and sub-central governing units. The measures

Table 6: Evolution of the sub central debt/GNP ratio in Italy, 2006-2010

Sub-central Governments	**2006**	**2007**	**2008**	**2009**	**2010**
Debt/GNP Ratio*	6.8	6.5	6.3	6.6	6.4
Debt bn eur	101.6	100.2	98.0	99.6	99.7

* These data do not coincide with those of Table 5.

are additional to those already envisaged by the Stability and Growth Pact, translated into a *Patto di Stabilità Interno* ever since year 2001.

The improvements of the budget balances requested to the sub-central governments are shown in Table 7: they are especially hard for the year 2011 and 2012 because in the same years the transfers from Rome to the periphery *have been severely cut*. Possibly things will be different in the future, since the central transfers have been abolished as from 2011 and turned into "own tax revenues" (see paragraph on the "municipal federalism" above) and therefore no more subject to the scissors of central government.

Table 7: Italy, "maneuvers" 2010 and 2011: the additional budget improvements initially requested by laws to sub-central governments (000 euros)

	2011	**2012**	**2013**	**2014 and ff.**
Ordinary Regions	4000	4500	5300	6100
Special Regions	500	1000	2000	3000
Provinces	300	500	900	1300
Municipalities >5000 pop	1500	2500	3500	4500
Total cuts	**6300**	**8500**	**11700**	**14900**

Source: Zanardi *(see bibl.)*

Focusing the attention on municipalities (only those with more than 5000 population are subject to the "Patto"), a complete reconstruction of their financial contribution is given in Table 8. It can be seen that for the year 2012 municipalities must produce a budget surplus of 3700 ml. euros irrespective

Table 8: Impact of the overall maneuvers on municipalities (000 euros)

	2011	**2012**	**2013**
Target of the Patto	2160	3700	4500
Cut to central transfers	1500	2500	2500
Overall financial contribution	**3600**	**6200**	**7000**
Incidence of the financial contribution on:			
– transferred resources 2010	29,2%	49,4%	55,8%
– current expenditure 2009	8,7%	14,8%	16,7%

Source: DEXIA, L'Europa delle Regioni e degli Enti locali, ediz. 2010/2011

of cuts from central transfers of some 2,5 bn euros: altogether a "sacrifice" of 6,2 bns., equivalent to some 15% of current expenditure.

4. A short conclusive remark

A conclusive remark on the situation of Italy as has been depicted so far could be that in Italy the fiscal federalism has started its march towards implementation despite the moderate enthusiasm of some of the actors involved for a reform that has not fully complied with their requests (the rich Regions of Northern Italy, which in vain asked for a "double speed federalism" like in Spain) and the massive bureaucratic complications of such an innovation for the governance machinery of the country.

In addition, the financial crisis has awoken the "old ghost" given by *the centralistic nature of the governance* of the country ever since its birth *(bibl.: Mangiameli)*. As a matter of fact the decisions that have been taken in the post-2010 period in Italy concerning the above described maneuvers have been very one-sided: Regions and Local Authorities complain not having been seriously involved in the shaping of the policies and decisions, despite the provisions contained in the fiscal federalism reform about mutual and "loyal" cooperation among layers of government. For this reason somebody has spoken of “a bomb on fiscal federalism” produced by the crisis.

This is exactly the hot issue of the political debate that has taken place in Italy in the 2010-2011 period and is still going on in 2012: sub-central governments (including those of the pro-Berlusconi territories) claim to be ready to share all sorts of sacrifices requested by the situation, but do not accept being treated as "obedient servants", without any room whatsoever for negotiating on the distribution of the burden among the "constituent units", being left free only to select the budget items to be reviewed, the social expenditure and the local transport being the first victims.

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Central Government Influence on Sub-Central Governments: The Case of Italy

Enrico Buglione

1. Foreword

The focus of this paper is the Central Government's (CG) influence over Ordinary Regions' revenue-raising and expenditure policies and, in more general terms, over their budgetary management.

This is an interesting case study because the CG influence has undergone a process of evolution which, from the point of view of the auditing methodology employed, can be divided in two phases: the "chain" phase, and the "electronic tag" phase.

The "chain" phase ran from 1970 (the year in which the Ordinary Regions listed in the 1948 Constitution finally became a reality), to the early 1990s. The financial autonomy of the regional governments was burdened by a whole series of highly invasive constraints which, while fairly ineffective as far as budgetary restraint was concerned, were very evident – hence the reference to the "chain" – and easy to detect in reading the regional accounts.

During that period, the Ordinary statute Regions played an important part in the economy and in government: their expenditure accounted for 8% of GDP and they managed about 23% of the total of the consolidated public spending. Yet they lacked:

- autonomous tax-raising powers (own tax revenues only accounted for about 2% of their total revenues);
- autonomous spending powers. In every area falling within their jurisdiction they were financed by CG tied transfer payments, the amount of which was decided annually. This was also the case with areas which were important even in those days, namely, hospital care – initially – and, after 1978, all health care.

Not only did total dependence on CG transfers weaken the Regions' accountability, but ultimately it gave CG sole responsibility for covering the regional deficits, since the regional authorities were unable to increase taxes levied on their citizens. Moreover, these deficits were facilitated by the comparative lack of transparency of the regional accounts, for whose drafting the govern-

ment had left a great deal of discretion to the Regions, probably in the belief that they were not particularly important.

It was during the 1990s that a raft of ordinary CG laws were enacted to address these problems and rebalance public accounts, looking ahead to Italy's entry into the euro area, and radically reforming the regional financing system. This reform also included the ways in which CG continued to exert its influence over regional budgetary policies. From that moment onwards, the constraints were only partly traceable to the regional budgets. This because they had been mainly 'hidden' in sectorial legislation and in the budgetary measures adopted every year to deal with every area of government in order to guarantee compliance with the European Stability and Growth Pact.

This marked the transition from the "chain" system to the "electronic tag" system, that is to say, to one that is certainly a more discreet approach than the previous one, and also one more effective, provided that there is a certain readiness on the part of the controlled entity to cooperate. Provision for this approach resulted from Title V of the Constitution as reformed in 2001, and was broached once again, as we shall be seeing shortly, in the recent reform of the financing system of the Regions and the local authorities, pursuant to law no. 42/2009.

This paper analyses the evolution of financial controls and audits, focusing on certain areas of relevance to the subject-matter of this conference:

- constraints on autonomous tax-raising powers;
- constraints on autonomous spending powers;
- strategies for guaranteeing consistency between the resources at the disposal of the Regions and the cost of their functions, particularly with reference to health care;
- the emerging areas in which the Regions can play a part in the matter of local finances.

2. Constraints on autonomous tax-raising powers

2.1 Prior to the 2009 reform

Before 1990, the Ordinary statute Regions had no tax-raising powers, as can clearly be seen from an analysis of their accounts. For barely a 2% of their total current revenues came from their own taxes (in so far as the Regions are able to manoeuvre them, at least in terms of tax rates).

In the years that followed, a radical change occurred. In 2005, for example, own tax revenues in the regional budgets accounted for 45% of the total current revenues, certainly not a negligible proportion. This growth in the volume of own tax revenues was due to the reform of the taxation system introduced in 1990, 1992 and 1995, and above all in 1996, when two specific and particularly important regional taxes were introduced, becoming effective the following year: the *Regional Surcharge on Personal Income Tax* (RSPIT) and the *Regional Tax on Productive Activities* (RTPA).[1]

RTPA and RSPIT are the main regional taxes: they raise 74% and 15%, respectively, of total regional tax revenues (the 2009 yield of these taxes was, respectively, 36 and 8 billion euro). The 19% of the remaining 11% came from the Regional Tax on Vehicles (RTV) and 2% from various minor taxes.

Box 1 summarises the substance of the tax-raising autonomy of the Regions in respect to the three main regional taxes.[2] Its most important aspects are the following:

- all current regional taxes were instituted and partly regulated by national legislation. Regional governments can enact legislation of their own to modify certain aspects of the tax, but they are under an obligation to levy it;[3]
- the basic RSPIT and RTPA tax rates set down in national legislation can be raised to a given ceiling. The RTPA rate can also be reduced to a minimum floor and the space for manoeuvre is symmetrical (+/- 1% of the basic rate);
- CG may always enact legislation to abolish all current regional taxes or change the rules governing them. For example, in the case of RTPA the standard rate was reduced from 4.25% to 3.90% and the tax base was changed several times;
- CG may oblige Regions running up substantial health care deficits to levy RSPIT and RTPA at the maximum allowed rates. When it is necessary to

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1 On the evolution of the regional financing system in the 1990s see Bosi & Tabellini, 1996; Strusi, 1999; Arachi & Zanardi, 2000; Giarda, 2000. For the earlier period, see Buglione, Pierantoni, 1990.

2 On the way this autonomy has actually been used by the Regions, cf. Buglione & Maré, 2010.

3 The only exception relates to minor taxes, like the regional surcharge on petrol consumption, provided by national legislation but applicable at the discretion of each Region (at the present time it only applies in seven Regions, and in all instances it is levied at a rate close to the permitted maximum of 2.6 eurocents per litre).

balance the budgets, the government may directly intervene by introducing extraordinary rates above the maximum;[4]

- lastly, to prevent increases in the national tax burden, for several years now CG has prohibited the Regions from raising RSPIT and RTPA rates, except in Regions with substantial health care deficits.

BOX 1 – Range of tax-raising powers vested in the regions on their own principal taxes

Range of powers	Principal Own Taxes		
	RTPA	**RSPIT**	**RTV**
Possibility not to levy the tax	No	No	No
Possibility to choose the tax rate (inside a range determined by CG)	Yes	Yes	Yes
General tax rate at which the tax must be levied if Regions do not choose a different one	3.90% of the value of the tax base	0.9% of the value of the tax base	2.80 euro/Kw (*)
Permitted range of tax rates	max 4.82% min 2.98%	up to 1.4%	+/- 10% per year
Possibility to vary the tax rate for specific categories of tax payers	Yes	Yes	Yes
Possibility to decide some aspects of tax management	Yes	No	Yes
Possibility for CG to oblige Regions with budget deficits for health care to apply the tax at the maximum rate and above	Yes	Yes	Yes
Possibility for CG to independently change tax regulations or abolish the tax	Yes	Yes	Yes

(*) Example of standard tax rate for cars in the pollution class euro 2, with no more than 100 kw.

4 So far, this central government power has only been used against one region in Central Italy (Lazio) and three Regions in Southern Italy (Campania, Calabria and Molise).

We might therefore say that as far as the Ordinary statute Regions are concerned, there has been a transition from no tax-raising powers (the 'chain' phase) to a situation in which this autonomy exists formally, but is subject to a series of constraints imposed by the laws governing individual taxes, or other measures such as the Budget Laws (the 'electronic tag' phase).

2.2 In the wake of the 2009 reform

At the present time, some 48% of the ordinary statute Regions' current expenditure is financed from revenues raised in their own territory, obviously with wide differences between the North and South due to different levels of economic development still existing in these two areas.[5] Legislative Decree No. 68/2011 – implementing the principles enacted in Law No. 42/2009 on the financing of the ordinary statute Regions – was intended to further raise the geographical revenues.[6] This will be achieved by sharing VAT revenues with the Regions on the basis of the territorial distribution of end sales, and by boosting own taxes in terms of both their revenue-raising capacity and their manoeuvrability.

With regard to autonomous tax-raising powers, the decree empowers Regions to enact new own taxes legislation, provided that this will not affect the taxable bases already subject to CG taxation. The Regions may also abolish some of the present minor own taxes. Lastly – and this is the most important innovation – the margins of manoeuvre have been expanded for the two main existing own taxes, namely, RTPA and RSPIT. For RTPA, the standard rate

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5 In Northern Italy, in 2009 the percentage of current expenditure covered by local taxes rose to 54%, while in Southern Italy the figure stood at 33%.

6 Law No. 42 of 5 May, 2009 is a complex piece of legislation affecting many areas, laying down a series of general principles to be implemented according to specific governmental regulations. The law sets out a root- and-branch reform of the system for financing the Ordinary statute Regions and local authorities. It also lays down measures for coordinating public finances and the taxation system, instituting new liaison bodies between central government and the regional governments, establishing a transitional procedure for instituting a new tier of government – the metropolitan cities – vesting the city of Rome, as the capital of the Republic, specific functions and special financial autonomy. The law also includes eight implementation measures to be adopted within two years of the date of entry into force of the law, namely, by May 2011 (although this deadline has been extended). The decrees implementing the law that have been brought into force so far include Legislative Decree No. 68/2011, which is mainly designed to reform the system of financing the Regions. For the overall examination of the substance of this law see Soriero 2009; Ferrara & Salerno 2010. On the decree implementing the measures governing regional financing, see Buratti 2011; Jorio 2011.

(3.9%) set by CG, and the ceiling for the increase left to the discretion of the regional governments (+1%), remain unchanged; conversely, the ceiling on tax reductions has been abolished (so after 2013 it will even be possible to reduce the tax to zero). For RSPIT, the CG will raise the standard tax rate (currently 0.9%) in order to replace the transfers which are to be abolished.[7] The manoeuvrability of this rate has also been expanded: it may be increased, albeit only in the case of Regions that have not increased RTPA, up to 2.1% (from the present 0.5%); it may also be reduced without restrictions, except that the yield may not fall below the present level of the regional transfers to municipalities.[8] Exemptions and deductions may also be granted. Independently of the tax, any reduction in tax revenues must at all events be covered by the region implementing it. Lastly, when assessing their fiscal capacity for the purposes of equalisation, the decree requires reference to standard tax revenues in all instances.

Decree No. 68/2011 certainly broadened autonomous tax-raising powers, but the regional governments could find its implementation difficult. Firstly because the introduction of new autonomous taxes must not affect the taxable bases already taxed by CG. To satisfy this obligation remains indeed very problematic, unless CG leaves room for the Regions to intervene (which is difficult to imagine). Secondly because, as far as the two main own taxes (RTPA and RSPIT) are concerned, the new areas of manoeuvrability opened up by the reform refer above all to cutting standard tax rates. The ability to implement policies of this kind, however, remains mainly theoretical. For the standard rates will be set by the CG in a way that the resulting yield – added to the revenues coming from the new VAT-sharing arrangement provided by the reform and the allocations from the equalisation fund – matches the expenditure needs deemed to be sufficient to guarantee, throughout the country and in every region, standard levels of service in the matter of health care and in other priority sectors (welfare, education, local public transport).

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7 To avoid increasing the burden on taxpayers, central government personal income tax rates will be simultaneously reduced.

8 The decree requires the regional governments to replace their existing transfers to municipal authorities by a share in RSPIT revenues.

3. Constraints on spending autonomy

3.1 Prior to the 2009 reform

The transition from the "chain" to the "electronic tag" phase – or in non-metaphorical terms, from a state of obvious lack of autonomy to one of apparent freedom – becomes even more evident with regard to the possibility of the Ordinary statute Regions to take decisions regarding the functional allocation of the resources included in their budgets.

Prior to 1990, the Ordinary statute Regions not only had no significant own taxes, but 80% of their total revenues came from CG transfers classified in the regional budgets as specific grants. CG power to influence the management of the functions devolved onto the Regions was therefore evident and wide-ranging, to the point that these could quite rightly be considered CG "agencies".

The reforms implemented during the 1990s, culminating in Legislative Decree 56/2000, radically changed the situation in formal terms. Most of the tied transfers, and primarily those to be used to fund health care, were replaced by general purpose revenues, that is to say, the new taxes referred to in the previous section and the allocations from the equalisation fund established by the same decree No. 56.

The Ordinary statute Regions therefore seem to have succeeded in acquiring a wide-ranging expenditure autonomy: since 2001, 80% of their total budgeted revenues have come from sources that are not subject to any constraints on their use, compared with barely a 20% in 1990.

Simultaneously with the liberalisation of tax-raising powers described above, CG put new strategies in place to influence more discreetly, but no less effectively, the way in which the Regions exercised their functions and, more generally, the way in which they managed their budgets, in order to ensure that they were able to meet two priority needs: to bring regional (and local) finance management in line with the public finance policies decided at the national level, and to guarantee Essential Service Levels (ESL) throughout the country for certain devolved functions.

The National Stability Pact (NSP) was introduced for the first time in 1998 to make sure that regional governments and local authorities played their part in complying with Italy's undertakings under the European Stability and Growth Pact.[9] The NSP is the main instrument for guaranteeing the coordination of public (central, regional and local government) finances, and for

9 In this connection, see Barbero, 2006; Balassone et al. 2002.

balancing them. Through it, the regional governments (as well as the local authorities) were required not only to achieve specific budget balances, but also: to contain current capital expenditure within given limits; to reduce particular expenditure items, such as expenditure on institutional organs, personnel, the purchasing of goods and services; to contain borrowing; not to raise own tax rates; to offset cuts of CG grants only by reducing expenditure and/or by improving efficiency. There are specific instruments for monitoring compliance with the Pact, and penalties for breaches.

For the regional governments, there is also a specific Stability Pact concerning the healthcare sector, aimed at reducing, and where possible doing away with, the scourge of budget deficits, that is to say spending without financial coverage. Great progress has been made in this area. Firstly, since 2002, healthcare financial needs and their territorial distribution have been decided through agreements between the central and the regional governments, in order to avoid subsequent recriminations about the cost of services to be guaranteed. Secondly, since 2005 a whole raft of strategies have been agreed upon to make the regional governments accountable for their deficits: CG financial assistance, which must be repaid, is only available if the regional government submits a financial recovery plan (i.e. staff cuts, reduction in beds, monitoring and auditing) and only if the plan is approved by the government, as well as by the State-Regions Conference; Regions running up a deficit are obliged to levy their own taxes at the maximum rates; in the most serious cases, the government will also introduce extraordinary tax rates. If the objectives of the recovery plan are not met, regional health care service can be entrusted to a CG appointed administrator.

Equally invasive are the constraints connected with the ESL guarantee. The current Constitution gives the CG exclusive power to identify the functions for which regional (or local) authorities are required to guarantee the ESL. At present, this has only been done in the field of health care; with reference to this, a long list of Essential Care Levels (ECL) was drawn up by agreement with the Regions as long ago as 1999, which came into force in 2002. Every year, bearing in mind, primarily, the need to balance the public accounts, the following are established: the financial requirement to guarantee ECL; the portion of the requirement to be covered by the regional governments with the standard yield coming from their two principal own taxes (RSPIT and RTPA); and the amount of the equalisation fund needed to cover the balance of the funding requirement. In practice, bearing in mind the constraints imposed by the ECL, most of the tax revenues and the proceeds of the equalisation fund must be considered tied revenues, even though in the budgets they are classified as generic revenues. Once again, therefore, the ‘chain’ is being replaced by the ‘electronic tag’.

3.2 In the wake of the 2009 reform

Law No. 42/2009, and in particular the Legislative Decree 68/2011 implementing it, confirmed and strengthened the approaches established prior to the reform.

On the one hand, any CG specific grants that still exist will be abolished and replaced by revenues that are formally free of any constraints on their use. The grants to be abolished are those – current and capital – currently allocated on a continuous basis to all Regions. Replacement revenues will come from regional taxes[10] and from the equalisation fund which the reform has retained, even though major changes have been made in it. On the basis of the budgetary data, then, expenditure autonomy will be further increased.

However, alternative instruments to monitor expenditure management will be strengthened.

To gain a better appreciation of this aspect, it should be recalled that the reform divides regional expenditure into two main headings: 'fundamental expenditure', and 'other expenditure'. Fundamental expenditure – which currently accounts for about 70% of the Regions' overall expenditure – includes healthcare and welfare, education and local public transport. For all these functions – and not only for healthcare, as at present – ESL will be defined, together with the expenditure which the country can sustain to guarantee them, given the public finance deficit-reduction demands. For these functions, and only for them, the CG also guarantees that the difference between the sustainable expenditure and the standard revenues from the taxes "dedicated" to funding them will be covered by a special section of the new equalisation fund introduced by the reform. [11]

With regard to expenditure autonomy, this means:

- extending the obligation to guarantee ESL for a wider range of functions;
- requiring every region to allocate the bulk of revenues to financing fundamental functions;

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10 Tax revenues comprise income from the RSPIT increased standard rate, as already mentioned, and from the new VAT sharing agreement. The overall amount of the transfer payments due from central government will be subsequently identified, as well the new RSPIT standard rate and the share of VAT revenues.

11 The "dedicated" tax revenues comprise the standard RTPA revenues and the geographical breakdown of VAT instituted by the reform.

- requiring every region to avoid exceeding the admissible expenditure ceiling laid down at the central level, because higher expenditure can only be covered by raising the tax burden on taxpayers.

Since this is coupled by a confirmation and a tightening of the constraints deriving from the NSP and the related rewards and penalties, one might conclude that CG ability to influence the management of the main functions falling within the jurisdiction of the regional governments, and to manage their budgets overall, will not be weakened by the reform. On the contrary, it will be strengthened.

4. How to guarantee adequate resources to meet the costs of the regional governments' functions.

In the long period of the "chain", namely from 1970, when the ordinary statute Regions were instituted, to the early 1990s, CG was the only judge of whether the cost of the regional governments' functions was adequately covered by the resources allocated to them. For each of the numerous tied transfer payments existing at that time, the CG autonomously decided on both the overall amount of the fund and its distribution across the Regions, estimating the expenditure requirement on the basis of parameters connected with the specific intervention to be funded. There was also an equalisation fund, known as the "Common Fund", which had been established in 1970 and then modified in 1976. This fund was structured in such a way as to provide the regional governments with a degree of certainty regarding the amounts they would receive, since its total amount was linked to the yield of certain consumption taxes. However, the rules were frequently adapted to meet the needs of the CG budget, and yet the fund had a very minor impact on overall regional revenues.

The only exception to the rule of total dependence on the CG to establish the amount of resources needed to perform their functions was in the field of health care. In that period, health care was also financed from a specific health care fund, but the initial amount allocated to the individual Regions was systematically changed at year-end, because of the widespread practice of the CG compensating any regional government overspend. It was therefore an 'open-ended' fund which was eventually adjusted to the actual expenditure of the individual Regions, but without following any rational plan for the division of resources.

Under the reforms of the regional financing system implemented from the beginning of the 1990s, major changes were introduced, also respect to the matter discussed here. More specifically, there was a tendency, which became

consolidated in the course of time, to involve more closely the regional governments in establishing the adequacy of the resources in terms of the functions to be performed.

One emblematic case here is the health care sector, which is of particular relevance for a variety of reasons:

- the volume of public expenditure earmarked to it (currently about 110 billion euro);
- the fact that this is the sector for which there is the greatest degree of decentralisation of public expenditure (the Regions disburse about 98%);
- the fact that this is a sector in which the Regions have been required, since 2002, to guarantee essential levels of service throughout the country;
- the fact that this is the very sector in which the Regions have run up huge deficits, jeopardising the policies for the rebalancing of public budgets.

It is precisely the need to contain the deficits that led to involving the Regions in defining the volume of resources required to guarantee the services laid down in national legislation. One of the reasons why these deficits arose originally was indeed the fact that the ceilings to regional expenditure, being established unilaterally by the CG, were not considered 'real' by the Regions.

After 2002, the practice was introduced whereby the amount of the funding needed to guarantee the services, and its distribution throughout the territory, was established on the basis of a CG proposal, and decided under agreements with the regional governments at the State-Regions Conference. The regional governments were required to agree on deficit-reduction strategies in Regions where substantial deficits were still being run up, as well as on systems for monitoring expenditure and the effectiveness of the services delivered (an area in which great progress is being made). It is also interesting to note that, at the behest of the CG, the most virtuous regional governments have been asked to offer their consultancy services to Regions whose health care expenditure management gives rise to particular problems.

This new strategy seems to be producing positive results. Firstly, agreements have always been found on the resources to be allocated to health care, taking account of the public finance constraints, sometimes despite considerable difficulties.[12] Secondly, the latest available data show that the recovery

12 For example, the negotiations for financing the ECL for the three-year period 2011-2013 were particularly complex, both between central government and the Regions to define the expenditure admissible at the national level, and between the regional governments for the distribution between them.

plans implemented in some Regions seem to be effective in reducing their massive health deficits.

The fair cooperation strategy – used also to reduce conflicts of power between the CG and the Regions, as is highlighted in Professor Mangiameli's paper – is nevertheless finding difficulties outside the health sector and, in more general terms, in the distribution between different tiers of government of the public expenditure containment targets. The government Bills in this field are submitted to the Conference for examination, but very little time is allocated for issuing an opinion on them and, in any case, where opinions have been expressed, CG has tended to ignore them.

The 2010-2013 budgetary measures are a good example in this regard. In July 2010, the CG issued a decree law introducing deep cuts in regional transfer payments. At the State-Regions Conference, the regional authorities criticised the cuts, claiming that they were out of all proportion to the share of public debt caused by them, and in any event that they were of such a magnitude so as to jeopardise their ability to continue delivering such important services as local transport and welfare. Yet the government dug its heels in, and the decree was duly enacted into law. Only *in extremis* have the Regions been able to ease the burden of the budgetary measures that they have to bear, and then only by a happy coincidence: the adoption of the decree implementing Law No. 42/2009 on regional financing, namely, decree No. 68/2011 which was mentioned several times. The positive opinion of the Regions on this measure was traded with a reduction of the scheduled cuts.

However, decree No. 68/2011 should help to resolve permanently the problems relating to regional participation in public financing decisions affecting them. One important measure here is the provision of the Public Finances Coordination Standing Committee, comprising representatives of the central, regional and local government authorities (art. 35). Among the numerous functions of the Committee the following are of particular relevance here: the distribution between different levels of government of public financing targets; monitoring of the effectiveness of the new financing model; ascertaining the adequacy of the resources in terms of the functions attributed; supervision of the rewards and penalties connected with the results of monitoring compliance with the NSP.

5. Possible openings for regional intervention in the matter of local finance.

As we have already seen, the strategy for involving regional governments in decisions relating to public financing adopted at the national level had already

been adopted before the fiscal federalism model reform under Law No.42/2009, particularly in the area of health care, which is extremely important in economic and social terms. This reform confirms that strategy, but it also opens up new and interesting opportunities for participation in the matter of public financing, in this case between Regions and Local Governments.

This feature, which was often neglected in the debate on Law No.42, appears to be particularly important in respect to one peculiar aspect of the existing fiscal federalism model. Unlike what occurs in most countries with a regional or federal structure, in Italy the Ordinary statute Regions have always played a wholly secondary role in the matter of local finance, the governance of which has been a task almost exclusively reserved to CG. Furthermore, financial transfers, particularly for the purposes of equalisation, have always been directly delivered from the centre to the individual Local Governments, despite the fact that the latter are quite numerous (more than 100 Provinces and over 8000 municipalities). The rules of the NSP regarding Municipalities and Provinces are also defined in a uniform manner at the central level, leaving no possibility for the Regions to better allocate the sacrifices required by the Pact within their territory, depending on the financial situation of the individual local authorities.[13]

This situation has been changed by decree No. 68/2011 which vests Ordinary statute Regions with a range of powers over local finance. More particularly, the Regions will now be able to:

- enact new legislation governing local taxes and set the margins within which they can act;
- change the criteria for distributing the equalisation funds transferred from CG to the local authorities, given that these transfers will pass through the regional governments' accounts, instead of being allocated by CG directly to Municipalities and Provincial authorities;
- redistribute the constraints of the Stability Pact between the local authorities within their own territory, while leaving unchanged the contribution to balance the national budget coming from Municipalities and Provinces in every region. In other words, the Pact for local authorities will become "regionalised".

13 It must, nevertheless, be noted that the Special statute Regions – particularly those in Northern Italy (Friuli Venezia Giulia, Valle d'Aosta, and the two Autonomous Provinces of Trento and Bolzano) – are already responsible for all three aspects mentioned above (regulating finances, equalisation transfers, the Stability Pact).

As was been pointed out, the purpose of allocating these new powers is to foster close collaboration between regional authorities and local authorities. For they can only be exercised by the Regions which manage to obtain the consent of their local authorities regarding the measures they intend to adopt. In the other Regions, CG will continue to intervene directly. The forum in which these agreements will be concluded is the Council of Local Government, provided by article 123(4) of the Constitution. All the Regions have laid down regulations governing this body in their own Statutes, and in many Regions it is fully operational already.

6. A few concluding remarks

In the matter of public finances, the evolution of the ways in which CG influences the Regions as described in this paper, suggests that Italian regionalism is now progressing towards its maturity.

One crucial element here has been the shift from a totally derived and tied financing system to a system in which regional own taxes have an important role. At the present time, this is the way in which 48% of the regional current spending is being financed, including health care, and in the Ordinary statute Regions in Northern Italy, because of their greater fiscal capacity, this figure reaches 54%. The intention is to make this level of government accountable for the cost of their functions, and improve its participation to the rebalance of public finance. It is precisely this sharing of general objectives – achieved obviously after some wrangling – that has made it possible to move away from the 'chain' to the 'electronic tag' system with regard to oversight and control. As we have seen, even though the supervision is more discreet now, it is no less invasive of the financial autonomy of individual Regions, particularly those which do not fall in line with the policies laid down at the central level under agreements between the central and the regional governments, as occurs in the health care sector. This may be considered an inevitable consequence of the fact that there is still a long and hard way ahead to balance Italy's public finances, and of the fact that the Regions are responsible for functions of major social importance (such as health care) for which the need to guarantee essential levels of service delivery throughout the whole territory is (still) strongly felt.

The reform of the regional financing system, which is about to come into force, maintains and strengthens this approach. For it increases the financing of the Regions' expenditure with own taxes and, in more general terms, with general purpose revenues; it creates new forums to foster the sharing of public finance policy-setting; it strengthens mechanisms for exercising supervision over the Regions which fail to comply with previous commitments. And

lastly, as we have seen, by assigning new powers to the Regions regarding local finance, the reform also fosters a new regime for cooperation between the Regions and their local authorities.

Of course there still remain many doubts regarding the way in which the new model will operate, partly because it is not yet ready in its final form.

One of these doubts has to do with the fact that by introducing greater tax-raising decentralisation the reform may widen the gap between the northern and southern Regions of Italy. The latter will continue to depend massively on the equalisation fund without which they will not be able to guarantee their citizens the essential service levels required nationwide. The Northern Italian Regions, on the other hand, with standard own-tax revenues and with the share of VAT yield, will become almost self-sufficient, and one region – probably Lombardy – will be fully self-sufficient. The spending power of the CG will therefore be very weak in relation to them. Under these new circumstances, will the wealthier Regions still agree to participate in the public deficit-reduction policies and the financing of the equalisation system?

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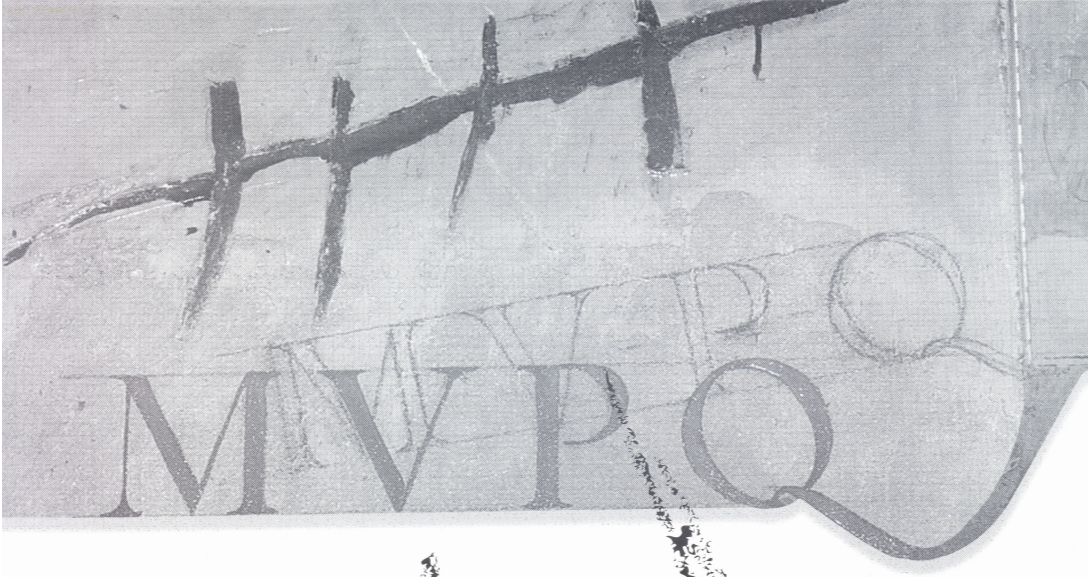

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