



ISSN: 2036-5438

The Functional Federalism of the United Arab Emirates

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Perspectives on Federalism, Vol. 15, issue 1-2, 2023





Abstract

Although only a young federation, the United Arab Emirates is prosperous and well-functioning, and its success set it apart from numerous unaccomplished federal experiments in the region. On the occasion of the golden jubilee of the UAE's 1971 establishment, this article aims to understand what model of distribution of powers is designed in the UAE and to what extent it is possible to classify it through the lens of comparative federalism. It is notable that flexibility in the provisions of the constitutions and in the jurisprudence of the UAE Supreme Federal Court shapes the division of powers between the federal government and the emirates. The analysis clarifies that despite evidence of dual and administrative federalism features, the UAE federalism model is still in the making. Nevertheless, it finds its relevance in a strong principle of supremacy of federal laws and the recent emergence of a direct relationship between the citizens and the federation.

Key-words

federalism, United Arab Emirates, distribution of competences, UAE Supreme Federal Court



1. Introduction

Fifty years ago, on 2 December 1971, a federation was born through an accord between 6 entities in the Gulf region known as ‘emirates’. This federation was called the United Arab Emirates (UAE), and Abu Dhabi was set as its capital. The emirates of Abu Dhabi, Dubai, Sharjah, Ajman, Fujairah and Umm Al-Quwain were the first members of the newly established federation. On 10 February 1972 a seventh emirate, Ras al Khaimah, joined them in the federation. Born after the dissolution of its predecessor, the Federation of the Arab Emirates^{II} which existed for few months only, standing among Muslim states where several newly formed federations were struggling to establish themselves in places such as Iraq, Libya, and Nigeria, and against the backdrop of a twentieth century littered with unsuccessful federations such as the West Indies (1958 to 1962) and Serbia and Montenegro (1992 to 2006) (Hueglin and Fenna 2015, 341), the United Arab Emirates has been a success and celebrated its golden jubilee^{III} in December 2021 in peace and prosperity. As nicely put by Heard-Bey, “the UAE is there to stay” (Heard-Bey 2021, 421).

The majority of scholarly literature on UAE federalism is available in the Arabic language. Bin Huwaidan gives an interesting recount of the political history of the United Arab Emirates including the steps to federal integration. The author notes that although the fifty years of the UAE’s existence may seem short in comparison to the age of countries, it is sufficient to provide us with much information on the federal experience in the UAE. The author observes that the federal structure of the UAE is now mature, having survived the inception stage where there existed real fear for its continuation as a federal state due to many internal and external challenges. Bin Huweidan posits that the UAE has now reached the stage of federal consolidation (Bin Huweidan 2022, 147-148).

In the English language however, scholarly literature on the federal system of the United Arab Emirates is scarce. Heard-Bey provides the most detailed historic account of the formation of the federation (Heard-Bey, 2021). Al-Abed summarizes the historical background of the birth of the federation and provides an overview of its main constitutional basis (Heyller and Al Abed (eds) 2021, 121). Simmons has researched the UAE federation and has recently provided an updated overview in a dedicated chapter in the Forum of Federations Handbook through which she reminds the reader of the history of the development of the UAE federation and conducts an interesting analysis of some



constitutional provisions relating to federalism. Simmons observes that the UAE constitution provides for “arrangements resembling a federation” that “reflects a compromise between emirates in favor of a centralized or integrated federalism and those that preferred persevering the autonomy of individual emirates” (Simmons 2020, 356). Further, the author acknowledges the significant constitutional federal powers but notes that they are counterbalanced by interesting powers granted to the emirates including residual powers and the ownership of the “natural resources and wealth” (Simmons 2020, 359).

Yet, many aspects of the UAE federation remain unexplored. In the very early stages after the formation of the state, the structure of the UAE was even sometimes identified as a confederation that was overlooked (Peterson 1988, p.198). The United Arab Emirates is very succinctly addressed in one of the most prominent academic works on comparative federalism. It is merely cited in a table of federations established in the twentieth century that are still in existence, in their order of formation (Hueglin and Fenna 2015, 48).

Building on the scholarship concerning the UAE federation, and acknowledging that the UAE remains a very young state which has yet to achieve its own preamble goals in becoming “*a comprehensive, representative, democratic regime*”, but is nonetheless a functioning and stable federation that has applied high international standards to itself and its people in many respects,^{IV} this research aims to conduct a critical examination of the UAE constitution and jurisprudence of the Supreme Federal Court with the aim of understanding the division of powers – mainly legislative and administrative –between the two levels of this federal entity. The division of powers is of fundamental importance in federal systems (Mueller and Fenna 2022, 1) and the ultimate purpose of analyzing the division of powers in the UAE federal order is to identify how or where the UAE federalism model follows classification of federalism systems in comparative federalism while capturing its main characteristics. The paper intends also to present new material for reflection in the ongoing federal debates and constitutional experiments in this troubled region of the world where transplanting Western style models of federalism may not necessarily be the most suited option.

The next section will set the conceptual contexts by briefly discussing traditional federalism models.



2. The Models of Federalism

Constitutionalists agree that there is no single definition of federalism, nor a single model of a federal state. Federalism represents “a family of disparate systems” (Parikh and Weingast 1997,1593). However, it is constant that federalism finds its foundation in a partnership that aims to build a state through a stable framework of government that is established voluntarily, aiming to achieve unity while accommodating and preserving diversity within a larger political union. One of the key principles of federalism is the principle of a vertical division of power between the federal and constituent levels, a division that comes in addition to the horizontal division of powers in any state between the 3 branches: government, legislative and judiciary. This constitutes a defining characteristic of any federal system (Parikh and Weingast 1997, 1598). Other principles pertaining to the autonomy of the entities and the external sovereignty of the federal state, as well as the principle of participation of the entities in the federal level of government, are also paramount to the existence of a federal order. If these principles are respected, there is a large margin for maneuver in calibrating the government and governance aspects between the two levels in the federation.

As Hueglin and Fenna explain, “one of the most important distinctions between federations will be the approach they take to dividing powers and responsibilities between the central government and the government of the constituent units” (Hueglin and Fenna, 2015, 53). Classically, scholars distinguish between the following two basic models: dual federalism and administrative federalism. The first model is based on the American model of federalism. It creates “distinct national and subnational policy domains” and makes each level of government responsible for the entire policy-making process including implementation and administration (Hueglin and Fenna 2015, 53). Since its establishment in the US, the model of dual federalism has been replicated in other federations across the globe including Canada, Australia and many others.

The second model finds its roots in German federalism and is commonly known as administrative federalism or the administrative division of powers. It reserves legislative power to the national level of government, granting executive and administrative powers to the local level or units of the federation. In Germany therefore, the legislative powers are concentrated at national level and most administrative powers rest with the local units known



as *Länder*. With administrative federalism, a significant degree of cooperation naturally exists between the two levels of the federation.

Comparative federalism is a complex field, given the many ways in which a federation can be constructed and operate, and they often do not follow traditional classification (Hueglin and Fenna 2015, 55). What model of distribution of powers did the UAE founders design for their new federation? In other words, to what extent is it possible to classify the division of powers in the United Arab Emirates?

In order to answer the question posed by this paper, section 3 briefly reminds the reader of the birth of the UAE and some important aspects relating to the context of its establishment. Section 4 provides an overview of the constitutional distribution of powers between the two levels of government in the UAE through which a large margin of flexibility is revealed. Section 5 attempts an unsuccessful classification of UAE federalism; Section 6 rationalises UAE federalism, revealing its atheoretical dimension. Section 7 seeks an explanation for the effectiveness of UAE federalism in light of its flexibility, and last; Section 8 concludes the research paper.

3. The Birth of UAE

On 2 December 1971, the sheikhs of each entity signed an agreement declaring the establishment of their federal state. This historical document has since become an integral part of the Constitution as its preamble. The latter shows that from its inception, UAE federalism has not been based on the joining of diverse cultural communities defined by their language, race, religion or other trait. At a time of regional instability created in the aftermath of the British withdrawal from the gulf, the 6 sheikhdoms decided, for political and economic reasons, to unite in a new federation called the United Arab Emirates, which two months later welcomed a seventh sheikhdom. The preamble emphasizes in its second paragraph the desire of the founders and the desire of the people for “more enduring stability and a higher international status for the Emirates and their people.” In addition to this, the third paragraph mentions the desire to create a state that is “capable of protecting its existence and the existence of the its members.” Common cultural reasons are also present in the core of the establishment of the UAE as the preamble stresses with pride the common Arabic roots and Islamic beliefs (Bin Huwaiden 2022, 96).



As far as the form of government of the newly established Union was concerned, the founders, with a sense of pragmatism, and being fully aware of “the realities and the capacities of the emirates at the present time”^v intended that the United Arab Emirates would become a “comprehensive, representative, democratic regime”. By setting a representative regime as a goal and not an immediate reality to implement in the newly formed state, the founders saved the federation from certain chaos. Simmons explains that around the time of the constitution of the UAE, the population was “less than 100,000 residing in impoverished desert villages and practicing a traditional way of life” (Simmons 2020, 354). Heard-Bey points to the “extremely harsh climate and inhospitable environment (that) imposed terrible hardship on the people born in the emirates before the oil age” (Heard-Bey 2021, 418). The knowledge index shows that half of the population of the UAE was illiterate at that time.^{vi} The goals set in the preamble, including to “prepare the people for a free constitutional life”, were set by the founders as a necessary precursor to the realization of the ultimate form of government. Since its establishment, the federation has invested heavily in its human capital making significant progress in the education sector. It has also made steps towards democracy^{vii}. This approach founded in realism helps with understanding the federalism choices in the UAE and provides the roots for its viability.

4. Understanding the distribution of powers in the federal UAE order

It is notable that flexibility in the provisions of the constitution as well as in the jurisprudence of the UAE Supreme Federal Court shapes the division of power between the federal government and the emirates.

In the federal constitution

Flexibility seems to be provided by constitutional design in the distribution of powers between the federal and the local authorities, known as emirates. It can be seen through the following aspects: (1) the distribution of legislative and executive powers between the federal and local levels, (2) the wide default powers granted to the emirates, and (3) the extended prerogatives of the emirates in the field of international relations.



1- The distribution of Legislative and Executive Powers.

The distribution of powers between the federation and the emirates is detailed in chapter 7 of the UAE constitution. Article 120 defines the 19 subjects in which the federal government has exclusive jurisdiction in the enactment of laws and in their execution. These include foreign affairs, defense and the armed forces, the protection of security against internal or external threat, finances and taxes, duties and fees, air traffic control and the issue of licenses to aircraft and pilots, nationality, passports, residence and immigration, currency notes and coins etc. Article 121 defines the subjects in which the federal government has authority for the enactment of laws only, leaving the execution of those laws to the local governments. This category includes work relations and social security, real estate ownership and expropriation for public interest; handover of criminals; banking; insurance of all kinds; protection of flora and fauna etc.

Finally, Article 122 grants the emirates with all residual powers, providing that: *“the emirates shall have jurisdiction in all matters not assigned to the exclusive jurisdiction of the Union in accordance with the provisions of the two preceding Articles”*.

Therefore the emirates execute not only the laws they enact themselves pursuant to their legislative power in all subject matters residually covered by Article 122, but they also execute the laws enacted by the federal authority in specific areas defined by the constitution itself in Article 121.

2- Blanket legislative and executive prerogatives granted to the emirates.

In addition to the distribution of powers between the federal government and the emirates illustrated by Articles 120, 121 and 122 of the UAE constitution, other constitutional provisions vest upon the emirates a sort of blanket legislative and executive power adding yet another layer of complexity to the distribution of respective powers.

Article 125 grants the emirates a general power to take necessary measures to implement the laws enacted by the federation and Article 149 vests upon the emirates a generic power to enact laws even in matters reserved exclusively to the federation by Article 121 when those laws are necessary for their executive role in an area covered by that Article. Article 149 provides that: *“As an exception to the provisions of Article 121 of this constitution, the emirates may promulgate legislations necessary for the regulation of the matters set out in the said Article without violation of the provisions of the Article 151 of the Constitution”*.



As such, the emirates can, on the basis of Article 125 and Article 149, enact laws and execute laws in matters where responsibility has not directly been granted to them by Articles 121 and 122 of the Constitution.

The Federal Supreme Court has upheld these extra blanket powers vested upon the emirates by the Constitution on different occasions. In a decision rendered not long after its establishment on 8th November 1981,^{VIII} the Court argued, in application of Article 149, that, although in principle, according to the explicit text of Article 121, the federation unilaterally legislates in the affairs of protecting livestock, defining the territorial waters of the state, setting the conditions for fishing in these waters, and determining the procedures for issuing a fishing license, an exception may be made for the emirates to deal with legislation on these matters until federal legislation is issued on them.

A few years later, during judicial review proceedings, the Federal Supreme Court upheld the constitutionality of a law issued by the emirate of Sharjah on a subject reserved by the constitution to the federal authority, on the basis that the latter had not yet enacted laws on the subject in question. The Court stated:

“Whereas, as long as the federation did not issue any legislation regarding the control of alcoholic beverages to regulate the affairs of continuing and exporting the status of alcoholic beverages, obtaining and consuming them, and supplying them to others, as is the content of the provisions of the law issued in 1972 by the Emirate of Sharjah in this regard. The aforementioned law is issued by a competent authority in accordance with the provisions of the Constitution”.^{IX}

The discussion of those powers granted to the emirates is echoed by Simmons who notes the extraordinary scope within the federation for each emirate to shape its own economic development, as well as her statement that the constitution permits the promulgation of legislation by the emirates in the areas of jurisdictions allocated to the federation (Simmons 2020, 356).

3- Powers of the emirates in international relations.

Flexibility is also present in the federal constitution in the matter of international relations and foreign affairs. Article 123 permits *“as an exception to Article 120 concerning the exclusive jurisdictions of the federation in matters of foreign policy and international relations”*, the emirates to conclude limited agreements of a local and administrative nature with the neighbouring states and regions under specific conditions that will be detailed later in this paper. The same



provision allows the emirates to retain their membership of, or join if they were not member before 1971, two specific international bodies, namely the Organization of Petroleum Exporting Countries (OPEC) and the Organization of Arab Petroleum Exporting Countries. It may be true that international relations are increasingly the domain of subnational entities such as the emirates (Michelman and Soldatos 1990) but the emirates interference in the supposedly exclusive domain of the national government has been a matter of tension. The term *paradiplomacy* is commonly used to note such activities of non-central governments in international relations. Usually, the central government has the exclusive authority to conduct external affairs. Comparative federalism shows that it is rare that a constitution grants such flexibility towards international relations in its own provisions as is seen in Article 123.

In the jurisprudence of the Supreme Federal Court

The jurisprudence of the UAE Supreme Federal Court has fully embraced the flexibility embedded in the constitution. It has applied the principle of flexibility sometimes in favour of the emirates (1) and other times in favour of the federal authorities (2), thus becoming an indispensable adjudicator of the UAE federal order.

1. Judicial Flexibility benefitting the emirates

In the 1981 *Livestock* jurisprudence discussed above, the Court contended that the emirates can legislate on a subject exclusively reserved to the Federal authority as long as the latter has not yet enacted laws on it.^X A decade later, in a decision rendered in 1992, the Court went one step further by accepting that local laws on matters exclusively reserved to the federal authority by Article 121 can coexist with federal laws on the same matter on the condition they do not contravene any of the federal provisions. The Court stated that:

“It is permissible for the emirates to issue the necessary legislation to regulate commercial affairs, provided that they do not conflict with the federal laws that regulate them”. The Court continued: *“Although the legislation related to Company Law falls within the enumerated matters in Article 121, and is, as such, originally reserved exclusively to the federation without the emirates, yet it is permitted, in accordance with the text of Article 149 of the Constitution, to issue the necessary legislation to regulate these affairs in a way that suits their special circumstances, provided that the enacted laws do not contain provisions that contradict the federal laws that regulate it”.*^{XI}



It is interesting to note that the openness of the Supreme Court towards cooperation between the federal government and the emirates on certain areas does not always result in advancing the autonomy of the emirates through the adoption of a broad interpretation of the provisions of the Constitution allowing them to function with the greatest autonomy possible. The attitude of the UAE Supreme Court in adjudicating on these powers is balanced as on other occasions it has ruled to the advantage of the federal government on areas which were reserved in principle to the emirates.

2. Judicial flexibility benefitting the federal authority.

The UAE Federal Supreme Court demonstrated its flexibility in one of the earliest decisions rendered by the constitutional division on 14th April 1974. The Court was invited by the federal government to interpret Articles 120 and 121 of the Constitution relating to the legislative and executive powers with the request to clarify what the provisions meant in terms of distribution of powers between the federal entity and the emirates. On this occasion the Supreme Federal Court granted an unequivocal invitation to the federal government to intervene in topics reserved to the emirates. This extension was however accompanied by a defined framework to govern its use.

The Court constructed its interpretation in three steps. In the first step, the Court took the time, in a very pragmatic approach to such a foundational decision at this early stage of the establishment of the state, to explain in detail, in the form of an academic exercise, the definitions of the legislative and executive powers and the differences between the laws and regulations.

The Court explained that legislation refers to the rules issued by the federation through the authorities that have the power to issue them according to the forms and in accordance with the procedures stipulated in the Constitution. Such legislation should be comprised of general and abstract norms and it should comply with the Constitution. The Court addressed itself to the UAE Council of Ministers who had requested this judicial interpretation and clarified that the executive authorities of the federation cannot issue regulations on matters for which the Constitution requires legislation.

As far as regulations are concerned, the Court explained that: *“what is meant by the executions of law are the administrative measures issued by the competent enforcement authorities and necessary to put the law into practice. They are either general regulatory decisions that lay down the detailed rules setting the*



method for implementing the legislation, or individual administrative decisions or other complementary decisions necessary to facilitate the implementation of laws. All these decisions and actions must comply with the law issued for its implementation". It further explained, with the same pedagogical approach, the functions of the authority entrusted with the implementation: *"It does not have the power to decide a rule that leads to amending or suspending the law or exempting it from its implementation, and it does not have the power to add new provisions to the legislation"*. Having outlined the background, the Court explained to the authorities that had instigated the case that the importance of the right to implement the law should not be underestimated, because the provisions of the law may not be enforceable without further implementation, and laxity in such implementation may disrupt the law, and thus regulatory decisions necessary to implement the law should be issued promptly.

In a second step the court focused on the two provisions relating to the distribution of legislative and administrative powers in the UAE federation, Articles 120 and 121 of the Constitution. The Federal Supreme Court thoroughly delimited the distribution of legislative and executive powers between the two levels of authorities in the UAE federation. The Court provided:

"In terms of the distribution of legislative and executive competencies between the federation and the Emirates, the federation has exclusive powers in legislation and execution in the affairs listed in Article 120, and it has powers in legislation only in the affairs listed in Article 121, while the emirates are concerned with the execution of the affairs listed in Article 121".

In a third step the Court cautiously delivered the possible exceptions to the principle it had presented earlier. The court provided that *"in few situations, in the course of legislating under Article 121, the federation might find out that this matter overlaps or connects with another matter that falls within the legislative and executive exclusive federal prerogatives of Article 120 in such a way that it is not possible to separate them"*. The Court argued that in this case, the federation extends its legislative power to include the execution power as an exception to the provisions of Article 121. The Federal Court based its interpretation on an analysis of the equivocal opening provision of Article 121 that it was *"without prejudice to the provisions of the preceding article"*. The Federal Court justified extending an invitation to the federal government to act in an area reserved to the local government by following a *contrario* reasoning in the decision. The Court stated: *"this is because giving the executive authority to the emirates in this particular topic contradicts the federation's unilateral executive power on the overall topic, for which the sole responsibility should be the federal authority"*



according to the text of Article 120⁹. It thus identified an inseparable relationship between a topic where execution falls under the prerogative of the local government and a topic where execution falls under the prerogative of the federal government. In this particular situation, the interpretation of the Court permitted the latter to take a prerogative reserved to the former.

This extension was however tightly constrained by the Court. In its 1974 decision the Federal Court provided the interpretation of Articles 120 and 121 requested by the Council of Ministers in accordance with Article 99 of the UAE Constitution. Aware of the pivotal importance of such an interpretation at an early stage in the life of the federation which had only established itself in December 1971, the Supreme judge took the time to provide detailed explanations and justifications. Not only was the reasoning explained before an expansive interpretation of the provisions was endorsed, but more importantly, the Court firmly framed the parameters for such an extension. It developed three prerequisites which must be met before the expansive interpretation could be relied upon: 1- establishment of a criterion, 2- definition of the nature of this criterion and 3- setting a rule for limitative interpretation.

While the Court referred to the existence of an overlap between the subjects listed under Article 120 and those under Article 121, it made it clear that the overlap itself was not sufficient to justify the federal government subsuming a local government power of execution. The Supreme Federal Court's reasoning gave rise to the following rule: the two subjects should be tightly linked to one another, creating an inseparable connection between them. *"This link must be organic and direct"* said the Court before continuing that: *"the two subjects should be linked to each other's as the part is linked to the whole"*. The Court further explained the characteristics of the link between the two subjects, stating that: *"in a way the execution prerogative itself becomes possible from a practical point of view only if it is combined along with the legislative prerogative in the hand of the federation"*. The Court further expanded on the extent to which the identification of such a criterion should remain limited in order to avoid: *"the expansion of the competences of the federation at the expense of detracting from the competences of the emirates"*. The Court was keen not to render Article 121 an empty provision by incorporating it into Article 120, and thus referred to the rules of interpretation in its ruling by stating *"the provisions of the Constitution should interpret each other's and not abrogate each other's"*.



In brief, the Supreme Federal Court upheld an extensive power for the federal government to appropriate the executive prerogative of the emirates granted by the Constitution in Article 121 when it judges that the subject of the legislation connects organically or directly with a topic listed in Article 120 in which the federal authority legislates and executes.

This particular flexibility in the constitutional design of the federation reflected in the jurisprudence of the UAE Supreme Federal Court cannot but impact on the nature of the UAE federal model. By designing a federation based on its realities, needs and aspirations, has the UAE shaped a very special theoretical model of federalism?

5. Attempts to define the UAE federalism model

This section examines the theoretical nature of federalism as applied in the United Arab Emirates, attempting to determine which federalism model is followed by the UAE.

A first glimpse at the allocation of powers in the main provisions of the constitution might perhaps create a perception of dual federalism in the UAE. Dual Federalism refers from a legal perspective to a particular model of allocating functions between the federal government and the local entities, characterized by defining separate and exclusive spheres for each level's actions (Young 2014, 34-82). As is noted above, Article 120 defines limited topics within the scope of powers reserved to the federal authority; and Article 122 provides a residual power to the emirates of jurisdiction in all matters not assigned to the exclusive jurisdiction of the federation. It would thus be possible to say that these provisions create separate and distinct spheres of authority as between the federal entity and the emirates; an approach consistent with what is referred to as the theory of dual federalism. Historically, in comparative law, the Constitution of the United States of America is seen as putting in place a dual federalism by allocating specific and enumerated powers to the federal government and reserving the remaining powers to the states. The 10th Amendment provides that "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people". One can see an analogy between the 10th Amendment and Article 122 of the UAE Constitution, as both provisions



grant the local authorities' wide powers to enact laws and regulations on all matters not specifically reserved by other provisions to the federal authority.

Scholars who researched the UAE federal system have mostly identified it as a system of dual federalism (Bin Huwaiden 2022, 67). Nonetheless in the United Arab Emirates, a deeper analysis of federalism matters in the Constitution itself and in the jurisprudence of the Supreme Federal Court reveals a more complex relationship between the two levels of government, and sets the scene for a more nuanced approach to the UAE theory of federalism.

The flexibility described above stems from a theory of federalism far removed from separating the roles of the federal and local entities into specific spheres or layers. Rather they show considerable connections in their various mechanisms.

A summary of the legislative and executive distribution of powers between the emirates and the central authority in the UAE would assist at this point. The federal authority enacts laws and executes them in certain matters as defined by the Constitution (Article 120). The federal authority legislates in other defined matters on which the execution is left to the emirates (Article 121). The latter has a residual power to legislate and execute in all matters not granted specifically to the federal authority by the Constitution (Article 122). Yet, both the federal authority and the emirates have been entitled by the Supreme Federal Court to impinge upon the areas reserved to the other through the following fine balancing exercise: on the one hand, the emirates can execute and enact laws in areas where the federal authority has not yet acted even if the matter is exclusively reserved to the latter. Furthermore, they can maintain their legislation on matters reserved to the federal authorities even when the latter has enacted federal laws, provided that the local laws of the emirates do not contradict the federal laws. On the other hand, the federal government can enact executive ordinances on areas reserved by Article 121 to the local government, when not doing so affects its executive and legislative powers listed in Article 120.

A dissection of some aspects of the mechanisms quoted above seems required in order to be able to identify if other theories of federalism invite themselves into the model of the UAE federal order.

For a very wide array of topics including banking, insurance, company law, civil and commercial transactions, procedural codes, and many others, Article 121 of the UAE constitution reserves the policy making to the federal level and the implementation to the



local levels known as emirates. This explicit distribution of functions on a vast array of subjects is a defining characteristic of a European-style model of federalism born in Germany and known under the appellation of administrative federalism. The German constitution in its Article 83 provides that “the Länder shall execute federal laws in their own right insofar as this Basic Law (i.e. the constitution) does not otherwise provide or permit”. Hence, as a general rule, it is assigned to the Länder of the German Federation to carry out the policies enacted by the federal authorities. In the UAE, by assigning the policy making to the federal authorities on a list of topics but requiring their implementation by the emirates, the constitution has adopted a dedicated provision that defines the feature of administrative federalism. Furthermore, the wide spectrum of subjects covered by the broad enumeration of Article 121 reinforces that the drafters of the Constitution were pursuing a type of administrative federalism, very different in its conceptualization from the model of dual federalism.

Features of both dual and administrative federalism are thus present in the constitutional design of the federation in the United Arab Emirates. The former, or American style federalism, can be seen in Articles 120 and 122, and the latter, the German style of federalism, is seen in Article 121. Furthermore, Articles 125 and 149 bring to the UAE federalism a certain constitutional element of cooperation between the two levels of the federation. This cooperation seems paramount for the proper functioning of the whole, and it takes place in concurrent or shared jurisdictions on many aspects. In the US, dual federalism has been slowly evolving towards this sort of cooperation, instituted not through constitutional norms, but rather through decades of evolution of the US Supreme Court jurisprudence.

It was through the jurisprudence of the Supreme Court that the states were granted the possibility to enact laws on matters reserved to the federal state provided that the state laws do not conflict with federal law or jeopardize the goals of the federal regulations. These interpretations of constitutional provisions by the Supreme Court have prepared the ground for some evolution of US federalism towards more cooperation. Scholars have referred to this phenomenon of cooperation as a marble cake federalism where federal and local entities do not act in completely separate spheres but rather come together on many aspects, like the two layers of a marble cake are closely entwined in the same space (El Sabawi 2020, 598).

When comparing the US federal path with that of the UAE, one can observe that it took decades of US Supreme Court jurisprudence to establish a functional version of federalism,



moving from a restrictive jurisprudential interpretation of dual federalism towards cooperative federalism. In the UAE, the constitution seems to have established the basis for a principle of functionality at its conception in 1971, thus sparing endless tension on the subject. Indeed, looking at the US distribution of powers helps to illustrate the extent of the pragmatism and flexibility provided by the UAE Constitution itself and echoed through the jurisprudence of the UAE Supreme Federal Court, which maintains a highly pragmatic jurisprudence in this regard, playing, as seen in the previous section, the role of the adjudicator or the guardian of the UAE federal order.

In sum, cooperative federalism as seen in recent years in the US, also seems to be embodied through Articles 125 and 149 of the Constitution, in addition to the two dominant models explored above.

Furthermore, it is possible to identify through the federal mechanisms in place in the UAE the implementation of the doctrine of enumerated powers. UAE federalism welcomes the presence of concurrent powers. As explained by Nico Steytler, “we speak of concurrent powers, generally, when the federal government and constituent units may or do operate in the same policy fields” (Steytler 2017, 1). In the UAE constitution, Article 149, as seen above, provides clearly that the constituent units can enact laws that are necessary for the regulation of a few subjects under the limitation of the supremacy of federal laws. This means that the constitution does not object to concurrent legislative power shared by the federal level and the emirates for specific topics. The Supreme Federal Court has pushed the concurrent power mechanism even further by allowing, as explored above, the emirates to enact laws on a topic reserved to the federal power provided the latter has not yet acted in that area and by allowing the federal government to implement policies in areas reserved to the emirates.

The combination of the various federalism features and mechanisms in the UAE federalism may appear unusual, but is in fact not uncommon. The next section will discuss its rationale.

6. Rationale for the UAE complex classification: functional federalism

First, federalism in many countries has not been static. Comparative federal experiences have shown that federalism is in constant motion. Even in cases where the constitution has not changed, such as in the US, the jurisprudence and political and socio-economic dynamics



have forced the evolution of the federal model with the addition of cooperative and integrated elements. A similar trend can be identified in Canada where the Supreme Court has gradually “pulled away from a dual understanding of the division of powers set out in Constitution Act, 1876”, and moved towards “allowing larger zones of contacts between federal and provincial legislations” (Boudreault 2020, 6). While Canada retains its dual federal model, it has integrated many cooperative and administrative elements. Thus, the Canadian federalism can “no more be characterized, according to the Supreme Court itself, as founded on watertight compartments” (Gaudreault-Desbiens 2014, 1). In other countries the evolution has been more premeditated, by means of constitutional reforms that have directly impacted on the federal model itself, for example, Switzerland which has purposely moved from dual federalism to administrative federalism.

Second, administrative federalism, the features of which appear in Article 121 of the UAE Constitution, does not operate exclusively in any federal model. Even in Germany, the land of its birth, few subjects remain under the administrative realm of the central government alone. Thus, even where elements of administrative federalism are detected, it is not surprising to find them alongside some elements of dual federalism. In this vein, identifying a mix of federalism theories in the UAE order could seem in line with any traditional administrative federalism. However, in the UAE the number of subjects under the full competence of the federal government under Article 120 is high in comparison to other federal states (Bin Huwaiden 2022, 74).

Third, comparative federalism provides various illustrations of a combination of federalism models. Scholars Mueller and Fenna point to India as “an interesting case where a substantial element of administrative federalism was introduced into what was overall a dual system” (Mueller and Fenna 2022, 13). Indeed Schedule 7 of the Indian Constitution consists of three different lists: the Union list, the state list and the concurrent list.

Fourth, reasons inherent to the specific context of the birth of the UAE can help to explain the difficulty of placing the UAE model of federalism in a particular category. In 1971, constitutional theories were not the primary concern of the drafters of the Constitution. Their key aim was the establishment of a unit that could be a viable structure in which a state could exist, defend itself and educate its people, with the aim to move in time towards a more accomplished order with democratic features and more defined political and constitutional regimes. The preamble of the constitution attests to this pragmatic



approach, far from dogmatic categorization or political modelling. The UAE federal order was the result of negotiations between the different entities while planning to federate under a leadership aware that “there is no place in today’s world for weak entities” and that the establishment of a federal order was the only way forward, as Sheikh Zayed bin Sultan al Nahyan, founder and former president of the UAE pointed out at the time. The UAE federal order is the result of a tentative constitutional sketch that was established as temporary at first, in order to test its functionality and viability. The constitution was only made permanent in 1996. Simmons rightly notes that “the constitution reflects a compromise between emirates in favor of a more centralized or integrated federation and those that preferred preserving the autonomy of the individual emirates. Sheikh Zayed of Abu Dhabi has always been an advocate of the former, while Sheikh Rashid of Dubai traditionally supported the latter” (Simmons 2020, 356). The combination of different federal mechanisms from different federalism models seems to be simply the constitutional result of this political compromise.

The UAE in 1971 was thus not aiming for a particular model of federalism, but rather wanted to retain flexibility and keep cooperation on the table for the sake of viability and functionality.

In comparative literature, scholars have argued that the federalism in the US “was not an embodiment of any particular philosophy nor was it an excessively legalistic undertaking” (Glendening and Reeves 1977, 329). In this perspective, “in contrast with the kind of understanding associated with dual federalism and its progeny”, federalism can also be simply “explicitly atheoretical” (Rosenthal and Hoefler 1989, 7) or as identified by Glendening and Reeves, it can be a pragmatic federalism. It would perhaps be a stretch today to define the very mature model of US federalism as not belonging to a theoretical model or simply a pragmatic approach. However, 200 years ago at its birth, it likely could have been accurately described as either.

One could also view UAE federalism as an empirical federalism, since it is based on captured experiences, pragmatic solutions and effectiveness, rather than on conceptual paradigms and theories, or formalistic approaches.

The oscillation of the federal court between supporting the powers of the emirates and strengthening central powers to create a fine balance reveals a concern to achieve a functional result. Thus, Emirati federalism appears, at its present stage of maturity, to follow a form of



federalism shaped by the dominant political dynamic, and the need to find a balance and solutions to pressing questions, rather than a federalism which responds to global federal designs or particular constitutional theories. The Supreme Federal Court as an adjudicator of the federal order is doing “whatever a situation requires” within the contours of the process sketched by the federal mechanisms of the UAE (Rosenthal and Hoefler 1989, 7). This can clearly be seen to be a pragmatic approach.

It is thus argued that the UAE federal order was not concerned with fitting a particular model or theoretical category. Rather the priority was to establish broad rules of federalism with the aim of making the establishment of the UAE state doable, workable and functional. UAE federalism can still be seen today as atheoretical, but it is not prevented from evolving with time and maturity, into one of the classic, or less well known, federal models of comparative federalism.

This flexibility, added to some other peculiarities of the UAE order including the composition of the federal institutions such as the Supreme Council, has pushed few scholars to see in the UAE some sorts of confederal arrangements rather than a federation (Simmons 2020, 4 and Peterson 1988, 198). Nonetheless, the UAE is not a confederation for the following reasons: (1) the role of the emirates in international relations remains very limited, it was further reduced with the reduction of oil resources (Bin Huweiden 2022, 73), hence the emirates do not retain full sovereignty necessary to confederal orders, (2) both levels in the UAE order exercise, as elaborated above, meaningful powers which is a determinant factor in defining federations (Fenna and Schnabel 2023, 1), (3) the 1996 constitutional revision confirms the permanent status of the UAE constitution and reaffirms the federal order as the definite principle of state organization, and (4) the organization since 2006 elections for the Federal National Council witnesses the emergence of a direct relationship between the federation and the people which supports and strengthens the federal structure.

The openness towards cooperation and flexibility in the constitution itself, in the jurisprudence of the Federal Supreme Court and in the constitutional design of the distribution of legislative and executive powers between the federation and the emirates, invites a further question. On what founding principles is the UAE federation built? How does UAE federalism combine functionality whilst also permitting such a degree of flexibility? Flexibility by itself could be harmful or chaotic to federalism. Boudreault argues that “flexibility favors overlap of federal and provincial legislation whether it leads to



cooperation or to competition” (Boudreault 2020, 3). Flexibility could also negatively impact on cooperation, as by removing constraints on the powers of each level in the federation, it reduces the need for cooperation and dialogue (Boudreault 2020, 11).

Instead of trying to identify a specific federal system or category for the UAE that, at best, will be inaccurate, it makes more sense to divert the search to the principles that hold the UAE order together and can explain its significance. In comparative federations, many such principles have been identified, including autonomy, subsidiarity and loyalty. Hugo Cyr sees the combination of these principles as the normative structure that confers to federalism “its inherent logic” (Cyr 2014, 30). In this vein, the next section will examine some founding principles that bring the UAE federal order together.

7. Supremacy clause and democratisation: cornerstones of UAE federalism

Article 151 of the Constitution establishes the principle of federal preemption by providing that: “*the provisions of this Constitution shall prevail over the Constitution of the member emirates of the federations and the Federal laws which are issued in accordance with the provisions of this Constitution shall have priority over the legislation, regulations and decisions issued by the authorities of the emirates*”. The same provision foresees the possibility of conflicts between federal and local norms and notes the primacy of the former over the latter: “*In case of conflict, that part of the inferior legislation which is inconsistent with the superior legislation shall be rendered null and void to the extent that removes the inconsistency*”.

Furthermore, the constitution reiterates the consecration of the supremacy of federal laws in Article 149, explored above. This Article contains the mechanism for concurrent jurisdiction, allowing emirates to legislate on topics where Article 121 grants them only the power to execute, on the condition that legislating is necessary for the implementation of the matters being executed. A second condition in this provision sets the limit of concurrent jurisdiction clearly – they must not contradict with the provisions of Article 151. Thus, local legislation can never violate federal legislation.

The first and most significant manifestation of the principle of loyalty emerges in the constitutional primacy of federal legislation over the local legislation of the emirates. This means that validly enacted federal laws always prevail over contrary law enacted by the



emirates. This doctrine of preemption was inserted into the federal design of the UAE by the founders, but the constitution also vests the Federal Supreme Court with the power to adjudicate on this matter.

The constitutional division of the UAE Supreme Federal Court has made significant use of this provision in many decisions. An example is the Decision dated 23 December 2014^{XII} where the federal judge had to decide between imposing the penalty prescribed for a particular crime in Article 3 of the Federal Law (where the penalty is the imprisonment for a period not exceeding one year and a fine not exceeding two thousand dirhams, or one of these two penalties) and the penalty provided for the same crime in Article Sixteen of the Local Law (imprisonment for a period of not less than three months and a fine of not less than Thirty thousand dirhams and not more than two hundred thousand dirhams). The Court relied on the preemption doctrine of Article 151 of the Constitution to rule that the federal provision was the applicable one.

The sacrosanct constitutional rule of the supremacy of federal law is one of the main pillars that explains the solidarity and efficacy of the UAE federal order, despite its flexibility

Another major recent development in relation to the UAE constitutional order reinforces the existence and relevance of the UAE federation. While there were no direct relationships between the citizens and the federation, in 2006, few democratic improvements were introduced, affecting the constitution itself of one of the main federal institutions, namely the Federal National Council (FNC). When the FNC was established in 1972, all its 40 members were appointed by the rulers of the seven emirates in accordance with a quota for each emirate provided by the Constitution. In 2006, a reformation stage began including nominations by the rulers of each emirate for 50% of the FNC seats and the initiation of an election process through an electoral college accounting for the remaining 50% of the seats (Yaghi and Antwi-Boateng 2015, 215). Although embryonic in 2006, this timid liberalization has since been steadily growing towards a wider representation at the occasion of each FNC election. It rose from 6,595 citizens included in the electoral college in 2006 to 135,308 in 2011, 224,281 in 2015, 337,738 in 2019, and 398,879 in 2023, accounting in the last 2023 elections for approximately 40% of the UAE's total emirati population.

In studying the relationship between federalism and rights, Chen brings forward the discussion about the connection between federalism and democracy. Federalism literature includes voices that identify federalism as a principle of organization of state regardless of



its democratic foundations or elements (Chen 1999, 853). Nonetheless, most federal scholars see a definite correlation between federalism and democracy (Elazar, 1998, 84). Fenna and Schnabel have very recently echoed this trend in their quest for establishing definitional clarification for federalism. As the two authors aimed to find the essential elements of federalism, they identified that the “existence of two constitutionally guaranteed orders of government, each enjoying a direct relationship with the people and exercising meaningful powers, is both necessary and sufficient for a political system to be characterized as a federation.” (Fenna and Schnabel 2023, 1). In that vein, the democratic development taking the form of the gradual participation of the UAE citizens in the composition of the Federal National Council through elections although still an emergent exercise, puts the UAE in a better position to give relevance to its federation.

8. Conclusion

This paper has provided a scholarly overview of the model of federalism as applied in the United Arab Emirates and has looked at its defining characteristics. It has highlighted the inherent fluidity of the UAE federalism, seen through the great degree of flexibility the federation offers at more than one level in its constitutional mechanisms and the jurisprudence of the Supreme Federal Court. Rather than indicating adherence to a particular classification, this flexibility reflects the pragmatism of the founders, whose focus was creating a workable and viable federal order rather than establishing a federal order perfectly aligned with a purely theoretical model. Thus, at this point, the United Arab Emirates’ federalism cannot fit, fully, in any of the classical federal models. Nonetheless, despite the significant degree of flexibility, the UAE federal order finds its strength and efficiency in the principle of the supremacy of federal laws, as enshrined in the jurisprudence of the Supreme Federal Court. Another promising feature fostering the consolidation of the UAE federal order is the nascent relationship built between the citizens and the Federal National Council through the implementation of national elections.

Finally, it is possible to say that functional federalism is in place in the United Arab Emirates. The constitution itself seeds this approach, but UAE Federal Supreme Court jurisprudence nurtures it. In comparative federalism, literature has referred to “a functional approach to federalism” (Bronstein 2014, 28). This approach can be mapped to the US,



where the Supreme Court adopted functional inquiry or analysis in the context of federalism and the separation of powers (Greenspan 1988, 1046). More recently, this approach to federalism was highlighted, for example, in South Africa, where scholars found that functional federalism “encourages judges actively to consider how different levels of government can function most effectively within the framework of the constitutional scheme” (Louw and Bronstein 2018, 548). As such, extrapolating to the UAE, the judges of the Federal Supreme Court will smoothly pursue their quest towards finding “the optimal balance of power” ((Louw and Bronstein 2018, 548) between the emirates and the federal level.

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^{II} In the wake of the announcement of the withdrawal of the British presence from the Gulf region, there was an attempt to establish a union between the sheikhdoms, Qatar and Bahrain. The Federation of the Arab Emirates was established in February 1968. However, 18 months later, Bahrain and Qatar declared their independence from the newly established state respectively in August and September 1971.

^{III} 2021 was announced as the Year of the 50th to commemorate 50 years of the United Arab Emirates.

^{IV} As an illustration of the achievements of the United Arab Emirates and a sign of its prosperity, it should be noted that the UAE was ranked in the Global Competitiveness Report 2020 published by the World Economic Forum as first in the region and ninth in the world. Other indicators include the launch of a UAE-built probe to Mars from Japan’s Tanegashima Space Center on 20 July 2020, the successful startup of the first unit of the Baraka Nuclear Energy Plant in August 2020, and Dubai International airport’s position as the busiest airport in the world in December 2022 with more than 4.5 million seats booked.

^V See the Preamble of the UAE Constitution in English available at https://www.constituteproject.org/constitution/United_Arab_Emirates_2009.pdf?lang=en (last accessed 21st February 2023).

^{VI} In 1971, 48% of the population aged 15 and above were literate, and in 1970 the average length of schooling was only three years (See World Development Indicator database, World Bank, United Arab Emirates data).

^{VII} See below.

^{VIII} See Decision Number 5 for Year 8 Constitutional, 8th November 1981, published in The Rulings of the Constitutional Division 1973-2012; Sader Legal Publishing, pp 46-50 (in Arabic).

^{IX} See Decision Number 1 on 5th June 1983, The Rulings of the Constitutional Division 1973-2012; Sader Legal Publishing, p. 55.

^X See Decision Number 5 for Year 8 Constitutional, 8th November 1981, published in The Rulings of the Constitutional Division 1973-2012; Sader Legal Publishing, pp 46-50 (in Arabic).

^{XI} See Decision Number 1 on 3rd June 1992, published in The Rulings of the Constitutional Division 1973-2012; Sader Legal Publishing, p 79 (in Arabic).

^{XII} Decision Number 5 dated on 23rd December 2014, in Compilation of Case Law 2014, Sader Legal Publishing p.12 cited in The Constitution, Sader Between the Legislation and the Jurisprudence in the United Arab Emirates, Sader Legal Publishing 2022, pp. 178-179 (in Arabic).

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