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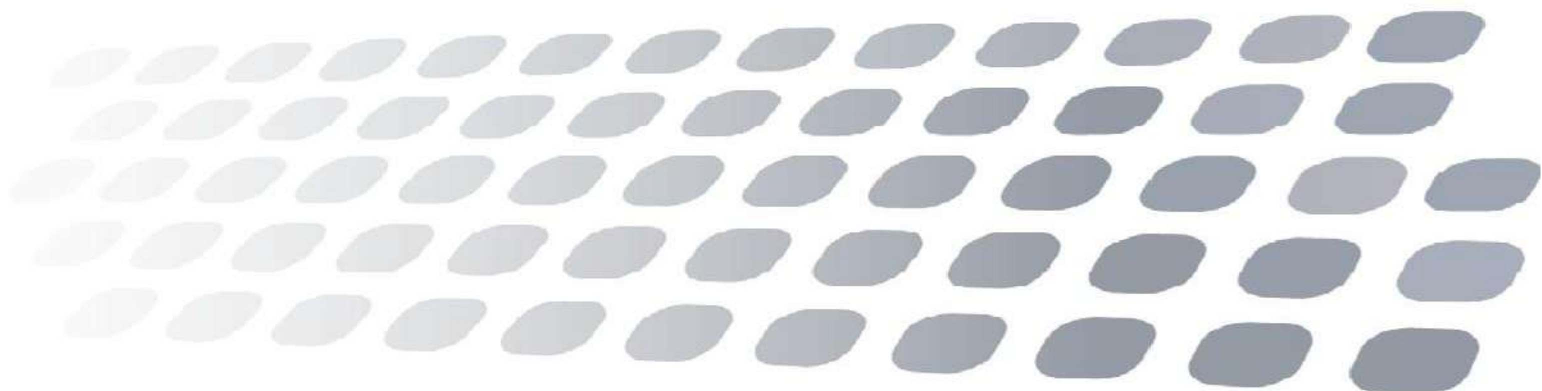

CENTRO STUDI SUL FEDERALISMO
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Edited by
Giuseppe Martinico and Matteo Monti

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ISSN: 2036-5438

New Trends in Comparative Federalism. A Special Issue

Introduction

by

Giuseppe Martinico[*] and Matteo Monti[**]

Perspectives on Federalism, Vol. 16, issue 1, 2024

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Abstract

In this special issue we will address some of the clichés present in the study of comparative federalism. In so doing we shall focus on little-explored federalising processes that are undergoing significant evolution or require different interpretations from those traditionally proposed.

Keywords

New trends, federalism, federalizing process, asymmetry, new actors

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1. On the Aims of Federalism

Why is this special issue entitled New Trends in Comparative Federalism, and how long will these trends remain 'new'? We have opted for a title that echoes some of the keywords used in comparative federalism in order to offer a small contribution to the evolution of a field that has always been very dynamic, but also in order to go beyond some of the 'usual suspects'. This special issue is designed to focus on little-explored federalising processes (Friedrich 1968) that are undergoing significant evolution or require different interpretations from those traditionally proposed. In this special issue we will address some of the clichés present in the study of comparative federalism.

We are, of course, aware that the study of this subject, in particular, is incremental in nature and builds on a constant interdisciplinary dialogue. This means that new trends often become old within a few years. From the first attempts to define the phenomenon of asymmetry (Tarlton 1965) or the study of legal systems not traditionally 'categorised' as federal (Requejo and Nagel 2016; Palermo and Kössler 2017) to the creation of methods of analysis based on the diachronic evolution of territorial decentralisation (Popelier 2021), comparative federalism appears to be in constant evolution.

In this sense, the very scope of the analysis of federalism, its function and the sphere of its application has historically been debated and this is also due to the different historical emanations of the federal principle.

After all, federalism has several purposes; indeed, the federal formula can be seen as a multi-functioning device that depends on the issues that characterise the political context. In other words, federalism has been shown to be a multi-purpose device:

> This is the perspective within which federalism must be understood as a political arrangement made intelligible only by the ends men seek to make it serve, and by the amenability or recalcitrance of federalism to those ends. At various times, men have sought varying ends from federalism, and the variety of federal systems has resulted from that variety of ends; each actual federal system differs from all others, as we shall see, by the peculiar blend of ends sought from the particular federal system. But the nature of federalism as such reveals itself in the ways federalism has served and failed to serve those varying ends (Diamond 1973: 129-130).

A constant element recalled in the literature is the difficulty of imprisoning federalism in

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a definition. 'Defining federalism and classifying federal states have kept scholars busy for centuries, filling libraries in the process' (Palermo 2018). Indeed, there is no universal agreement on what constitutes federalism (Gamper 2005: 1297). Furthermore, there is no consensus on how to classify federal countries. There have been many definitions of federalism and it would be pointless to attempt to provide an overview here.

Precisely with reference to the question of ends in the history of federalism, Karmis (2006: 67) argued a few years ago that 'cette histoire présente trois grands courants de réponses à la question des fins normatives des arrangements fédéraux: le fédéralisme universaliste, le fédéralisme communautarien et le fédéralisme pluraliste'. Starting from similar considerations on the ambiguity of the concept of federalism, Bassani (2015: 292) recalled that 'in any attempt at a theoretical investigation of federalism, either as an institutional fact or as a political doctrine, a number of qualifying elements come to the fore. Firstly, as has just been pointed out, the ambiguity of the aims: union, but not to the point of amalgamation. Secondly, the pactional element: the Federation was born from a *foedus* and its origins reverberate throughout its history'[I]. To overcome a mere formalistic approach, Palermo and Kössler (2017) suggested that it is necessary for federal studies to look more carefully at *policies*, including how these are managed on the basis of legal norms and how they are interpreted by courts.

It is no coincidence that it is precisely because of the variety of manifestations of the federal principle that Palermo and Kössler decided to proceed 'without definitions' (Palermo and Kössler 2017: 65.). On the basis of these considerations—and in the wake of an empirical approach (Friedrich 1968, La Pergola 1987: 133 and ff.)—the two authors also challenged the distinction between regional and federal states. In so doing they relied on the works of eminent scholars. After all, for Carl Friedrich (1955), studying federalism meant researching federalising processes that overcome static classifications.

In this special issue we aim to analyse some recent phenomena linked to the concept of the federalising process. This also clarifies the proposed title, which deliberately recalls that of one of Carl Friedrich's most famous essays. In particular, and while trying to maintain a focus that is not merely Eurocentric, we will attempt to analyse three groups of phenomena that seem to us to be of pressing topicality.

As anticipated in this special issue, we will try to reflect upon some of the clichés present in the study of comparative federalism. In this respect, the first section of this special issue

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is devoted to *Asymmetry in Comparative Federalism*. Here the cliché is represented by the vision that understands symmetry as a reflection of the perfect equality of the parties to the contract, in the light of a reading influenced by the Compact Theory (Calhoun 2017). While asymmetry in federal systems was once thought to be the exception, a rigorous approach to the study of federalism shows that all federalisms exhibit varying degrees of asymmetry and symmetry (Tarlton 1965; Agranoff 1999; Palermo and Kössler 2017). Indeed, in some respects asymmetry is a pillar of comparative federalism, particularly in the light of multi-national systems such as those of Canada, Switzerland, India, and Belgium, to mention but a few examples.

The second section will explore *New Actors in Federal Dynamics*. While the mainstream reading tends to trace the phenomenon of federalism back to state contexts, there has been no lack of studies attempting to extend this concept to non-state actors, such as, for example, regional organisations and cities. The increasing populations of cities and their acquisition of special powers in various legal systems, as well as the emergence of indigenous autonomies, has indeed contributed to the development of new ideas of federalism beyond federalism. At the same time, the development of regional integration processes has led to new studies of these processes from a comparative federalism perspective.

The third section focuses on *Secession in Context: Experiments and Innovations* and, in particular, on the attempts made to tame secession by relying on constitutional procedure. Wrongly considered to be extraneous to federal dynamics, secession has once again come to play a central role in the life of many federal systems. Since 1998 (the year of the famous *Reference Re Secession of Quebec*), secession has been rehabilitated as an instrument that can be used – under certain conditions – in domestic constitutional law. Indeed, those who see federalism and secession as antithetical realities are culpably forgetting the history of federalisms, both classical ones such as that of the US and multi-national ones. In recent years, we have witnessed interesting attempts to rationalise the secession procedure, as shown in the examples of Article 50 TEU and the repeated referendums in New Caledonia.

With this tripartite division in mind, we will cover many relevant and less frequently considered jurisdictions, trying to offer a fresh reflection upon the current state of the art in comparative federalism.

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2. Structure of the Special Issue

The first section of the special issue is devoted to the topic of asymmetry, and it addresses this issue from different perspectives: the "crisis" of asymmetry in India, the relationship between asymmetric federalism and EU differentiation, the kind of asymmetry that seems to be demanded by ethno-regionalist parties in so-called 'regional states', and the development of new approaches to the study of fiscal federalism.

The first section opens with a contribution by Harihar Bhattacharyya on the recent developments in Indian federalism, with specific reference to the issue of Article 370 of the Indian Constitution. Federal asymmetry is associated with specific ethno-regional issues that cannot be addressed by symmetrical institutional arrangements. This has led to calls for the appropriate recognition of ethnic identity, territorial concessions, and power-sharing for autonomy and development in the Indian Federation. However, recent trends seem to go in the opposite direction.

In the second contribution, Marjan Kos applies the concept of asymmetric federalism to differentiation in European Union law. In doing so, he brings together two strands of literature that share many similarities but have seldom been considered by scholars in parallel. The author seeks to highlight the convergences between differentiation and asymmetric federalism and to identify some lessons from asymmetric federalism that can be applied to the differentiation process in the European Union.

In his article, Matteo Monti introduces the concept of 'spearheaded asymmetry' in order to explain the asymmetric demands of ethno-regionalist parties in some European federalising processes defined as 'regional states'. The article explores how the demands of political movements in Italy and Spain cannot be framed within the strict category of asymmetry because they are also enriched by the aspiration to acquire the greatest possible self-government within a 'regional' state.

Alice Valdesalici revisits the traditional categories of fiscal federalism studies through a comparative constitutional law perspective and a comprehensive approach to (fiscal) federalism. Fiscal federalism is one of the main areas in which demands for asymmetry have been developed, and it is also one of the most controversial. The analysis is, therefore, helpful in developing new understandings of fiscal asymmetry: the author adopts a new

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understanding of fiscal decentralisation, looking at the institutional framework and the dynamics of intergovernmental relations within federal systems.

The second section of the special issue is devoted to the non-state actors *in* and *of* comparative federalism: the emulation of the EU supranational model of judicial dialogue in Africa, the role of so-called 'units' in comparative federalism, and supranational integration as a form of functional federalism.

This second section opens with an article by Allan Tatham, who examines how the success of the judicial dialogue model of the EU Court of Justice and its case law on integration in the EU led to it being emulated in Africa. The author examines how this model – especially its procedure of reference for a preliminary ruling – has contributed to the development of judicial dialogue within African regional economic communities.

Erika Arban addresses the issue of 'units' in federal systems, questioning whether the currently configured boundaries of federated units respond to local needs. She also proposes considering other types of unit created using different sets of criteria from the traditional ones. The author argues that 'units' are crucial to making federalism more responsive to the challenges of the twenty-first century, and discusses constitutional theories and designs to enhance their function.

In his article, Giuseppe Martinico explores the federal dynamics of the European Union in the light of the concept of 'functional federalism' developed by Peter Hay in his seminal book *Federalism and Supranational Organizations*. Within the debate, Martinico points out that Hay has contributed important arguments to challenge the idea that federalism is an 'f-word' in European studies.

The third section deals with federalism and secession by addressing some new and recent trends: the new secessionist challenges in Canada, a new reading of the *vexata quaestio* of the relationship between federalism and secession, the correlation between secession and federalism in the tumultuous context of Ethiopia and through a case study of the secessionist referendums in New Caledonia.

The third section begins with Errol Mendes' article on the new secessionist challenges in Canadian federalism. The author focuses on the concept of provincial sovereignty, which is employed by two western Canadian provinces, Alberta and Saskatchewan. These two provinces have used this concept to achieve a new form of autonomy within Canada. The

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article explores the challenges for the Canadian legal system arising from this new kind of autonomy.

Nikos Skoutaris deals with the tricky relationship between federalism and secession by making three crucial points. The author emphasises that secession can occur at various levels within a federal system, examines how federal constitutional orders deal with secession at different levels, and finally suggests a conception of federalism that can accommodate secession. Skoutaris proposes a new reading of the relationship between federalism and secession, providing a fresh perspective on an issue on which much ink has been spilt.

Yonatan Fessha and Nejat Hussein analyse the recent demands for internal secession in Ethiopia. These authors highlight the challenges involved in establishing internal secession as a constitutional right, and the procedures entailed in its implementation. In the light of recent internal secessions in the south of the country, the authors explore the problems and issues that have arisen around Article 47 of the Constitution, providing an overview of the latest developments of the Ethiopian federation.

Elisabeth Alber addresses one of the new cases in the field of the constitutionalised procedure of secession: the case of New Caledonia. The author investigates the complicated history of New Caledonia in the light of the third independence referendum and in view of the islands' new constitutional status. Combining historical content and legal-political analysis, the author outlines the problems behind the problematic cohabitation between 'natives and settlers'.

This special issue closes with a short symposium devoted to new trends in the Middle East and North Africa. The symposium opens with a book review of a very challenging volume edited by Aslı Ü. Bâli and Omar M. Dajani entitled *Federalism and Decentralisation in the Contemporary Middle East and North Africa*, which is devoted to an analysis of the new decentralisation trends in the Middle East and North Africa. It is a fundamental and recent work that deals with various experiences and legal systems and explores the different forms of self-government emerging or proposed in this broad geographical area. Nickson Oira offers a detailed and critical review of the volume, and the book's editors offer a rejoinder.

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[I] Our translation from Italian

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The Current Challenges to Asymmetric Federalism in India in Comparative Perspective

by

Harihar Bhattacharyya[*]

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Abstract

The article examines the various facets of the challenges to asymmetric federalism in India in comparative perspective and in the appropriate theoretical framework of asymmetric federalism. Asymmetry, conceptually speaking, is linked to the so-called politics of difference and recognition in post-liberal political theory. The abrogation of Article 370 that ensured federal asymmetry in India in 2019 by the Union government and its judicial approval in 2023 has been very challenging to Indian federalism. Since the States in India are based mostly on some ethnic identity, any attack on the States, let alone taking away statehood, affects the sensitive ethnic identity. The erstwhile Jammu and Kahmir – now demoted to a Union Territory – was India's only Muslim majority State bordering Pakistan. The problems of autonomy of Sabah and Sarawak in Malaysia are discussed in comparative terms. This article argues that in multi-ethnic countries, different forms and layered of federal asymmetry are a must to accommodate ethnic diversity for recognition, and political stability.

Keywords

Indian federalism; Jammu & Kashmir asymmetry; recognition; political centralisation

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1. Introduction

The most powerful challenge to federalism in India in general, and asymmetric federalism, in particular is the abrogation of Article 370 of the Indian Constitution that was designed to ensure federal asymmetry (special status with a constitution of its own) for the State of Jammu & Kashmir – a princely State before 1947. It was a kingdom ruled by a Hindu king, but most of the subjects was Muslims. The Muslims were a large in Kashmir, but in the other two regions within the State, it was not so. In Jammu, the Hindus were a majority with the Muslim as minority, and Ladakh, another region, was predominantly Buddhist. Historically, there was hardly any internal territorial integration. The BJP-led NDA (Union Government), as part of its electoral pledge, abrogated Article 370 of the Constitution of India by a Presidential Order based on a resolution in Lok Sabha on 05 August 2019 which guaranteed statehood with 'special status' for Jammu and Kashmir. The matter provoked a lot of political controversy in India and abroad. As many as 22 writ petitions were submitted to the Supreme Court challenging the governmental action. On 11 December 2023 a five-member bench of the Supreme Court of India heard them and upheld the government decision in a rather complex judgment in which the constitutional position of Article 370 as 'temporary[I] provision of the Indian Constitution received greater attention. This Article was designed to offer more autonomy to the State of Jammu & Kashmir unlike most other States in India. Its 'special status' and 'limited sovereignty' was recognised by the Supreme Court in 2016 (AIR 2016) (quoted in Bakshi 2017: 391)[II] But in the current judgment the five-member bench refused to consider that[III]. The demotion of the State of Jammu & Kashmir to a Union Territory, and its territorial contraction to make way for another Union Territory of Ladakh remains challenging especially those States which are placed under Part XX1 of the Indian Constitution as 'Temporary, Transitional and Special Provisions. By comparison, a year earlier the government of the Philippines, a unitary presidential system of government, approved the Bonsamaro Organic Law giving *more autonomy* to 13 rebellious Muslim groups in the South of the country, predominantly a (Catholic) Christian country[IV]. The first case i.e, India (80 per cent approx.) Hindu majority country is a federal (Union of States[V]) democratic republic while the latter i Presidential. In India, the ethnic self-rule for the religious minorities, especially the Muslims being the largest group) (numbering some 140

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million scattered all over India with significant regional concentrations) is constitutionally prohibited to demand territorial autonomy as it would go against India's version of secularism. The event in the Philippines little affected the country's system of government and raised little criticisms but more praise in the public domain. On the contrary, there had been international condemnation of violence, and pressure to concede self-government to the Muslim tribes[VI]. India and the Philippines perhaps are not comparable, but what is of special significance is that while the Philippines' move is likely to have little effect on the country system of governance, the Indian case casts a large shadow over the future of federalism in India, in general, and asymmetric federalism, in particular. True, by virtue of Article 2 and 3 of the Indian Constitution, the territory of India has been reorganized since 1956 in many rounds (latest being Telangana in 2014) (Bhattacharyya 2014; 2019) – 1956; 1960; 1966; 1987; 2000; and 2014. But the case of Kashmir being the only Muslim majority region of the State bordering with Pakistan carries special significance. After the Supreme Court verdict approving the government action, the issue is, arguably, settled. But the fear and apprehensions among many remain.[VII] Can the Union (federal government) with a huge majority in Parliament resort to similar action to other such 'temporary and transitional' provisions in the Constitution those that provide for asymmetry? Those familiar with the Indian Constitution will know that Part XXl of the Constitution provides for mainly three forms of asymmetry mostly for the States in the North-East, and for some States in the mainland (Bakshi 2017: 389-402). There are inter-State asymmetry of different kinds, and intra-State asymmetry providing for sub-State asymmetry. There are structural asymmetries in Indian federalism which affects the federal balance of power. Above all, there were Special Category States mostly in the Northeast but some in the mainland designed to offer them asymmetric Plan grants and loans so that these States received 90 per cent Planning Commission money as grants and 10 per cent as loans whereas the General Category States the grant portion was 30 per cent and loan 70 per cent (Bhattacharjee 2015). Intra-State asymmetry includes various provisions for development grants to specific Development Council governed under the State law. In the erstwhile State of Jammu & Kashmir, there were District Councils in Ladakh, Kargil and Ley. This suggests that a post-colonial federation in the midst of complex ethnic diversity required many types of asymmetric arrangements to accommodate diversity and to cater to the development and empowerment needs of specific region and sub-regions and peoples. As shall show below later in this article,

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performance records when measured by a set of criteria of such units and sub-units were quite remarkable. This includes Jammu & Kashmir too.

Article 370 was designed to ensure greater autonomy (federal asymmetry), and the lone State in India to have a constitution of its own. However, the extent of its autonomy and the degree of integration with the Indian Union remained a matter of considerable debate, and some irritation among the officials both the governments. The Supreme Court in a verdict in 2016 defended though Jammu & Kashmir's 'limited sovereignty' (quoted in Bakshi 2017: 391). However, in the most recent verdict on 11 December 2023 relating the abrogation of Article 370, the Court put things in the right perspective, as it were:

In view of the above discussion, the following are the conclusions: a. The State of Jammu and Kashmir does not retain any element of sovereignty after the execution of the IoA* and the issuance of the Proclamation dated 25 November 1949 by which the Constitution of India was adopted. The State of Jammu and Kashmir does not have 'internal sovereignty' which is distinguishable from the powers and privileges enjoyed by other States in the country. Article 370 was a feature of asymmetric federalism and not sovereignty; [VIII]

Nonetheless, the governmental action of abrogation of Article 370 and its approval by the highest court of India raises other important issues. As per the verdict of the Supreme Court on the issue of Article 370, the said Article was indeed a case of asymmetric federalism. Its abrogation is an attack on asymmetric federalism in India. The other profoundly important issue is that such an attack adversely affects the sense of ethnic identity of the people inhabiting the territory. In India, the territorial units and sub-units are not merely some pieces of land; most of them have ethnic bases. Most of India's States and sub-States (e.g., the Autonomous Tribal District Councils) were so designed as to respond to the specific needs of some specific ethnic people. The territorial re-sizing that took place in India since 1956 was to create ethnically homogeneous units as far as possible – initially language was a predominant consideration in the so-called 'balanced approach' of the States Reorganization Committee (1955) but subsequently other factors came to be considered (Bhattacharyya 2019; Tillin 2013). As far as Jammu & Kashmir was concerned, it was three distinct ethno-regions with their specific history of evolution (Bhattacharyya 2023). This erstwhile princely State had a Hindu king over the subjects who were, and still are, overwhelmingly Muslims with a minority of Hindus; Jammu with a preponderance of Hindus (with a minority of Muslims), and Ladakh with preponderance of Buddhists. Historically the

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State was never internally cohesive and integrated (Bhattacharyya 2023). After the signing of the Instrument of Accession on 26 October 1947 it was considered part of the Union of India although the degree of its integration with the mainstream of India remained for long a matter of political speculation. It has often been argued that rather than integrating with the rest of India, Article 370 has stood in the way: the State based political parties have made skilful political use of the so-called 'autonomy' and ghettoized its people. There are counterarguments that despite the Article 370 and 'autonomy' the State never enjoyed any real autonomy because of successive central intervention in the State, and the frequent use or misuse of Article 356 that provides for imposition of Presidential rule (State emergency) for long. Therefore, if the State of Jammu and Kashmir was a challenge to Indian federalism for long, bifurcation of the State into two Union Territories since 2019 has posed a challenge to asymmetric federalism in India generally.

Does it contain a message for the other cases of asymmetric federalism in India? The other powerful challenge to asymmetric federalism is posed by India's neo-liberal macro-economic reforms since 1991 which have cleared the deck for free market economy, and withdrawal of the public sector. This has implications for the small hilly States in the peripheries of India which enjoy different degrees of asymmetry but have relied on state support for meeting various needs of the peoples inhabiting the regions with little potential for investment, foreign and or national.

2. Research Questions and Hypothesis

Indian federalism has been passing through challenges since 2014 when the BJP led NDA government came to power and returned in 2019 with greater majority. The party also is in power in as many as seventeen States. Ideologically the BJP does not believe in cultural diversity which is the *sine qua non* of Indian federalism and various asymmetric arrangements. In this context, we seek to provide answers to two research questions. First, can federal asymmetry sustain itself in the changed political environment with not too friendly a federal government that does not defend cultural diversity, doctrinally, let alone promoting it? Second, are asymmetrical arrangements always good for federalism and democracy?

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2.1 Hypothesis

Asymmetric federalism is a dependable variable and can work well if federalism and democracy are allowed the appropriate space, and there is no risk of being attacked or potential attack from a very dominant Union government particularly when such federal units are heavily dependent upon the Centre (Union Government) for financing. Again, the peripheral asymmetric States being located on India's international borer makes them more vulnerable and Centre-dependence. This creates two possibilities: the very dominant Centre resorts to carrot and stick policy to bring them under its suzerainty. Second, there is more concern for the small asymmetric States for its identity. Finally, such units and sub-State units (considered also as instance of asymmetry) can perform if given the opportunity, which militates against holding such arrangements useless and wastage of public money.

2.2 Objectives

In Asia, while federal elements are introduced into non-federal countries such as the Philippines, Indonesia, China, the formally federal states are still few in number: India, Pakistan, Malaysia, Nepal and Myanmar are the only constitutionally declared in Asia. Sri Lanka is still not a federal country despite significant devolutionary measures introduced for the Tamil minorities. Nepal being a very inclusive, participatory federal democracy, is still fledgling, and its constitution left little scope for asymmetry. In Myanmar, a formally declared a federation (Union of Myanmar) but under the heavy-handed rule of the military junta, both federalism and democracy do not look prospective at all. Although a democratic regime was somehow functioning with a space for negotiation for federalism prior to the military takeover, there is little democracy and federalism in Myanmar.[IX]

The first objective of the article is to introduce the concept of federal asymmetry and its links with the politics of recognition. Second, we seek to analytically present the constitutional provisions for federal asymmetry in India and Malaysia, the other federation with distinct federal asymmetry. Third, we discuss the effects of such institutional arrangements on identity and governance in India and Malaysia. In conclusion, we will make a comparative assessment of the merits and demerit of asymmetric federalism and point out the current challenges to such institutional innovations.

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3. Concept and Debate

Federalism is a complex and difficult system of governance in multi-ethnic countries. And yet, it is unavoidable if the country is to survive. It combines two or more types or tiers of rule, but generally two tiers of rule: a shared rule for national purposes and a regional self-rule for regional purposes. Every country must deal with certain issues of national and international significance which must be under the authority of national level government: defence; foreign affairs; currency, telecommunication, railways, international treaty and peace making and so on. There are issues of regional character which relate to the day to day lives of the citizens. These are better left to the regional government, which is closer to the people. Federalism as a political principal advocate for the combination of the above two types of rule. Dynamic political equilibrium that is to be the outcome of federalism, if at all, is tricky and elastic. If such an outcome does not occur, and federations fail, federalism, or federation as such may not be responsible for this. The experiences of failure in Asia, Central America, and Africa (very few in number) (1966) suggest that what was the reason behind such failures was the inappropriate way of combination of the two types of rule.

The other precondition of the success of federalism is *democracy*. If democratic participation and power-sharing, as per the Constitution, are absent, a federation falls victim to *ethnocratic oligarchy*, or ethnic majority rule, or worse, ethnic zealots ruling at the regional level, who fail federalism rather than the other way round. The result could be ethnic exclusion, ethnic cleansing, or pogroms. Therefore, even if regional self-rule is allowed for some regionally concentrated ethnic group, it is not supposed to be an *ethnocracy*, but a democratic system of governance in which power is transferred every five years or so peacefully, constitutionally. Even if some region has a one hundred per cent one ethnic group that does not and should not mean that one ethnic leader rules; she/he must seek mandate regularly for democratic legitimacy. The other important issue little highlighted is the question of *shared rule at the regional level. The* existing scholarship focuses merely on shared rule at the national level, but not at the regional level. In the multi-ethnic context at the regional level, self-rule is also required to be a shared rule so that the smallest ethnic minority is not deprived of the benefits of participation and power-sharing. This has been pointed out by Bhattacharyya very recently (Bhattacharyya 2023).

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How to conceptualize asymmetry in the federal template of Watts (2008)? Ronald Watts (2008) has offered a very useful six-point template of federation as a descriptive category:

- at least two orders of government – one for the national level, and the other for the regional level – each elected separately by the people and acting also directly on them;
- a constitutional distribution of powers – legislative, administrative, and financial – between the two tiers of government that ensure some areas of genuine autonomy for each level of government.
- Provision for representation of regional views in the national level policy making through a second chamber of parliament.
- A supreme written constitution not unilaterally amendable requiring the consent of the federal units;
- Provision for an umpire (court or other body) to see that the constitution is honoured in the legislation and administration of the country; and
- Some mechanisms for inter-governmental collaboration and adjustment, which is much required in federal governance (Watts 2008: 9).

As is obvious in the above, federal asymmetry is not included in the template, a neglect which required to be rectified. Watts' template is based on the presumption of federal symmetry. The first point in the template is to be revised as two or types of government *with symmetrical and or asymmetrical status and powers.* However, Watts has discussed at some length the issue of asymmetry in chapter 8 of his now classic book (2008). There he made a distinction between political asymmetry and constitutional asymmetry. He referred to social, cultural and other factors as the sources of political asymmetry but argued that such asymmetry produced impact on the operation of the federation. By constitutional asymmetry he referred to asymmetric distribution of powers by the constitution Watts (2008: 128) has listed eight federation with asymmetric units: Belgium, Bosnia-Herzegovina; Canada, India, Comoros; European Union, Malayasia, St. Kits and Nevis, and Spain.[X]

In the standard discourse on federal asymmetry (Tarlton 1965; Agranoff 1999; McGarry 2007), asymmetric federalism refers to a system of unequal status and powers of some federal units and sub-units designed to meet some special socio-economic and historical, and geo-strategic needs of some people living in the peripheries of the federations. It entails special

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institutional arrangements for meeting the special diversity needs of those areas. It could be both *de jure* and *de facto*, covering recognition of identity, territorial autonomy, and local/regional self-rule. Many federations have areas of asymmetry for special circumstances, but asymmetric in Asian federations has been distinctive.

Is a theoretical framework of asymmetric federalism possible given the wide variety of contexts? The current understanding of asymmetric federalism is that it is a tool of governance that provides for the space for accommodation of specific ethnic diversity and adds legitimacy to the political system. Watts (2008) has recently cleared the deck, to some extent, for us by accepting the premise of multi-tiered federalism, in the standard theoretical literature on the subject though the interest in asymmetric federalism is still intermittent (Tarlton 1965; McGarry 2007, 2005; Sweden 2002; Agranoff 1999) and more or less has remained confined to the two-tiered structure of federalism in discussing asymmetric federalism. That is most often at variance with the very complex social and cultural diversity at many layers of society which may require multiple levels of institutional arrangements for accommodating diversity, and power-sharing. In other words, we ought to go beyond the simple and often unclear idea of 'self-rule' because self-rule often empowers one dominant ethnic identity to the exclusion of the others. For responding to multiple identities, self-rule need to reflect elements of 'shared rule' (so far conceived only for the national/federal level) so that the micro-minorities within the self-rule structure do not fall victim to majoritarianism. In defending a case for sustainable federalism for Russia, for example, Smith has also drawn our attention to what needs to be done. To avoid the danger of secession (in the case of Russian federation), he asserted:

> it is important to ensure, first, that federal sub-units are not defined as the possession of one ethnic group, but rather as belonging to all residents; secondly, that a civic identity is developed which can be a source of allegiance and identity for non-dominant groups… (Smith 2000: 365).

The observations of Smith above are profound and contain original insights not only about the method of recasting federal subunits but also the units below, i.e., the sub-State level units which, ethnically distinct, demands also recognition, which is not otherwise met by the designing of the federal subunits. His second suggestion takes one to a greater theoretical debate on nationhood. In a multi-ethnic country in which ethnic identities are

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thick, and where such groups find little in common to share with other ethnic groups, what then holds them together? In my other writings, (Bhattacharyya 2007; 2008; 2015) I made a conceptual distinction between ethnic and civic nationhood, and argued that in multiethnic countries, it is not ethnic identity/identities which provides for the cementing glue to hold them together but a thin layer of civic nationhood which implies, *inter alia*, sharing in certain civic values deriving mostly from the constitution but on which a societal consensus has been built. The construction of ethnic identity is always and everywhere exclusivist; the *ethnie* define them always in terms of having an other; in such a construction, there is always the ethnic other to which it is opposed and from which it is different. This ethnic other is the enemy to be fought out.

The term 'asymmetry' does not suggest a desirable value to be upheld, not particularly in left radical thinking. The term 'asymmetric federalism' may appear on the face of it to be sacrilegious. This is so perceived because while symmetry implies balance of elements, asymmetry implies just its opposite. That, at least, is the dictionary connotation of the terms. But then, if we take the view that the basic objective of federal governance, however difficult it is, is to obtain and maintain a dynamic political equilibrium among constituent parts, or elements, premised on the protection and maintenance of diversity for identity of sorts, then asymmetric federalism serves to play a supplementary role for the same objective. It is so argued because not all identity demands could be responded to and met at 'sub-national' levels. This is particularly so in complex multi-ethnic countries. This is, however, not to argue that the tool of asymmetric federalism, or the practice of it, is something unique discovered recently. The fact of the matter is that all federations starting with the US have had some space for asymmetric federalism, theoretically and practically speaking, since their beginning.

What then is asymmetric federalism? Why is it provided for and how? What is the motive behind asymmetric federal demands? Given the growing global interest in federalism as the mode of governance for multi-ethnic countries, it is time perhaps to alert the scholars of comparative federalism to the need to pay more serious attention to federal asymmetries across federal states because a symmetric approach, as it is constitutionally and conventionally assumed so far in most standard literature on federalism, does not answer all the questions why federations have succeeded in cases, and where they failed. Following Riker (1975), Rao and Singh (2005: 4-5) argued that the 'differences in bargaining strength' provides for a 'source of asymmetry' – bargaining for economic gain, greater freedom of

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action, and political representation (Rao and Singh 2005: 5). About half a century back, Charles D. Tarlton's seminal essay titled 'Symmetry and Asymmetry as Elements of Federalism: A Theoretical Speculation' (1965) pointed our attention to this direction when he argued that even in the US federation known for its symmetry of relations between the States and the federation (although the US federation had has peripheral asymmetric structural elements from quite early on) (Watts 1999), in actual practice, there had been significant areas of asymmetry in respect of the relations between the States and the Federal government. This has recently been pointed out by John Kincaid (2011).

Defined very simply, asymmetric federalism refers to institutional arrangements, constitutionally guaranteed, for different status and rights of the units of the federation premised on the political recognition of diversity 'while deflecting the secessionist potential of certain forces' (Agranoff 1999: 9). Taking a broader perspective, one would also go beyond to examine not only the structures as designed in the institutional arrangements, but also the processes and outcomes to assess the effectiveness of such techniques. In fact, the above is the main thrust of the collection of some ten long chapters edited by Agranoff (1999). If Tarlton (1965) found out different relationships of the States with the Central government, the scholars found out that Tarlton was stating almost a universal fact about federalism across the globe.

Sociologically oriented scholars on federalism (Livingstone 1952; Duchacek 1970; Watts 1966 &1999) point out the inadequacies of a symmetric approach in federalism to adequately respond to the federal qualities of society marked by differences of kinds. Agranoff (1999: 17-23) has identified a 9-point 'guiding principles' of asymmetric federalism: *de jure* and *de facto*; conditions and outcomes; levels of asymmetry; normative dimension; analytic dimension; asymmetry and political stability; relational symmetry and asymmetry; neutrality of asymmetry; and asymmetry as a social reality. De jure and de facto asymmetry refer to constitutional/legal status and rights of units, and the actual practices either following from the de jure position/or not. Also, the de jure asymmetry may vary enormously relative to social and cultural contexts, and the compulsions in federation-building. It may affect variously the principles of representation and other institutional principles of federalism and democracy. Differentiated federal structures, as Watts argues (Watt 1999: 16) are the examples of de jure asymmetric federal arrangements. 'Conditions and outcomes' refer to the social basis of federalism and the effect on the 'politics of recognition' that is embedded

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in asymmetric arrangements respectively. The levels of asymmetry refer mostly vertical relationship of the units, especially special units with Centre suggesting more diffuse centres of power within the federation. It is argued, for example, that Quebec's current relationship with the federal government in Canada 'reflects the possibility of greater vertical asymmetry' (Agranoff 199: 18). What is the normative implication of asymmetry? This principle takes one down to the issues of ethnic and democratic rights of groups and their self-rule because only through that the ethnic groups can resist rule over them by other groups. The analytical dimensions of asymmetry entail institutional designing, that is, the recognition of the nature of society at stake, the details of regional or local autonomy and so on (Agranoff 1999: 19). The remaining principles suggest the cardinal issue of political stability and recognition in favour of increasing devolution.

From the developing literature on asymmetric pressures on the federations, it also found out that such pressures act upon the actual operation of the political systems, federal or unitary (McGarry 2007), including that of coalition-building, as Sweden (2002) has pointed out. In this context, it is worth considering a little more of the views of Watts (1999, 2008: 125-30) Asserting like others before him on the subject that all federations contain some asymmetric elements, he pointed, for example, the case of US federation in which beyond the 50 symmetric states (constituent units), there are what he terms 'peripheral unit' (two federacies, three associated states, three home rule territories, three unincorporated territories and some 130 Native American Nations (de facto federacies). He pointed out that they exist 'in an asymmetric federal relationship to the federation' (Watts 1999: 25). According to Watts again (1999: 25), the current Russian Federation of 89 constituent units of varying sizes and powers and jurisdiction provides the 'most complex' *de jure* and *de facto* asymmetry. In his subsequent writing on the subject (Watts 2008: 125-30), Watts has distinguished between political asymmetry – a function of social, economic, cultural, and political factors – , and constitutional asymmetry, which is constitutional and legal allowing a variety of units within the federations with differential powers and jurisdiction, and influences within the federation (Watts 2008: 25-27). The movements for more powers to the units, or to increase regional autonomy and so on fall, Watts believes, within this category. Watts' conclusion which is not to be ignored is that more and more asymmetric pressures within the federation also induce counter-movements for more symmetry. Second, extreme asymmetry may prove to be dysfunctional in the end d (Watts 2008: 30).

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4. Comparative Evidence

Indian federation (with 28 States and 8 Union Territories) has offered greater scope of asymmetry than other federations in Asia. To begin with, Indian federation was built from above by successively right-sizing, mostly ethnically, a large, centralized state left over by the departing British colonial rulers, and the additional territory of some 560 princely States interspersed between the British ruled Provinces – such rulers were under colonial rule by very nominally maintained their so-called sovereign status. These autocratic kingdoms faced the difficult problems of staying sovereign or joining the Indian Union, and if yes, how and at what cost (Menon 1956). During the foundation of the republic in 1947-50, most of these kingdoms were 'integrated' with the Indian Union by various means, and in the Constitution of India (1950), most of them were given a *secondary status* called 'Part B State' with lesser powers than that of the provinces. As discussed in greater detail by Bhattacharyya (Bhattacharyya 2023: 41-64), the integration of such numerous princely States was 'asymmetric'. In the period since 1956, by way of merger, bifurcation, separation, cutting and pasting, as it is called commonly, much of asymmetry was symmetrized. But the process of creation of more new States followed to further right-size the federal units, to make them more ethnically homogeneous (Bhattacharyya 2019: 99-112). The federation became more symmetric. Nonetheless, the scope of much asymmetry remained, and was unavoidable.

Until 2018 India had two types of States: general category States and *Special Category States* – the latter numbering 11 and located mostly in the border and hilly regions, and in some cases, with the preponderant of aboriginal population. This was an important area of asymmetry in Indian federalism, but the system was not provided for in the Constitution. The Special Category States received higher per capita funds transfer from the Centre by way of the Finance Commission, by the Central Government, and by the then Planning Commission (now defunct). For example, of the total money received from the Centre by way of the Planning Commission,[XI] 90 per cent was grants for the SCSs and 10 per cent as loans. But for the General Category States it was 70 per cent loans and 30 per cent as grants (Bhattacharjee 2016). This system has been withdrawn, but by way of the Finance Commission (a constitutional body under Article 280)[XII]-formed in every five years), the formerly SCSs continue to receive discriminatory (in their favour) fund transfer in the form

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of numerous Central Plan Assistance, and special finance packages. In India, there are not only asymmetric constitutional arrangements, and bodies with relatively autonomous powers, but also the money made available to run the government.

Table 1 Criteria-based Tax Devolution (14th -15th FC) (2015-21) (in %)

Criterion	14th FC 2015-20	15th 2020-21	15th FC 2021-26
Income Distance	50.00	45.00	45.00
Area	15.00	15.00	15.00
Population 1971	17.5	--	--
Population 2011	10.00	15.00	15.00
Demographic performance	---	12.5	12.5
Forest cover	7.5	--	--
Forest &ecology	--	10.0	10.0
Tax effort	--	2.5	2.5
	100	100	100

Source: 15th Finance Commission 2020.
(https://fincomindia.nic.in/writereaddata/html_en_files/15thFcReportIndex.html)
(sighted on 30/12/23)
Note: 'Demographic change' refers to 2011 population.

The data presented in table 1above need to be explained. Except Assam, all other States in the Northeast are small in population, so they do not gain much from the weightage to population. They gain in terms of 'income distance' and areas, in the case of Arunachal Pradesh. 'Income distance' is a formula used by the Finance Commission so that the backward States get a higher per capita tax devolution (Reddy, Reddy 2019: 94).

There are two vital financial issues to be mentioned. First, on average the States in India raise about 35 per cent of the total tax revenues but spend a greater sum above 55 per cent of the total public expenditure. The latest figure is 58 per cent. This requires some explanation. Although the Centre taxes and collects more revenues, greater than that of the States, after devolution, the Centre's receipts decrease, and the States' revenues increase. In the constitutional federal structure of India, the States have to perform a greater number of

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tasks relating to social welfare, law and order, public health, sanitation and so on. This also enhances the popularity of the States, if so efficiently carried out. The Centre in India does not have the *line administration*; the States have it. The States must implement not only their own laws, but also many laws of the Centre, as a Constitutional obligation. Second, the principles of equity and justice in federalism are kept in mind in the horizontal transfer from the Centre to the States. As a result, the poorer States and those on the borders with limited resource bases receives greater per capital transfer from Centre as recommended by the Finance Commission (Rao, Singh 2005; Reddy, Reddy 2019). In short, there is greater financial asymmetry in Indian federalism than the other federations in Asia.

The General and Special Category States were one type of inter-State federal asymmetry. There are other types constitutionally guaranteed. These are de jure asymmetry. Most of the States in the Northeast (eight States) – Arunachal Pradesh, Assam, Meghalaya, Manipur, Mizoram, Nagaland, Sikkim and Tripura – which enjoy different degrees of asymmetry. In other words, there is asymmetry within asymmetry in such a case. For example, the case of Nagaland (created in 1963) (after a prolonged insurgency and negotiations) is a case apart. Nagaland enjoys a very special kind of asymmetry unlike the other States in the region, and the mainland. Under Article 371A this State is given a semi-sovereign status. This Article states:

Notwithstanding anything contained in the Constitution (of India) ...No act of Parliament (of India) in respect of:

a. Religious or social practices of the Nagas;
b. Naga custom, laws and procedure.
c. Administration of civil and criminal justice involving decisions according to customary laws
d. Ownership and transfer of land and in resources, shall apply to the State of Nagaland unless the Legislative Assembly of Nagaland by a resolution so decides' (Bakshi 2017: 391).

These provisions are clear enough that the Nagaland Legislative Assembly enjoys near-sovereign powers than any other such bodies in India. Beyond Nagaland, the other States in the region also enjoy various forms of asymmetric status and powers. This applies to some States in the mainland India too (Bhattacharyya 2023: 59-60). Prior to the demotion of the State of Jammu & Kashmir in 2019,[XIII] and its division between two Union Territories of

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Jammu and Kashmir, and Ladakh, there were two Autonomous Hill Development Councils one each for Leh and Kargil since 1997. The Council had the powers to levy taxes and fees and to raise other resources, and to spend them relating to economic development, heath care, education, and equitable development down to the grassroots. Additional funds were made available from the then State government.

How have the asymmetric States performed in India? Bhattacharyya (2023) have provided a detailed empirical survey-based analysis of performance records of asymmetric States in terms of certain agreed upon criteria, which is neglected in the existing scholarship. Using the methodology formulated by Malhotra (2014), and the detailed data provided, it has been found that in terms of *policy effectiveness* index – a composite index of many composite sub-index – the asymmetric States improved upon a lot (Table 2) in delivering governance (law and order, safety of women, sanitation, electricity, safe drinking water and so on.

Table 2 Policy Effectiveness Index in Asymmetric States in India (1981-2011)

States	**1981**	**1991**	**2001**	**2011**
Arunachal Pradesh	0.188	0.243	0.303	0.345
Assam	0.177	0.193	0.220	0.232
Himachal Pradesh	0.239	0.268	0.290	0.359
Jammu & Kashmir	0.188	0.258	0.308	0.347
Manipur	0.275	0.280	0.330	0.328
Meghalaya	0.248	0.327	0.374	0.383
Mizoram	0.229	0.335	0.424	0.493
Nagaland	0.261	0.372	0.341	0.371
Sikkim	0.237	0.388	0.503	0.566
Tripura	0.193	0.257	0.263	0.302
Uttarakhand	--	--	0.255	0.311
All India	0.205	0.228	0.246	0.285

Source: Bhattacharyya 2023: 103.

As is evident from the data in table 2 above, the performance records of the asymmetric States have remained higher than that of India average. The erstwhile State of Jammu &

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Kashmir performed far better especially during 2001-11 than that of India as a whole. Even in the high days of insurgency and violence, this State performance records were competitive. From other reliable sources, it was found that in 2019, Jammu & Kashmir's records (0.688) was even higher than that of Karnataka (0.683) (Bhattacharyya 2023: 104).

Below the State level there are constitutional provisions for sub-State level autonomous tribal district councils under the 6th Schedule of the Constitution applicable to the hill tribes of Northeast India. These councils (at present ten are working in the region) have wide ranging autonomy to manage their own affairs independently but based on democracy. Such Councils are to be elected every five years based on adult suffrage, and all decisions at the Council are to be taken after adequate debate and discussion and by a majority. Although each such Council are named after a particular tribe, there are tribal and, in some cases, non-tribal ethnic minorities who may be excluded but for the fact that the State Governor has the power to nominate some members from the communities which may not otherwise be elected lacking in territorial concentration. This is a kind of consociational arrangement. Bhattacharyya (2023) has presented a detailed empirically survey-based data on the working of two such Councils one each in Assam and Tripura and assessed their comparative merits and demerits in institutional functioning and effectiveness (Bhattacharyya 2023: chapter 9-10, 115-62). Of the two – Tripura Tribal Autonomous District Council in Tripura and the Bodoland Territorial Authority – while the former is a relative success story, the latter seems to be a case of failure due to a deviational principle in providing for formation of such bodies under the 6th Schedule. The 6th Schedule originally was meant for the hill tribes of Northeast India on the proviso that the aggrieved tribal community demanding a Council formed a majority in the proposed 'homeland'. In the case of the BTA, both principles have been violated: the Bodos are Plain Tribes, and secondly, they constitute only 30 per cent of the population in all four Bodo districts on the Northern banks of the river Brahmaputra in Assam. The persistent ethnic violence, predictably, has been the consequences (Bhattacharyya, Mukherjee 2018). This suggests that although overall India's federalism is a success story, there are pocket at the grassroots where things do not run because of ill-designed institutional engineering dictated often by short term political gains by the political actors.

In the Malaysian federation (13 States), the two Borneo States of Sabah and Sarawak exemplify asymmetry. These States are mentioned in the very article 1 of the Federal

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Constitution. The States of Sabah and Sarawak were constituent units of the Malaysian Federation in 1963. These two States like some other federal units have Constitutions of their own. Like some other States these two States are provided with the powers to confer the Supreme Head of the Federation the religious head of their States. The Federal Constitution is the supreme Law of the land and protects all the constitutions of the units including that of Sabah and Sarawak. These two States have more liberal scope of borrowing with the State law with the approval of the Centra Bank (Article 112 of the Federal Constitution). Under Article 161 of the Federal Constitution, the States of Sabah and Sarawak have the freedom to use English language in Parliament and Legislative Assembly, in the judiciary and other official communications. In addition, these two States have been given the freedom to use 'native language currently in use Under Article 161 Clause 5 it is stated:

> Notwithstanding anything contained Article 152[XIV], in the States of Sabah and Sarawak a native language in current use in the state may be used in native courts of Sabah and Sarawak until otherwise provided in enactment of the Legislature, may be used by a member of the Legislative Assembly, or any committee thereof. (Federal Constitution 10th April 2002, p. 204).

While these two States have good sources of revenues,[XV] the Federal government under Article 112D offers special grants for these States. In November 29, 2023, for example, Prime Minister Datuk Seri Anwar Ibrahim said that 'the Federal Government, together with the Sabah and Sarawak State governments, have reached an agreement to review the amount of special grants under Article 112D of the Federal Constitution effective from 2023 as an interim solution and on the process of finalising the special grant review formula for the long term. This interim rate is an increase to the RM16 million per year for Sarawak since 1969 and RM125.6 million for Sabah for the year 2022 through an interim review that was implemented for Sabah in 2022.'[XVI]

The two Borneo States have great strategic significance for the pursuit of the Malay political elites to show up a Malay majority called *Bumiputera (*songs of the soil). At the time of independence from British colonialism, the Malays were slightly less than 50 per cent of the total population (49.8), and it was not until 1990 that the Malays were estimated to be 55.1 per cent (Bhattacharyya 2010: 39). In 2000, the figure jumped off to 65.1 per cent. The World Factbook shows that Bumiputera[XVII] now are 62.5% followed by the Chinses 20.6%,

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Indian 6.2%, other 0.9%, non-citizens 9.8% (2019 est.),[XVIII] The population of Sabah and Sarawak (80.5 per cent and 72.9 per cent of the so-called *Orang Asli* (aboriginal or the original inhabitants) were grouped together with the Malays, without that it was difficult for the Malays to prove their majority. Like the Peninsular Malayasia with 11 States, the *orang asli* also come under the purview of reservation for the majority – perhaps the only known country where reservation is provided for the majority. This is discriminatory for the minorities who are significant in number: the Chinse were 38.4 per cent in 1947 who today are about 20.6 per cent and the Indians who were about 11 per cent in 1947 are about 6 per cent (Bhattacharyya 2010: 39). The Article 153 of the Federal Constitution of Malaysia clearly stated: It shall be the responsibility of the Yang Di-Pertuan Angon (Head of the Federation) to safeguard the special interest of the Mayas and the natives of any of the States of Sabha and Sarawak. No wonder, the non-Malays ethnic minorities are suspicious (Bhattacharyya 2010: 84)

5. Conclusion

Federations in Asia generally are passing through challenges: military junta rules over Myanmar since February 2021; Nepal is still in fledging federal functioning; relative lack of democracy in Pakistan with the surreptitious control of the Punjabi dominated army casting a big shadow over democracy and federalism; the Provinces were empowered hugely by the 18th Amendment in 2010 but nothing concrete is in sight as yet (Bhattacharyya 2021); the increasing Maly domination over the federation by enforcing Malays (*Bhumiputera)* special rights as *staatvolk*;[XIX] and the ongoing neo-liberal reforms in India coupled with increasing Hindutva hegemony over the federation are the most general trends affecting the prospects of federalism in Asia, which do not augur well for federal asymmetry as examined above.

Asymmetry in federalism in both India and Malaysia[XX] have some negative aspects. In India, while asymmetry has been effective in ensuring equity and helping maintain diversity and overall balance in the system, some kinds of asymmetry look rather odd, federally speaking. In the case of India, there are undesirable structural asymmetry. To take the case of India's largest State: Uttar Pradesh has a population about 241 million and sends as many as 80 Members to Lok Sabha (popular chamber)(total member 542) and 32 to Rajya Sabha

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(total member 249), the second chamber. This does not compare with any other States in the federation. The States in the Northeast except Assam send only 1 or 2 members to parliament. This creates a structural imbalance in federalism. India's second chamber is strictly speaking not a chamber for the States because there is no equality of membership from the States – this is so because the federal units in India were not the compacting parties to the federation. Therefore, the same criterion of population size as applied in deciding the territorial constituencies of Lok Sabha is also applied with higher weightage in the case of Rajya Sabha.

Second, the abrogation of Article 370 by the incumbent government in Delhi, and the Supreme Court's approval of the government action has raised concern about the very existence of the States placed in similar position, i.e. as under 'Temporary, Transitional and Special Provisions' of the Indian Constitution. However, India's ongoing neo-liberal reforms have made little difference to asymmetric arrangements. Going by the latest Finance Commission's recommendations (2021-26), the States do get a better deal in devolution, and more fiscal space. India's neo-liberal reforms have empowered the States in carrying out reforms in the days of market freedom. India's previous political economy with the public sector domination and with heavy centralisation has passed into a capitalist political economy – a big challenge – but her federalism generally has received, as it were, a better deal.

But in the case of Sabah and Sarawak in Malayasia, different challenges were found. Constitutionally, these State are asymmetric but because of several amendments passed in the national parliament, the latter appear to be like any other States. Second, with the opposition parties leading governments at national level and Sabha, for example, the latter are not received well by the national level officials with equal respect, if invited at all (Loh 2020: 202-06). There are also the ill-effects of increasing centralisation. It is remarked: In Sabha's case, the federal government also imposed a ban on export of timber log, ostensibly to promote the development of local wood-based factories. Consequently, Sabha's economic performance turned sluggish under the PBS' (the Opposition party) (Loh 2020: 207. The way these two States are treated by the federal government; it appeared as if the indigenous population in these State are 'second class *bhumiputera'* (Bhattacharyya 2019: 188). It is ironic that such slogans in public from such States would be raised: 'Decentralisation or complete independence' (Bhattacharyya 2019: 188).[XXI] It has been argued in other writings of Bhattacharyya (Bhattacharyya 2015) based on a distinction between the *diversity-problematic*

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and the *equality-problematic* that one of the criteria of assessing the success of democratic federalism is the production of more equality, reduction of poverty, more health care and so on. Judged thus, the poverty level in Sabah exceeding 32 per cent and child poverty at 40 per cent do not suggest a particularly desirable scenario (Bhattacharyya 2019: 188). Regarding the issue of minorities in these two States, the story is as dismal. The Chinese, for example, speak Mandarin and other dialects of antiquity. Bhasa Malay is the official language of the federation, but there is no official recognition of the Chinese even though they are predominant in one State of Penang. The *orang asli,* the indigenous peoples in the Borneo States suffer from the imposition of *basha Malay.* They speak different languages of their own such as Kadazan, Iban and Dasum which have fared very badly (Bhattacharyya 2019: 193). As a result of the increasing federal control (allegedly violative of the terms of agreement) there has taken place depletion of resources of the States of Sabah and Sarawak such as oil, gas, palm oil and logging. In short, there is a strong undercurrent of discontent among the peoples in these two States against increasing centralization, and the resultant loss of their special autonomy.

The lesson that one would draw for aspiring federations world over is that federal governance is a difficult governance, but it does not work in conditions of authoritarianism, centralization, and the lack of fairness. Large or small, many federations remain only on paper, and various units languish under the clutches of heavy doses of authoritarianism. The authoritarian leaders fail to read the writings on the wall and fail to take course correction before it is too long.[XXII] On the basis of the personal experience of the author in (unattributable) deliberating on the constitution making for State riven with ethnic conflicts in Myanmar, it can be further asserted that in many cases only a *large measure of asymmetric federalism* coupled with minority veto conceded in favour of minority can save the countries from unending civil war and ethnic cleansing.[XXIII] In multi-ethnic countries in Asia and Africa, if not elsewhere too, a federal solution should be large extent of asymmetry at many levels rather than a symmetrical arrangement – it requires a lot of institutional engineering.

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[I] The 'temporary' provisions were so inserted in the Constitution (under Part XX1) in view of the war like situation in J & K in 1947 created by the Partition of India, and the invasion of Kashmir by some tribesmen from across the border backed by the Pakistan state, which resulted in the occupation of a western part of Kashmir known as 'POK', or ' Azad Kashmir', arguably controversially (see for details, Menon 1956: 390-415; Anderson 2014: 70-92. 2nd edn). As the volumes of writings on J and & suggests, the case of the real status of

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the State, and its integration with the Union of India has remained highly controversial. While the official argument was that the King of Jammu & Kashmir signed the Instrument for Accession willingly to integrate with the Union of India, international scholarship 9Anderson 2014) believed that the State was handed over to India 'on a British plate' (Anderson 2013: 64). Anderson even went to the extent of claiming that the IOC was backdated by the Indian officials. There was and still is a lot of misunderstanding about the subject. During the debates in the Constituent Assembly of India (dated 17 October 1949) on the question of representation of the State in the body, Jawaharlal Nehru categorically stated that the accession of the State to the Union of India was 'unconditional'. But V. P. Menon, a top civil servant closely associated with the whole issue of accession and integration of the State stated that the accession was conditional. He wrote: There was a lot of discussion, at the end of which it was decided that the accession of Jammu and Kashmir should be accepted subject to the provisions that a plebiscite would be held in the state when the law-and-order situation improved' (p. 400).

[II] When Jammu and Kashmir acceded to the Union of India on 26 October 1949 under very difficult circumstance (Menon 1956; Anderson 2013) there were no conditions as to the special status accompanied the Instrument of Accession.

[III] The tenor of the judgment consists of the following: first, the State of Jammu & Kashmiri did not retain any element of sovereignty after signing the Instrument of Accession on 25 November 1949. Neither did it have any 'internal sovereignty'. Second, Article 370 and its placement in Part IX of the Constitution of India is a temporary provision. Third, the power of Article 370 (3) ceased to exist after the dissolution of the Constituent Assembly of J & K. Fourth, the Presidential Proclamation to declare Article 370 ceased is valid. Firth, since the Solicitor General of Law stated that 'the statehood of Jammu and Kashmir will be restored (except for the carving out of the Union Territory of Ladakh)' the Court did not 'find it necessary to determine whether the reorganisation of the State of Jammu and Kashmir into two Union Territories of Ladakh and Jammu and Kashmir is permissible under Article 3. However, the Court 'uphold the validity of the decision to carve out the Union Territory of Ladakh in view of Article 3(a) read with Explanation I which permits forming a Union Territory by separation of a territory from any State'. Finally, the Court directed that 'steps shall be taken by the Election Commission of India to conduct elections to the Legislative Assembly of Jammu and Kashmir constituted under Section 14 of the Reorganisation Act by 30 September 2024' and 'Restoration of statehood shall take place at the earliest and as soon as possible'. (https://main.sci.gov.in/pdf/LU/article_370.pdf) signed on 25/3/24.

[IV] 84 per cent Christian (approx.) out of which the Catholics are 79 per cent, the Protestants 6 per cent and the Muslims 6.4 per cent.

[V] In the world's first federation of the United States the term 'federal' is not used. The Americans wanted to make a more perfect Union.

[VI] https://www.aljazeera.com/news/2018/3/13/philippines-muslim-leaders-tired-of-waiting-for-bangsamoro-law (sighted on 7/1/24).

[VII] The BJP, India's (in fact the world's) largest party) operate electorally speaking, within the remit of India's federalism and democracy, is not doctrinally a pro-federal party.

[VIII] https://main.sci.gov.in/pdf/LU/article_370.pdf (sighted on 10.3.24) *note: IOA=Instrument of Accession.

[IX] And yet, based on long involvement as an expert (unattributable) in constitution-making, a federalism with a heavy bias to asymmetry and adequate minority veto appear to be the only realistic solution to the country.

[X] See, for further details, Watts (2008), pp. 125-30.

[XI] The Planning Commission was an extra-constitutional body formed in 1950 as an essential body for a public sector dominated command economy which became superfluous in the era of India's neo-liberal reforms.

[XII] The Finance Commission is constitutionally mandated recommend to the President of India who appoints the members and define the Terms of Reference of the Commission, the devolution of tax and non-tax revenues between the Union and the States both vertically and horizontally. Vertical transfers now are 42 per cent of the total pool of taxable money, but in case of horizontal transfer the Commission follows a complex formula that takes into consideration many variables for the sake of equity and diversity so that the weaker units do lose out Table1). As per Article 275 of the Constitution the Commission also duty bound to determine the principle of for grants-in-aid to the States. These two bodies had overlapping and often conflictual issue to resolve, but the Finance Commission has been the key to the stability of the Indian federation. In comparative terms federation failed ion Pakistan for the Finance Commission there never followed any objective criteria in tax devolution, and its disbursement was arbitrary.

[XIII] This was very controversial and lots of appeals to the Supreme Court of India were made against the Union government decisions. But the Supreme Court in its recent verdict dated 11 December 2023 upheld the President India's action to abolish Article 370 on the ground that it was a 'temporary' provision.

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[XIV] Article 152 of the Malaysian Federation Constitution says: The national language shall be Malay language and shall be in such script as the Parliament by la provide.
[XV] In 2024, the budget of Sabah shows a surplus of RM 35.82 million. (The New Strait Times dated (https://www.nst.com.my/news/nation/2023/11/982301/sabah-2024-budget-surplus-rm3587-million) sighted on 15.1.24
[XVI] https://www.malaymail.com/news/malaysia/2023/11/29/payment-of-special-grants-to-sabah-sarawak-completed-says-pm-anwar/104863 (sighted on 15.1.24).
[XVII] *Bumitputra* includes the Malays and indigenous peoples, including Orang Asli, Dayak, Anak Negeri,
[XVIII] https://www.cia.gov/the-world-factbook/about/archives/2021/field/ethnic-groups/ (sighted on 15/1/24)
[XIX] Staatvolk was coined by Brendan O'Leary in 2001 to refer to a federation dominated by one ethnic groups who considered it as their own state. The Malaysian federation with the Malay domination is a major example. (see Bakar 2007: 68-76); and O'Leary 2001 for details on the term *staatvolk*.
[XX] Nepal and Myanmar are federations but not discussed because, the federation in Nepal is still fledgling and struggling to sustain itself while Myanmar is a precarious case being under military rule over the last two years.
[XXI] It is widely believed among some parties and opinion makers that the 1963 Agreement on the basis of which they joined the Malaysian federation has increasingly been violated giving birth to and sustaining what is called 'state nationalism' in these States.
[XXII] One instance is of course Pakistan which does not allow federal asymmetry although this could meet the grievances of many small ethnic identity communities who profess Islam, but their ethnic identity demands far-outweigh their faith.
[XXIII] It is ironic that in the evolving discourse of federalism in the Post-Cold War era the idea of 'asymmetric federalism' is yet to be seriously considered when the countries being discussed exhibit varied levels of diversity and the clamor for autonomy. In an otherwise scholarly collection of essays on the subject titled "Emerging Federal Structures in the Post-Cold War Era edited by S Keil and S. Kropp (Palgrave Macmillan 2022) the term 'asymmetric federalism' has occurred in the Index for once.

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What Can Asymmetric Federalism and Differentiation in EU Law Learn From Each Other? Asymmetric Federalism as an Explanatory Model for Differentiation in EU Law.

by

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Abstract

The article applies the concept of asymmetric federalism to differentiation in European Union (EU) law. By doing this, it brings together two strands of literature that share many similarities but have seldom been considered in parallel. It discusses the two theoretical frameworks in terms of their common features and their underlying normative idea, namely, the accommodation of diversity. Additionally, the article also offers refinements of the asymmetric federal model based on the EU's experience with differentiation. The two refinements proposed, namely to integrate the importance of asymmetry and subnational (constitutional) identity in the studies on asymmetric federalism, have the potential to provide a more exact analytical model which would better explain the dynamics of accommodation of diversity in quasi-federal systems.

Keywords

Asymmetric federalism, differentiation, European Union, quasi-federal systems, identity

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1. Introduction[i]

The purpose of this article is to link two theoretical approaches to the accommodation of diversity in multilevel systems: asymmetric federalism and differentiation in EU law. Although this may imply a Eurocentric approach to asymmetric federalism, the article aims to show how the parallel study of asymmetric federalism and differentiation in EU law may not only be beneficial for a better understanding of the EU but can also offer insights into the possible new approaches to the accommodation of diversity in other quasi-federal systems[ii] based on the EU's experience with differentiation. The article approaches the task set out by dividing it into two limbs.

Firstly, it analyses the correspondence between asymmetric federalism and differentiation. It briefly outlines the theoretical underpinnings of each of the two approaches to establish the level of substantive correspondence. As shown in the article, this is beneficial primarily to better understand and analyse the existing dynamics within the EU, positioning them into the wider context of (asymmetric) federalism studies. Asymmetric federalism can be adopted as a model that helps to better understand and explain the struggle between unity and diversity in the EU. In that way, the article attempts to combine two sets of literature, which share many similarities but have seldom been considered in parallel.

Secondly, the article attempts to draw lessons for asymmetric federalism from the EU's experience with differentiation. Based on the previous part of the article, it offers two potential refinements of the asymmetric model of federalism which may produce an analytical framework potentially more apt to better explain the dynamics of accommodation of diversity quasi-federal systems. In that respect, the article uses the EU's experience to expand upon the existing theoretical framework of asymmetric federalism.

2. Comparing Asymmetric Federalism and Differentiation in EU Law[iii]

2.1 Introduction

The discussion in this section brings together two strands of literature that share many commonalities, which have not been studied in detail in the literature. The first is asymmetric federalism and the second is differentiation in EU law. On closer inspection, it becomes

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apparent how these two theoretical approaches to the accommodation of diversity, the first within federal states, and the second specifically within the EU, employ similar strategies and legal mechanisms. The purpose of this section is to analyse the overlaps as well as dissimilarities, aiming to show that approaching differentiation from the perspective of asymmetry may be beneficial in terms of more precise legal analysis. The comparison also serves as the foundation for the discussion in Section 3 on the possible refinements of the theoretical model of asymmetric federalism developed in federalism studies, based on the experiences with differentiation in EU law.

2.2 Asymmetric Federalism: Regular Federalism on Steroids?

In the additional exploration of asymmetric federalism, this article follows a relatively straight line of literature that has developed on the topic, especially in the last few decades. While there are few monographs specially devoted to asymmetric federalism (e.g. Agranoff 1999a), the study of asymmetric federalism, including this article, draws from the intellectual pool of ideas produced by some of the giants in the field of federalism studies in general.

The starting point for the study of asymmetric federalism is the fact that all federations are states that are founded upon the recognition of difference and diversity (Burgess 2009: 21; Elazar 1987: 12). Paradoxically, federations are therefore formed to institutionalize conflict, competition and cooperation in a way that perpetuates complex problems and may produce instability. The system is constructed to accommodate diversity in a way that creates the conditions for both a stable and an unstable state (Burgess 2009: 21). Since federal states are purposefully built upon divergent socio-economic and cultural-ideological bases, asymmetry is present in any federal arrangement: Social, political and economic differences ensure that no federal system is completely symmetrical. In that sense, asymmetric federalism can be viewed to present merely one end of the federalism spectrum, where the degree of differences among the constituent units is more pronounced and where this diversity is, more than usually, reflected in the legal (constitutional) treatment of those constituent units by the central (federal) authority. Accordingly, we could speak of asymmetric federalism as one 'extreme' of the application of the general federal idea under the conditions of manifest diversity, usually occurring in multinational multilevel systems.

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Unsurprisingly, since symmetry is perceived as the embodiment of equality of constituent units of a federal system (Delmartino 2009: 37), the traditional federal approach, expressed for example in the commonly referred-to piece by *Tarlton* (Tarlton 1965), views asymmetry with suspicion (cf Sahadžić 2021: 3; Burgess 2006: 213–15). Conversely, recent research proves that asymmetries do not necessarily promote disunity (Sahadžić 2016: 135–147). As practice in the last decades has shown, asymmetry can also be adopted with notable success to stabilize quasi-federal systems in the processes of decentralization to promote sustainable pluralism in diverse societies (Palermo, Zwilling, and Kössler 2009: 7).

Asymmetry in federations refers to the differential status and rights among the constituent units of the federation and between them individually and the federation as a whole (Burgess 2006: 209). It follows from differentiation in the degrees of autonomy and power among constituent units of a state (Watts 2005: 2). Different analytical categories have been developed under the theoretical framework of asymmetric federalism for descriptive and analytical purposes. Firstly, there is a division between the conditions and the outcomes of asymmetry. Outcomes are further divided among *de iure* (constitutional) and *de facto* (political) asymmetries (e.g. Watts 2008: 125-30; 2005: 2; 2000: 12–30; 1999: 30-42; Burgess 2006: 218-21; Burgess and Gress 1999: 50–54; Popelier and Sahadžić 2019: 5-6; Sahadžić 2021: 16-44).

Asymmetry is conditioned by objectively identifiable differential societal factors, defining asymmetry as an empirical reality that actually exists within a given society (Burgess 2009: 24). If we draw once more from the traditional federal studies, we see that *Livingston* already identified a set of diversities that drive federalism: Differences of economic interest, religion, race, nationality, language, variations in size, separation by great distances, differences in historical background, previous existence as separate colonies or states, and dissimilarity of social and political institutions (Livingston 1952: 89–90). These empirical facts can also be extended to asymmetric federalism, forming preconditions for asymmetry. From the above, two categories of preconditions can be identified: socio-economic and cultural-ideological (Burgess 2006: 215).[iv]

These preconditions lead to outcomes of asymmetry (Burgess 2009: 24). Asymmetrical outcomes involve the actual relations generated by state activity (Agranoff 1999b: 17) and reflect preconditions in the legal setup of a federation (Burgess 2006: 217). They are defined by the relations between constituent units of a system and other parts of the system, the

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central authority and the system as a whole (Watts 2000: 8). Based on the ensuing disambiguation, *de facto* asymmetries (political asymmetries) refer to the asymmetric practice or relationships, which result from the preconditions (Burgess 2006, 217). They encompass practices and relationships based on linguistic, religious, cultural, ethnic, social, economic, political, and other differences among sub-national entities and between sub-national entities and the central level. More specifically, they are based on differences such as the size of the population and the territory, the economic character, resources and wealth and the party system of the sub-national entity (Sahadžić 2021: 17). They present themselves as differences in the constituent state units, fiscal power and autonomy, representation and protection in federations and political parties and party systems (Burgess 2006: 217–220). As different expressions of *de facto* asymmetric federalism, they are the outcomes of the underlying objective social reality (Burgess 2009: 24–25). *De iure* asymmetries (constitutional asymmetries) refer to the legally and constitutionally entrenched differences (Burgess 2009: 25; Agranoff 1999b: 16). They produce variations among sub-national entities and between sub-national entities and the central level within one constitutional system under the law and correlate to differences in constitutional design and distribution of powers and competences (Sahadžić 2021: 17) – constituent units are treated differently under the federal law (Burgess 2006: 217). These asymmetries include territorial delineation, distribution of competences, representation in the chambers of the central legislature, the entrenchment of the Bill of Rights and general divergences between federal and constituent state legislation (cf Burgess 2006: 217, 220–221; Sahadžić 2016: 143–45; Watts 2000: 21–30). Contrary to *de facto* asymmetries, *de iure* asymmetries are not present in all federal systems (Sahadžić 2021: 17–18). Accordingly, *de iure* asymmetric federalism is broadly defined by *Burgess* as a policy choice of converting social reality into a formally differential status, embodying the constitutional, legal and political expression of unique socio-economic and cultural-ideological identities that require protection, preservation and promotion *via* constitutional entrenchment, legal recognition and other special procedures (Burgess 2009: 25).

In theory, the relationship between the two types of asymmetry is often only vaguely explored. In this article, they are understood not to be mutually exclusive. As pointed out by *Sahadžić*, *de facto* asymmetries form the basis and function as a prerequisite for *de iure* asymmetry (Sahadžić 2021: 17). This means that *de iure* asymmetries are adopted in the presence of pre-existing *de facto* asymmetries to protect the underlying pluralism and ensure

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substantive equality among the constituent units of a system. However, this is not the only possible interplay between the two concepts. While *de iure* asymmetry may therefore lead to *de facto* asymmetry, *de facto* asymmetries may also arise when the law treats the component units of the system symmetrically, but the different exercise of their power (due to the existence of preconditions for asymmetry) nevertheless leads to factual asymmetric relations or outcomes. This means that asymmetry is, therefore, either a result of an asymmetric *distribution* of power or an asymmetric *exercise* of (either asymmetric or symmetric) power (cf Palermo 2009: 11–12 esp. n 4).[v] In the latter case, asymmetry is the result of non-exhaustive regulation of an issue at the federal level. This is important because if *de facto* asymmetries are seen as a defining feature of asymmetric federalism, non-exhaustive symmetric legal regulation at the federal level should also be considered an instrument for achieving the underlying aim of asymmetric federalism, namely the accommodation of diversity. This proposition is more exhaustively developed and explained in Section 3.2 of this article. Note, however, that situations where symmetrical powers are used to produce asymmetric application of those powers is labelled in federal theory as 'asymmetry in the outcome' (not to be mistaken with outcomes of asymmetry discussed above) (Sahadžić 2023: 7).[vi]

2.3 Differentiation in EU Law: A Variation on a Federal Theme?

The EU Member States are marked by heterogeneity related to differences in territory and population, languages, cultures, political differences, as well as social and economic differences. Some of these also lead to constitutional diversity (e.g. Albi and Bardutzky 2019) where differing values are expressed in differential constitutional arrangements (Kos 2023a). Under differentiation theory, this value pluralism has been distilled into two analytical categories: economic and social, on the one hand, and political and cultural value diversity, on the other (Bellamy 2019: 179 ff).

Although the EU's principled stance has been to integrate by unification (cf Thym 2017: 56; de Witte 2017: 9), it has also had to overcome the challenges stemming from diversity by adopting different mechanisms of differentiation (Kos 2023b: 207–9). To accommodate differences, Member States may be assigned different rights and obligations in different policy areas (cf Bellamy 2019: 178–79; Bellamy and Kröger 2017: 628; Kölliker 2010: 40–41). It is relatively clear how this approach resembles what was discussed in the previous

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subsection under the terms of *de iure* asymmetry, whereby constituent units of a quasi-federal system are explicitly treated differently under federal law to accommodate the underlying social disparities.

In academic discussions, the terms differentiation and differentiated integration are often linked to 'flexibility' (Stubb 1999; Avbelj 2008; Přibáň 2010; Closa 2015: 7; Böttner 2021: 2). While being defined in different ways by different authors, the two terms are either used interchangeably, or differentiated integration is the preferred term (cf Tuytschaever 1999: 1; Sielmann 2020: 39). What the definitions of those concepts hold in common is the consensus that the key feature of the described approach is the facilitation or accommodation of a degree of difference between Member States in what would otherwise be common (unified) EU policy. Differentiation is adopted to enable the integration process to proceed despite objective and value-based differences (de Witte, Hanf, and Vos 2001: xii), leading to different levels of integration among the Member States (Sielmann 2020: 39). This includes differentiation in the narrow (*stricto sensu*) and in the wider sense (*sensu lato*) (cf Tuytschaever 1999: 2–3).

As traditionally used in the literature, differentiated integration can be understood as a synonym for differentiation *stricto sensu*, defined as the differential validity of EU rules across Member States (Schimmelfennig and Winzen 2014: 356). Under this variety of differentiation, EU law (primary or secondary) applies different rules to its addressees: Some Member States are explicitly excluded from the scope of application of EU law, or obligations under the law differ among the Member States (Tuytschaever 1999: 2; de Witte 2019: 1; Schimmelfennig and Winzen 2020: 3–4). Differentiation *sensu lato*, on the other hand, covers situations falling within the scope of common EU law regulation, but where these rules are nevertheless implemented differently in different EU Member States, which employ the discretion left to them by the EU legislator. This occurs when EU legal acts do not contain measures of total harmonisation or unification (meaning partial or minimum harmonisation or the employment of other approaches which entail a degree of deference). Under this variety of differentiation, the relevant EU rule formally treats Member States equally: The same rule applies to all of them, but it also allows all of them a margin of discretion in its implementation, enabling them to adopt differentiated (implementing) rules. This approach to differentiation is sometimes also referred to as differentiated or flexible implementation or application (de Witte 2019: 1) and in some studies on the topic it is

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considered to be an example of uniform, rather than differentiated integration (Sielmann 2020: 41, 369).

Differentiation has fared importantly throughout the constitutional history of the EU (Hanf 2001; Kos 2023a) and most forms of differentiation were maintained, with some being additionally refined under the Treaty of Lisbon (e.g. Sielmann 2020: 76–83). There are hence numerous examples of this approach to accommodating subjective and objective differences among the EU Member States. Under the Treaty of Lisbon, four Member States procured opt-outs from Treaty obligations (Tuytschaever 1999, 122–23; Sielmann 2020, 354–61). By opting out, rules adopted in those areas do not (fully) apply to those states, typically due to concerns related to sovereignty (Tuytschaever 1999, 121–22). The central Treaty mechanism of differentiation is enhanced cooperation, governed by Arts. 326–334 TFEU, which has long been posited as the flagship approach to differentiation, but has so far failed to deliver (see, for example: Beneyto 2009; Fabbrini 2012; Martinico 2015: 6; Thym 2017: 40–49; Martinico 2014: 284–85; de Witte 2018: 237–38; 2019: 6–7; Sielmann 2020: 296–322; Böttner 2021: Kos 2023a: 211–13). Notably, the Treaties also entail mechanisms of differentiation in the single market and secondary legislation in general (Closa 2015: 21–22). These include safeguard clauses[vii] in primary law, such as the possibility to maintain stricter national standards in social policy, consumer protection, environmental policy and public health,[viii] as well as universally for legislation adopted under Art. 114 TFEU[ix]. These mechanisms of differentiation are then also used in acts of secondary law.[x] Secondary-law differentiation also results from non-exhaustive, most often, but not limited to minimum harmonization (cf Vos 2001: 148–54), allowing the Member States to provide or maintain higher standards. Differentiation may also materialize by way of derogation clauses either in primary or secondary law (cf Sielmann 2020: 365–66).[xi] Differentiation outside EU law (international *inter se* agreements)[xii] has been widely used in the wake of the financial and economic crisis post-2008 (Sielmann 2020: 166 ff; Kos 2023b: 213–17).

2.4 Overlap Between Differentiation in EU Law and Asymmetric Federalism

This article is not the first piece of academic research to draw the quite clear parallel between asymmetry and differentiation (see, for example: Delmartino 2009; Martinico 2013; 2014; 2015; 2016; Bardutzky 2018; Van Cleynenbreugel 2019; Sahadžić 2021: 6). In the

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literature on federal asymmetry, sporadic mentions of differentiation or differentiated integration in the EU can sometimes also be found (e.g. Watts 2000: 24).[xiii] However, an overall schism between the studies of asymmetric federalism and differentiation has been noted (Delmartino 2009: 38). One of the main aims of this article is to attempt to bridge that gap by pointing out the key overlaps of the two theoretical approaches to the accommodation of diversity in multilevel systems. Four of those can be identified based on the foregoing theoretical overviews in the previous subsections.

Firstly, the causes of each of the two phenomena, as identified in the literature, both relate to different types of social, cultural, political and economic diversity. All the differences between the Member States that exist within the EU neatly correspond to the preconditions of asymmetry in asymmetric federalism. The existing heterogeneity within the EU aligns with preconditions or inputs of asymmetry. In both cases, we are talking about economic, social and political differences which feed different legal approaches under the overarching central (EU or federal) legal structure. The overlap between distinctive analytical categories of socio-economic and cultural-ideological preconditions for asymmetry (Burgess 2006: 215) and between economic and social, and political and cultural value diversity in the EU (Bellamy 2019: 179ff) is quite clear. Both approaches are the result of and driven by the demands of the same diverse social reality.

Secondly, both strands of literature introduce analytical approaches which explain the abovementioned causes of the two phenomena in corresponding ways. The literature on differentiation broadly identified two groups of reasons for differentiation and accordingly two types of differentiation in EU law: subjective and objective. *Tuytschaever* showed that the overall causes of the differentiation in EU law were the existence of objective differences, entailing socio-economic factors, and of subjective political differences (Tuytschaever 1999). His distinction follows *Ehlermann's*, who separated economic and social factors on the one hand from the 'purely political phenomena' on the other as relevant for flexibility arrangements (Ehlermann 1984: 1289). Objective differentiation is grounded on existing socio-economic differences between the Member States or between regions within the Member States (Tuytschaever 1999: 218–19; cf Bardutzky 2018). In political science *Winzen* and *Schimmelfennig* label this instrumental differentiation (Schimmelfennig and Winzen 2014: 355; also see: Bellamy 2019: 179–80, 188–89). Subjective differentiation, on the other hand, is based on political differences (Tuytschaever 1999: 122–23). *Winzen* and *Schimmelfennig* call

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this constitutional differentiation, concerning primarily issues of sovereignty and identity (Schimmelfennig and Winzen 2014: 355). Similarly, in the realm of asymmetric federal theory, *Watts* analysed asymmetries as either politically or capacity-driven, depending on the types of inputs of asymmetry (Watts 2000: 7). The first group refers to situations, where a territorially defined group presses for a differentiated political relationship with the central government. These demands are often, but not exclusively based on self-determination claims, stemming from ethnic differences and also related to identity. The second group encompasses situations where diverging capacities to provide effective sub-national governance lead to claims for asymmetric treatment. These may, for example, stem from limited financial or human resources (Watts 2000: 7–8). While those from the former group would presumably lead to permanent forms of asymmetry, those from the latter are usually construed as transitional (Watts 2000: 10–11). *Watts'* categorization clearly mirrors the difference between objective and subjective differentiation in EU law.

Thirdly, the outcomes under both approaches vastly correspond as well. As briefly outlined in Section 2.3 above, the EU employs different mechanisms of differentiation which include either explicit differential treatment of different Member States or symmetrical treatment that enables differentiated implementation or application. On the other hand, in asymmetric federalism, *de iure* asymmetry (or symmetry, as discussed in Section 3.2) is used to reach the same goal in quasi-federal systems. Accordingly, we see that *de iure* asymmetry would presumably mostly fall along the lines of differentiation *stricto sensu*, while federal symmetry (which gives some deference to constituent units) would align with differentiation *sensu lato*. The different forms of differentiation in EU law therefore also correspond to different types of asymmetry (or in some cases symmetry) according to asymmetric federalism. Similar legal mechanisms, such as opt-out clauses or different degrees of legislative harmonization and/or unification, are adopted under each of the noted approaches.

Lastly, the correspondence follows also from the overarching normative premise of both asymmetry and differentiation. The predominant narrative explains differentiation as an institutional response to the increasing diversity and divisiveness of the EU, resulting from its widening (cf Böttner 2021: 1–2; Avbelj 2008: 139, 142–43; Přibáň 2010: 26–27) and deepening (cf Avbelj 2008: 138–39; Closa 2015: 7; de Witte 2017: 10; 2018: 227–28; Antoniolli 2019: 85). The more complex and diverse the EU became, the more it employed

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different mechanisms of differentiation to secure deepened and wider integration. Differentiation has therefore been employed to accommodate differences and to preserve and foster the unity and integrity of the EU multilevel legal system. Similarly, the overarching premise of asymmetry is constituted by the formal politics of recognition: Its root is in the respect for and toleration of difference in quasi-federal systems (Burgess 2006: 222). Asymmetry in federalism is a governance practice to confront ethnic, social, economic and other diversity (Agranoff 1999b: 21), a normative choice to formally recognize difference and diversity (Burgess 2009: 25). Asymmetric federation is an instrumental device for accommodating differences to provide the overall political stability of the system (Burgess 2006: 222; also see: Sahadžić 2021: 52). The accommodation of diversity and the unity and stability of the system are the two main normative ideals behind both concepts (cf Burgess 2009: 34).

Based on the above, we see a significant degree of overlap between asymmetric federalism and differentiation in EU law: they share preconditions, theoretical explanations, outcomes and normative bases. Both are designed to tackle the same social realities by adopting similar techniques with overlapping normative premises.

Admittedly, the EU does not fit perfectly into the analytical and explanatory model of asymmetric federalism; specifically, while asymmetry has mainly been ascribed to fragmenting systems, the EU is a typical example of an integrative system (Sahadžić 2021: 6).[xiv] Accordingly, in the EU, differentiation has been analysed almost exclusively from the point of view of its role in the further integration of the EU. In that sense, talk has, as noted, mostly been about 'differentiated integration'. Conversely, due to its modern-day role in the processes of decentralization (cf Palermo 2009: 13), asymmetrical federalism rather focuses on subduing identity-related claims for asymmetry in multinational quasi-federal systems, stressing their impact on the stability, and most often being linked to politically sensitive questions of governance. These dissimilarities should, however, not overshadow the clear conceptual overlap between differentiation and asymmetry. While context defines the standout issues and solutions, the underlying objective generally remains the same: the accommodation of diversity to provide stability and legitimacy of a multilevel system (Kos 2023c: 181).

In conclusion, we can determine that the relation between differentiation and asymmetry is one of *species* and *genus*. Differentiation represents a specific emanation of asymmetry in the

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context of the EU being an EU-specific example or manifestation of asymmetry, which can more generally be applied in any quasi-federal system (Kos 2023c: 197).

The foregoing linkage of the two theoretical approaches helps the EU for explanatory, analytical and normative reasons. On the one hand, it can serve as an analytical tool applied to the European Union, but can also be extended to other quasi-federal systems. When viewed through the prism of asymmetric federalism, the dynamics within the EU can be better understood and, most importantly, placed into the realm of wider discissions on asymmetry in quasi-federal systems. This provides a better understanding of why, when, how and which mechanisms of accommodation are used and how they operate. On the other hand, it also gives structure to the discussion on how to accommodate diversity when this is normatively desirable. This means that it can offer solutions for a better construction of the EU (as well as any other quasi-federal system) in the future.

3. Two Refinements of the Model of Asymmetric Federalism: Lessons from the EU

3.1 Introduction

In terms of conclusions that can be drawn from the comparison between the EU and asymmetric quasi-federal systems for the further development of the theory of asymmetric federalism, this article offers two refinements: (1) the need to consider symmetric solutions as venues for the accommodation of diversity and the preservation of pluralism, and (2) the need to distinguish between the different types of preconditions of asymmetry. In this part of the article, the benefits of the parallel study of the two theoretical approaches reverse the relatively Eurocentric approach by searching for potential lessons the analysis of differentiation can offer to asymmetric federal studies.

3.2 The Pronounced Role of Symmetry in Asymmetric Federalism: An Oxymoron Overcome

While it may at first glance appear as contradictio in adiecto, the employment of symmetric legal solutions as mechanisms for the accommodation of diversity under asymmetric federalism should also be underlined. Building on the initial remarks on the

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relationship between different types of federal asymmetries in Section 2.2, this part of the article aligns the role of symmetry in differentiation and asymmetric federalism.

As we saw from the example of the EU, differentiation sensu lato, although understudied for its constitutional relevance in the EU, is commonplace. It occurs when the EU treats all Member States in the same way, i.e. (legally) symmetrically, but leaves them a margin of discretion that they may use in the implementation or the application of the EU's standards. As discussed above, this approach is designed to align the relevant legislation to the underlying social fabric, espousing the principle of substantive equality among the Member States.

Although some authors writing on asymmetric federalism have noted that symmetric legal arrangements may (nevertheless) produce de facto asymmetries (cf Palermo 2009: 11 n 1.)[xv], under the study of asymmetric federalism, the possibility of employing symmetry to attain the normative goal of accommodation of diversity has not featured prominently. The reason may be found in the fact that the initial focus of the studies on de facto asymmetries was meant to show that even in de iure symmetrical federations, asymmetry may follow from the underlying social diversity. This was to overcome the initial position that relations within a federation are always symmetrical and, as per Tarlton, that federal symmetry and stability are directly proportionate (Tarlton 1965: 873; cf Sahadžić 2021: 3). De facto asymmetry was therefore understood as an addition to possible de iure asymmetries: A system may be de iure asymmetrical; but even systems that are not de iure asymmetrical (which implies that they are therefore de iure symmetrical), may exhibit signs of de facto asymmetry. It was, therefore, implied that de facto asymmetries (in federal theory) may emerge when the treatment of component units at the federal level is symmetrical. If initially, the aim was to explain the (asymmetric) relationships that may emerge in a generally symmetrical federal system, this article stresses the fact that asymmetry may also be consciously employed to accommodate diversity and secure substantive equality. Instead of looking at the results of the employment of asymmetrical mechanisms, it analyses asymmetry for its potential use as a mechanism that can be adopted to achieve these results. This shift in focus shows that the normative ideal of the accommodation of diversity (and the linked stability of the system) can be reached both by either de iure symmetry or asymmetry. The extent of the level of accommodation of diversity by the central level of a quasi-federal system will depend on how and in what circumstances mechanisms of asymmetry or symmetry are adopted.

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If we first look at de iure asymmetry, we see that it can be used to either entrench and protect, or to iron-out and diminish the differences between the constituent units of a system. The central authority can adopt de iure asymmetry in favour of some or all constituent units, leading to de facto asymmetry.[xvi] This either leads to the entrenchment of the existing de facto asymmetries or counterbalancing (ironing-out) of the existing de facto asymmetries. The effect de iure asymmetry at the federal level will have on de facto asymmetry will depend on the type of underlying diversity (i.e. preconditions for asymmetry).[xvii] In both cases, constitutional asymmetry at the federal level will restructure the constitutional framework to account for the underlying heterogeneity, resulting in the accommodation of diversity and ensuring (substantive) equality among the constituent units (cf Kos 2023c: 189–93).

However, similar results may follow when applying de iure symmetry as well. At the central level, de iure symmetrical treatment of constituent units can either be implicit or explicit. The first occurs when the central level omits any regulation whatsoever, leaving the constituent units free to regulate the field as they prefer. This will lead to de facto asymmetry in the case of underlying diversity among the units. The second option is for the federal system to explicitly adopt de iure symmetry via central regulation, applicable to all constituent units in the same way. However, this regulation can either be exhaustive or non-exhaustive. This choice is related to the extent of federal pre-emption of subnational constitutional autonomy (cf Palermo and Kössler 2019: 131–32). If symmetrical regulation is exhaustive, the result in terms of accommodation of diversity will depend on the type of asymmetry: it may either entrench or override de facto asymmetry. Conversely, when symmetrical regulation is non-exhaustive, the constituent units are allowed to deviate from the common standard, depending on the extent and depth of the central regulation. Despite de iure symmetrical treatment, this will also produce de facto asymmetry and by adopting it the central level of the system will accommodate diversity among its constituent parts (cf Kos 2023c: 189–93).

The key outtake from the above is that if we start from the proposition that the overall goal of asymmetry (and differentiation) is the accommodation of diversity, this can be achieved both by de iure symmetrical and de iure asymmetrical regulation at the central level. This means that when pursuing the policy of recognition of diversity, both symmetrical and asymmetrical legal mechanisms may be considered. Which will fit the purpose of

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guaranteeing substantive equality of constituent units of a quasi-federal system better will ultimately depend on the type of diversity that needs protecting. This proposed refinement adds another layer to the accommodation of diversity under asymmetric federalism, which has not been fully captured thus far. The parallel study of asymmetry and differentiation therefore proves useful both for the study of asymmetric federalism as well as for differentiation in EU law.

3.3 Is there Space for Constituent (National or Constitutional) Identity in (Asymmetric) Federalism?

In the EU, a long strand of literature has been devoted to the issue of Member State national or constitutional identity, especially since the adoption of the Treaty of Lisbon (see, for example: Reestman 2009; Besselink 2010; von Bogdandy and Schill 2011; Claes 2013; Dobbs 2014; Cloots 2015; Kos 2019; 2021; Scholtes 2021; Millet 2021; Martinico 2021; de Witte and Fromage 2021; Scholtes 2023). This concept has often been studied as something particular to the integrative dynamics and specificities of the EU as an integrative project. The question arises whether the concept can be (or has been) of use in quasi-federal systems as well. A closer look warrants careful conclusions as more comparative research specifically devoted to this issue would be needed to provide a clear answer. However, when adopting the approach advocated above, a clearer distinction between the different types of preconditions for asymmetry under asymmetric federalism can potentially be established based on differentiation in EU law.

As discussed, under differentiation in the wider sense, the EU may leave different degrees of autonomy to subsequent Member State regulation, which is related to the doctrine of pre-emption in federal studies (cf Kos 2023c: 133–37). Essentially, the central legislator allocates a degree of deference to constituent units to autonomously regulate certain issues within the confines of the central legislation. When the central authority gives constituent units such a margin for a differentiated implementation or application of the law, there may be more or less acceptable reasons for the deviation from the common, symmetrical standard. In some cases, there may be stronger, even constitutional arguments which warrant the allocation of such a margin (cf Kos 2023a). Here, it is posited that the normative weight of the subnational argument may also be determined precisely by the circumstance of whether or not a specific

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type of diversity is constitutionally protected – either at the central, or the constituent unit level. In the EU, this is exemplified by the identity clause from Art. 4(2) TEU and the corresponding doctrines developed under Member States' constitutional law (e.g. Kos 2019: 44–51). The fact that the EU must respect the national identities of the Member States shows that if a specific emanation of a societal value is expressed in the constitution of the Member State, especially if the national constitution gives this value a specific, higher, hierarchical position, such a value may demand recognition at the central level (cf Faraguna 2016: 494–95). This requirement may be reflected either in the adoption of new (central) legislation, or in its practical application within the states.

When discussing the preconditions for asymmetry, this means that it may be beneficial to see whether some preconditions of asymmetry are constitutionally entrenched (either in the constituent units of a federal system or in the federal constitution) and whether in quasi-federal systems other than the EU, this carries any normative significance of the kind described in the previous paragraph. It may be presupposed that the constituent units would be more reluctant to comply with a common central rule that goes against a core value at that level (*e.g.* protection of a minority language, religious practices, cultural specificities or distinct ethical or moral views within that particular community) especially when it is considered to be (nationally or subnationally) constitutionally protected. Similarly, the federal level may potentially be more receptive to such arguments, adopting its legislative policies (*i.e.* the choice regarding the degree of pre-emption) accordingly.

As conflicts of rules in federal systems are dominated by supremacy clauses (e.g. Palermo and Kössler 2019: 130),[xviii] it may be difficult to imagine how a subnationally protected constitutional value could play a role at the level of federal regulation. When a conflict arises, the federal rule generally overrides the subnational (constitutional) rule. Furthermore, the distinction between integrative and fragmenting systems appears relevant here as well. The role of subnational values, constitutionally protected in subnational constitutions, could presumably only appear in integrating systems, since only in those systems, subnational constitutions predated the federal constitution and may potentially warrant additional protection as a precondition for joining the federal system. The only situation where subnational constitutional specificities could play a role would therefore seem to be when the federal constitution itself specifically safeguarded some aspects of subnational constitutional autonomy. In that sense, it would not be the subnational constitution, but

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rather the federal constitution safeguarding the subnational constitutional variance. In fact, this is how national identity functions in the EU as well. In that sense, comparative studies may point to jurisdictions such as Canada, where due to a specific approach to the allocation of competences, the doctrine of pre-emption or paramountcy does not necessarily favour the central level of government, meaning that, depending on the type of competence, it can also be expressed so that sub-national laws prevail over federal legislation (Hartery 2023, 18; Newman 2011, 4–5; Ryder 2011, 577).[xix] In some cases, local (subnational) autonomy may, therefore, carry a higher normative value than the pursuance of the federal unitary approach.

In that sense, the proposed widening of the analytical approach under preconditions for asymmetry may be beneficial. It may lead to the realization that some differential social values present in specific subnational units must also be recognized at the central level. Even if comparative analysis shows that in most federal systems this may be irrelevant when a concrete and specific conflict of rules emerges, it may nevertheless, even in those cases, play a role in the process of adopting a federal rule, regulating a sensitive issue. The central legislature may opt for a broader level of deference toward constituent units. In situations where the federal constitution adopts special protection of certain aspects of subnational constitutional autonomy, such as in Canada, the usefulness of the proposed approach may be more pronounced. In that sense, pointing out the role of subnational (constitutional) identity, which has extensively been discussed in EU law, for asymmetric quasi-federal systems as well, provides a sharper picture of when diversity is and should be accommodated at the federal level. In that sense, it is a refinement based on the EU's experience which helps to better understand (analyse and explain) other systems that employ asymmetry as well.

4. Conclusion

The purpose of this article was twofold. The first aim was to draw attention to the parallels between the concepts of differentiation in EU law and asymmetric federalism. For this purpose, the article explained the basic tenets of differentiation in EU law and asymmetric federalism. Next, the analysis showed that at least four levels of overlap between the two concepts exist. Firstly, they both share the input or the preconditions side. Just as asymmetric federal arrangements, the EU is also permeated with structural diversity among its Member States. This is relevant as this structural diversity is understood in theory as the

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precondition and the driver of both differentiation and asymmetry. Secondly, theoretical analyses of the drivers of differentiation and asymmetry overlap. Thirdly, there is also considerable overlap when it comes to the (legal) outcomes of this underlying diversity. Both asymmetric federal arrangements and the EU use different mechanisms that allow differentiation or asymmetry among their constituent units. In both cases, this may entail either explicit differential legal treatment of constituent units or other (symmetrical) mechanisms that implicitly allow such differentiation. Lastly, and perhaps most importantly, it has been shown that theoretical takes on both concepts identify common normative bases. The proposition is that asymmetric federalism can also be used to analyse and explain differentiation in EU law. It follows that the dynamics in the EU are not unique: Similar trends can be observed in some federal arrangements. Differentiation in EU law is presented as just one example of asymmetry, its specific emanation within the EU.

Based on the comparison between the two theoretical concepts, the second aim of this article was to, reversely, propose two refinements to the theory of asymmetric federalism based on differentiation in EU law. The first is addressed to the realization that not only asymmetrical but also symmetrical legal treatment can lead to the accommodation of diversity. This helps to better analyse the existing mechanisms, and also construct new mechanisms that can be employed for this purpose. The second refinement stems from the fact that the EU showcases how especially in some cases of symmetrical legal treatment (differentiation in the wider sense), the question of whether or not the differences among the constituent units are constitutionally entrenched is also relevant. Constitutionally entrenched differences may carry higher normative weight. Therefore, to better understand when and why differentiation or asymmetry may be used, a look at how the sources of diversity are treated in the constitutional systems of either the constituent units of the quasi-federation is also useful.

By drawing the parallels between differentiation in EU law and asymmetric federalism, the article attempted to bridge the divide between the two strands of research. In that sense, it should be read as a starting point for further research into the possible uses of asymmetry in the EU, as well as the potential benefits the study of federalism may reap from looking at the EU. The article therefore also attempted to go beyond the Eurocentric approach to the study of federalism. By looking at the specific developments related to the use of differentiation to provide further integration of the EU, it tried to transfer experience from

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the EU to the realm of federalism studies. In that sense, a fresh look at asymmetric federalism may warrant some refinements for the existing theoretical model to be more apt to be applied to modern dynamics. However, as noted, this part of the article remains theoretical, and further comparative research into the existing federal systems will be necessary to validate the hypotheses put forward.

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[i] This article is based on the Author's research, done within the context of his PhD dissertation and is based on the findings of that PhD dissertation, specifically its Part 3. See: Kos 2023c. An early version of this article has been presented at the IACL World Congress in Johannesburg in 2022. The comments and suggestions received significantly helped in developing the ideas put forward in this article.

[ii] The term 'quasi-federal systems' is used in this article to encompass constitutional systems, which are not necessarily states, that apply the federal principles. It is similar to what Elazar dubbed as 'federal arrangements'. More recent literature also employs the terms 'multi-tiered systems' and 'multilevel systems'. See, in that sense, Elazar 1987: 38–64; Sahadžić 2021: 47–49 and literature referenced there; Popelier, Aroney, and Delledonne 2022: 1.

[iii] The Author has published (forthcoming) an article on the topic of this section of the article in Slovene language. See: Kos 2024.

[iv] More specifically, Burgess distinguishes elements such as political cultures and traditions, social cleavages, territoriality, socio-economic factors and demographic patterns as forming these two categories. The overlap with Livingston is apparent. His approach to asymmetry has been adopted by other notable authors in the field, such as Watts.

[v] This interpretation seems to be in line with Palermo's understanding of the relationship between the two concepts. He notes that the different divisions of power both in legislation and in the implementation of laws result in asymmetry. He gives the example of Germany, where legislation is usually symmetric, but its implementation is generally left to the *Länder*, carrying an inherent differential potential.

[vi] Sahadžić offers the examples of the regulation of immigration in Canada and variations in institutional and territorial design in Bosnia and Herzegovina. For a more detailed discussion, see Section 3.2.

[vii] There are provisions that allow the Member States to provisionally derogate from their obligations to maintain or introduce new measures under national law.

[viii] Arts. 153(4), 169(4), 193 and 168(4)(a) TFEU, respectively.

[ix] Art. 114(4) and (5) TFEU.

[x] Art. 114(10) TFEU mandates their use for legislation adopted under the said article.

[xi] For example, Art. 36 TFEU in connection to Art. 114 TFEU.

[xii] For the sake of comprehensiveness, this article discusses international side agreements as an example of differentiation, acknowledging that they are strictly speaking not examples of differentiation *in* EU law. However, they are usually adopted to overcome vetoes within the Treaty structure or to avoid excess rigidity of the Treaties. The linkage to EU law is provided by the common thread of the use of EU institutions in place of creation of *ad hoc* bodies as well as specific provisions referencing compliance of the international side-agreements with EU law.

[xiii] In this context, Watts noted the following: 'The European Union provides an example of asymmetrical integration. The EU in negotiating the accession of each new member, has often had to make some particular concessions. In addition, in order to get agreement upon the adoption of the Maastricht Treaty, the European Union found it necessary to accept a measure of asymmetry in the full application of that treaty, most notably in the cases of Britain and Denmark. Furthermore, the establishment of the European Monetary Union has not included all the members of the EU.'

[xiv] On the difference between integrative and fragmenting systems in general, see: Aroney 2016; Stepan 2005: 257–58; Sahadžić 2021: 44–45; Palermo and Kössler 2019: 40, 45.

[xv] He notes the following: 'A different degree of power can be labelled as de jure asymmetry, and a different exercise of (the same) power leads to de facto asymmetry.'

[xvi] This means that the existence of (de facto) asymmetry is not only dependent on the type of legal regulation

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at the central level but also on the existence of diversity among component units: A system with the same symmetrical laws (e.g. no central regulation) can either result in symmetric relations (if there is no underlying diversity) or in asymmetric relations (if there is underlying diversity that fuels asymmetry). Therefore, one can not identify an asymmetric federation by simply looking at, for example, the federal constitution.
On the relationship between *de iure* and *de facto* asymmetry in this article, see above, Section 2.2.

[xvii] When looking for example at the representation in the second chambers of legislatures in federal systems, *de iure* asymmetric solutions may sometimes be used to downplay or limit *de facto* asymmetries (for example, where representation in the second chamber is not proportionate to population). Conversely, when discussing asymmetry in fundamental rights, *de iure* asymmetry at the federal level will entrench the existing *de facto* asymmetries between the subnational units.

[xviii] Supremacy clauses are generally blind with regards to the type of subnational legal act (constitution, statute, sub-statutory acts) as any subnational act must conform with the federal constitution – unless the constitution itself provides otherwise.

[xix] Under the doctrine of interjurisdictional immunity, central legislation may be invalidated if it interferes with core subnational competences. As noted by Newman, the practice of the Canadian Supreme Court shows that interjurisdictional immunity may protect provincial powers as well. Furthermore, he argues that such development of areas of provincial paramountcy is in fact a logical consequence of the principle of federalism. See: Newman 2011: 4–5.

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'Spearheaded Asymmetry' in "Multinational" European Federalising Processes: the Asymmetric Challenges in 'Regional States'

by

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Abstract

In comparative federalism studies, the category of asymmetry is being explored more and more. However, the traditional category of asymmetry, developed for federal states, does not seem to frame all the facets of the asymmetrical demands of national minorities in those federalising processes called 'regional states'. This article introduces the concept of 'spearheaded asymmetry' to explain the asymmetric claims of autonomist and ethno-regionalist parties in some European regional states, notably in Italy and Spain. The asymmetrical demands of political movements representing national minorities are enriched by the aspiration to acquire the highest self-government possible within regional states (as a transitional asymmetry) and, simultaneously, to see their differential status recognised (as a permanent asymmetry). Spearheaded asymmetry holds these two aspects together. Four sub-national units are studied in analysing this concept: South Tyrol and the Aosta Valley for Italy, Catalonia and the Basque Country for Spain.

Keywords

Asymmetry, asymmetric federalism, spearheaded asymmetry, regional state, minorities, ethno-regionalist parties.

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1. Introduction: asymmetry in so-called 'regional states'

In comparative federalism studies, *de jure* asymmetry has been described as a constitutional tool to accommodate demands for differentiation by sub-national units inhabited by national minorities (Gagnon 2010; Burgess, Pinder 2007) or to solve conflicts and mitigate secessionist claims by those subnational units (Keil, Alber 2021). These challenges and the use of asymmetry have characterised both multinational federal and regional states (Gagnon, Burgess 2018; Popelier, Sahadžić 2019). However, the concept of asymmetry seems to require further analysis and a different perspective to fully grasp all its shapes and dynamics in that type of 'federalising process' (Friedrich 1968) called 'regional state'. The regional state category was developed in the European scenario above all by non-English literature.[i] The 'crude' (Loughlin 2008: 473) distinction between federal and unitary states does not frame the nature of those federalising processes labelled 'regional states'. Regardless of the "comparability" of 'federal states' with 'regional states' (Palermo, Kössler 2017), the comparison *among* regional states can be useful to identify some "original" and "specific" challenges those kinds of federalising processes have to deal with. One of these challenges is the kind of asymmetry often demanded by regions inhabited by national minorities.

In European regional and devolutionary systems (Requejo, Nagel 2016; Palermo, Zwilling, Kössler 2009), asymmetry seems to be a relevant element of those federalising processes with regions inhabited by minorities or where differential needs arise (Palermo 2009: 13; Loughlin 2007: 395 and ff.). In regional states asymmetry appears to be a more "disruptive" mechanism than in federal states because it sometimes aims to establish a federal dynamic within a regional system (see, *infra*) and can generate jealousy/self-government "symmetric" claims by "ordinary" regions to obtain the same level of self-government as regions inhabited by national minorities (Nagel, Requejo 2016: 260 and ff., 267 and ff.; Hombrado 2011). Both the attempt to build a federal compact with the central state by national minorities' regions and the symmetric claims by "ordinary regions" are central challenges of those federalising processes that cannot yet – in a 'dynamic' perspective (Popelier 2021) – be ascribable in the category of federal systems, even in the difficulties of defying what is a federal state and what are its main features (Gamper 2005).

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In this context, the ordinary legal category of asymmetry does not seem suited to frame in all their facets the demands of certain regions inhabited by national minorities and governed by ethno-regionalist or autonomist parties (De Winter, Tursan 2003; Dandoy 2010). The subcategories of asymmetry ('transitional asymmetry', 'permanent asymmetry', asymmetry as 'maximum self-government', asymmetry as 'differentiation') seem singularly incapable of capturing these kinds of demands in regional states. This article's goal is to produce and propose a concept for analysing the asymmetrical dynamics in regional states: 'spearheaded asymmetry'. This concept aims to hold together the quantitative/qualitative datum of asymmetry (demands of maximum self-government and differentiation/special status: Swenden 2006: pp. 263 and ff.), and the temporary datum of asymmetry (transitional or permanent asymmetry: Watts 2005). In this sense, the concept of spearheaded asymmetry is not meant to replace or alter existing categories but to introduce a concept to explain the original and specific asymmetrical demands of autonomist and ethno-regionalist parties in regional states. The ethno-regionalist parties, in fact, transcend the left-right continuum by placing themselves in a centre-periphery continuum.[ii] In analysing these demands, the focus is on the three aspects of asymmetry: division of powers/competencies; institutional datum, e.g. institutional representation of regions in federal bodies; financing mechanisms of sub-national units (Palermo 2009: 12). Spearheaded asymmetry appears to be a helpful concept for illustrating and understanding the demands of certain regions inhabited by national minorities and governed by ethno-regionalist /autonomist parties.

It is a concept that could probably be extended outside of Europe. However, it is explored in this article in relation to some prototypical European cases of "regionalism", such as in Italy and Spain.[iii] The case studies selected for this analysis are four sub-national units inhabited by national minorities and traditionally ruled by ethno-regionalist/autonomist parties:[iv] South Tyrol, the Aosta Valley, the Basque Country, and Catalonia.[v] These regions are inhabited by *minoranze linguistiche* (linguistic minorities) in Italy and *nacionalidades* (nationalities) in Spain. In this article, the term 'national minority' will also be used to refer to them.

From a methodological point of view (Hirschl 2014), comparing these two federalising processes is advantageous because of the devolutionary historical similarities they share ('most similar cases') and their regional state status ('prototypical cases'). First, Italy and Spain are legal systems that have passed through dictatorial experiences attempting to match

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minorities to the national paradigm and that, after the restoration of democracy, guaranteed asymmetric arrangements for these minorities in contrast to the past dictatorships. Second, the Italian constitution of 1948 and the Spanish constitution of 1978 can be described as prototypical cases of a regional state, i.e. of a *sui generis* form of state that cannot be fully included either in the concept of a federal state or in that of a unitary state. Methodologically speaking, I employ a historical approach and an interdisciplinary perspective to carry out this analysis. As far as the historical and diachronic approach is concerned, it is employed here to reveal how the demands for a spearheaded asymmetry can be consistently detected in the claims of ethno-regionalist and autonomist parties representing regions inhabited by national minorities. From the interdisciplinary perspective, I use political science and historical studies and engage with the political data and positions of ethno-regionalist and autonomist parties.

The paper is structured thus: Section Two explores the concept of spearheaded asymmetry; Section Three briefly traces Italy's and Spain's territorial evolutions from the symmetry-asymmetry dichotomy perspective; Section Four analyses the asymmetrical demands of ethno-regionalist and autonomist parties in Italy and Spain through two sub-sections. The Final Remarks discuss the value of the concept of spearheaded asymmetry in framing the asymmetric demands of national minorities in regional states and in gaining a clearer insight into the challenges those federalising processes have faced and may face.

2. The concept of spearheaded asymmetry: a concept to explain the asymmetrical dynamics in those federalising processes defined as regional states

The concept of asymmetry developed by Tarlton (Tarlton 1965) is one of the pillars of comparative federalism research and theory today. It has shaped a branch of comparative federalism known as asymmetric federalism (Agranoff 1999; Sahadžić 2020). The study of comparative asymmetric federalism increasingly looks at those legal systems not traditionally defined as federal states, including regional states. In the context of so-called regional states, it is worthwhile to examine what kind of asymmetry is demanded by subnational units (or better, by their political parties) inhabited by national minorities. This section introduces the concept of spearheaded asymmetry. It is a concept that can explain the demands of the

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autonomist and ethno-regionalist parties in power in sub-national units inhabited by national minorities within regional states.

The concept of spearheaded asymmetry describes those territorial demands marked by two elements: the demand for maximum self-government (as self-government superior to that of other regions) and the demand for differentiation (as recognition of the identity peculiarities of regions inhabited by minorities). The concept of spearheaded asymmetry also relates these two elements to their character of transitional asymmetry or permanent asymmetry. The demand for the highest/maximum possible self-government within a regional state, which sometimes rises to the claim of a kind of federal compact between the region and the state, can be qualified as transitional asymmetry. The second element, i.e. the demand to guarantee the differentiation aspects of the region inhabited by minorities, can be qualified as a trait of permanent asymmetry. Those two elements of asymmetry coexist in the concept of spearheaded asymmetry: the demand for the highest self-government is the "edge" of spearheaded asymmetry, whereas the demand for differentiation is its "base".

However, while the second element—differentiation—also seems to persist in the demands of ethno-regionalist parties in the case of the evolution of the regional state into a federal legal system, the first—the demand for the maximum possible self-government—seems to be a demand intrinsically linked to the territorial model of those regional states that have not yet achieved that division of powers, institutional character and degree of financing of sub-national units typical of a federal state. The demand for spearheaded asymmetry, therefore, seems to serve a purpose as long as the federalising process is in a "regional" phase.[vi]

The concept of spearheaded asymmetry is indeed made up of a transitional element, the demand for maximum self-government, and of a permanent character, the demand for differentiation. Sometimes, this demand for maximum self-government goes beyond the specific constitutional limits of regional autonomy, especially when all the regions have achieved the highest self-government possible according to the constitution, and it can function as a drive for reforming the territorial system. This drive is a crucial factor to consider in the context of territorial models that constitutionally limit regional authorities' powers, institutional aspects and financing. But why define this demand for the maximum self-government as asymmetrical? Because it arises with respect to the powers of other regions, and it can be depicted as a call for more self-government than "ordinary" regions.

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If it is true that this call for maximum/highest self-government sometimes exceeds the constitutional limits of the regional states and seeks to build a federal dynamic between the region inhabited by the minority and the central state, it has to be stressed that this demand for the highest self-government is a transitional asymmetry element.

Consequently, the transitional element of spearheaded asymmetry could be exhausted, and spearheaded asymmetry could lose its edge (i.e., the demand for maximum/highest self-government). Beyond metaphor, the concept of spearheaded asymmetry appears applicable before the establishment of a fully-developed federal state, i.e. when the structure of the division of competencies, of institutions and of financing will correspond to that of a federal state. Identifying when this federal-state structure is achieved could be problematic, both because of the difficulties mentioned above in understanding the characteristics of a federal state and because of the different federal-state models to which various ethno-regionalist parties aspire. The federal-state reference models vary according to individual party experiences. Regardless of the different federal-state models and the definition of what a federal state is, the establishment of a federal state would eliminate the asymmetrical demand for maximum self-government. With the development of a federal state, it would be possible to return to the idea of asymmetry as has traditionally been developed in comparative federalism studies.

Once the federal phase of the territorial system had been reached, only the second element of spearheaded asymmetry would remain. The demand for differentiation is a shared request of sub-national units inhabited by national minorities. Even in the case of the transformation of the regional state into a federal state in accordance with the wishes of the autonomist and ethno-regionalist parties, the demand to maintain an asymmetry between the regions inhabited by national minorities and the other regions could remain. This asymmetry appears to be linked to the unique needs of these regions, such as the protection of the language, customs, culture, and traditional legal institutions of those national minorities. This request for permanent asymmetry (the base of spearheaded asymmetry) can vary from institutional asymmetry, e.g. veto/consultation powers on some matters, to the protection of the regional language at the federal level or special representation in some federal bodies. This permanent asymmetry adds two adjectives to the type of federal state sought by regions governed by ethno-regionalist parties: the federalism wanted by the parties of national minorities seems to be ‘asymmetrical’ and ‘multinational’. Of course, the types of

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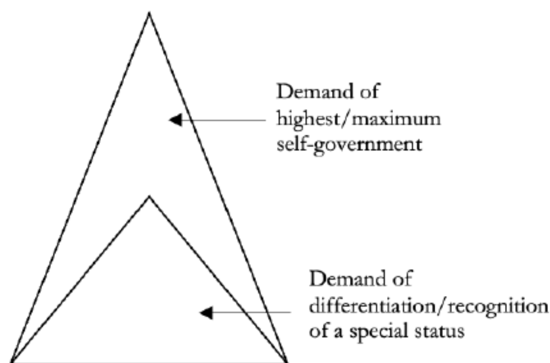
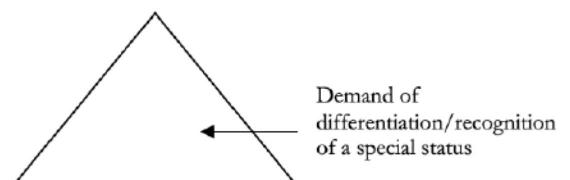
these permanent asymmetries vary in the different experiences according to the federal-state models to which the different ethno-regionalist parties aspire.





Thus, until a fully developed form of federalism is constructed, the spearheaded asymmetry concept proves helpful in explaining and identifying the asymmetrical demands by autonomist and ethno-regionalist parties in so-called regional states. It is a concept that holds together two elements: the transitional asymmetry of the demand for maximum/highest self-government and the permanent asymmetry inherent in the demand for differentiation based on the linguistic/ethnic diversity of the community inhabiting that region. This concept may help to describe particular dynamics in those regional states with sub-national units inhabited by national minorities and governed by autonomist or ethno-regionalist parties. In particular, given the dynamic nature of regional states, it is possible to observe how this demand for spearheaded asymmetry becomes more explicit and more evident in the event of the homogenisation of regions inhabited by minorities with "ordinary" regions. For this reason, the Italian and Spanish federalising processes are analysed from a historical perspective, starting from a brief overview of the symmetrical-asymmetrical transformation of the two legal systems and then examining the asymmetrical demands of the autonomist and ethno-regionalist parties representing national minorities.

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3. Territorial evolution in Italy and Spain from the symmetry-asymmetry perspective

An overview of the institutional history of the Italian and Spanish legal systems reveals, broadly speaking, some macro-phases of the asymmetry-symmetry balance.[vii]

The Italian regional system[viii] has been characterised by a crystallisation of asymmetry in Article 116 of the Italian Constitution (IC), distinguishing between 'special' and 'ordinary' regions. This form of asymmetry was paralleled by the protection of linguistic minorities in Art. 6 of the IC. In this way, a permanent asymmetry was originally formalised for five special regions, including the Aosta Valley and South Tyrol. The protection of linguistic minorities coincided for the Aosta Valley and the Province of Bolzano with a self-government of minorities (Pizzorusso 1975: 58).

For 22 years, the 'special' regions were the only ones functioning, as ordinary regions had not been instituted. Eventually, in 1970, regional elections were held for the ordinary regions, and in 1971, the statutes of the ordinary regions were enacted. In this regard, the difference in powers and self-government between ordinary and special regions remained significant until 2001. In 2001, an extensive constitutional reform widened regional powers while strengthening the asymmetry of the territorial system in two directions (Toniatti 2001: 81). The reform confirmed the asymmetry of special regions but also introduced a potential new form of asymmetry with Art. 116 para. 3 of the IC, which entitles the central state to grant regions additional competencies from the state's competencies catalogue (Palermo 2021: 144). Regardless of this further element of asymmetry, until today never applied, it should be pointed out that the 2001 reform expanded the legislative powers and institutional prerogatives of the ordinary regions but, at the same time, ensured that special regions benefited from all the autonomy expansions of the reform (Art. 10 of Constitutional Law No. 3/2001) and did not affect the many areas in which special regions enjoyed higher self-government. In this way, the system guaranteed an expansion of the powers of the ordinary regions while maintaining the asymmetry of the special regions. Francesco Palermo (Palermo 2008) described Italy's asymmetrical system with the paradox of Achilles and the tortoise, where the tortoise would represent the special regions, and Achilles represents the ordinary regions. No matter how much the ordinary regions may "chase" the special regions, i.e. try to acquire similar powers and autonomy, the special regions are always endowed with higher

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self-government. In this context, the asymmetry of special regions, according to some of the scholarship, is only fully exploited by the provinces of Bolzano and Trento and the Aosta Valley region (Bin 2003: 214).

After the 2001 reform, there were two other attempts to reform the Constitution, one in 2006 and one in 2016, which were not adopted. While the 2006 reform was ambiguous in asymmetrical terms, the 2016 reform would have entailed a regression of the autonomy for ordinary regions and a slight advancement for the special regions, with the introduction of a kind of principle of agreement between special regions and the central state for the revision of statutes and a strengthened representation in the new parliament for special regions.

With respect to the asymmetry envisaged by the Spanish Constitution (SC), it can today be framed as a transitional asymmetry in terms of self-government.[ix] At the same time, it can be defined as a permanent asymmetry in terms of constitutional *hechos diferenciales*, i.e. a series of constitutional provisions protecting nationalities' languages or particular features of some regions connected with singular characters, such as geographical, cultural, et cetera, characters. Dramatically simplifying the phases of evolution of the Spanish federalising process, it is possible to highlight how the Spanish system envisages an initial phase of marked asymmetry, thanks to the Second Transitional Provision of the SC, which was then tempered by the 'first autonomous pacts' of 1981 and definitively levelled out (*hechos diferenciales* apart) with the 'second autonomous pacts' of 1992.

In contrast to the Constitution of 1931, which seemed to inaugurate an asymmetric regime for specific regions with a national character (García de Enterría Martínez-Carande 1989), the 1978 Constitution opted for a more ambiguous arrangement (Cruz Villalón 1981), which could have evolved into an asymmetric state or one that would have been only partially asymmetric. Article 2 of the SC, which emphasised the difference between *nacionalidades* and regions, did not give rise to any political-constitutional approach to maintaining an asymmetrical system (Álvarez Conde 1997). Whereas the Italian case identified a precise number of special regions, the Spanish Constitution refused to recognise a closed number of regions entitled to special territorial treatment that could formalise and legitimise different self-government between regions and nationalities (*hechos diferenciales* apart). Article 150 of the SC permits the transfer of state competencies to the regions but was rarely used to create asymmetries for the *nacionalidades* (one of the rare examples was the creation of the regional police of Catalonia). On the contrary, the acquisition of territorial autonomy, as envisaged

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for "common" regions on the basis of Articles 143 and 151 of the SC, began immediately after the Constituent moment. Javier Pradera depicted the Spanish territorial dynamics using Aesop's Fable of the Hare and the Tortoise (Pradera 1993). Ordinary regions (like the tortoise in the fable) immediately began a slow but effective "chase" after the *nacionalidades* (the hares) in terms of acquiring the same powers. The so-called autonomous pacts of 1981 inaugurated the season of regionalisation in Spain, which still maintained extensive asymmetrical features in terms of competencies. The autonomous pacts of 1992 (Muñoz Machado 1992) brought a new wave of uniformity to the Spanish territorial system. The second 'pacts' opened the season of the development of regional statutes incorporating the highest powers, even for those regions that had hitherto lacked them. In 1992, despite some attempts by the *nacionalidades* to regain the lost asymmetry, a symmetrical legal system was thus established. The elements of asymmetry persisted only in the *hechos diferenciales*, in the historical rights of the First Additional Provision of the SC, in specific competencies attributed under Article 150.2 of the SC, and in the differences in the competencies transmitted to the various regions due to the different historical periods in which the *Cortes* approved the various regional statutes.

After this very brief overview of the historical evolution of Italian and Spanish territorial systems, it is now possible to focus on the asymmetrical demands of autonomist and ethno-regionalist parties in Italy and Spain.

4. 'Spearheaded asymmetry' as a concept to explain asymmetrical demands by national minorities in Italy and Spain

This section of the paper analyses the demands and positions of autonomist and ethno-regionalist parties in the context of two regional states, Italy and Spain, i.e. two federalising processes not yet ascribable to the category of the federal state. The following subsections explore the demands for reforming the territorial system by four regions inhabited by *minoranze linguistiche* and *nacionalidades*, highlighting how these requests can be framed within the notion of spearheaded asymmetry. The notion of spearheaded asymmetry, which brings together transitional and permanent asymmetry, takes on significance within regional state systems that have yet to reach a federal-like arrangement concerning the division of

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competencies between the central state and sub-national entities, the constitutional autonomy of such subunits, and their financial autonomy. The analysis is conducted considering the peculiarities of the two systems. The first subsection analyses the demands of South Tyrol and the Aosta Valley ethno-regionalist and autonomist parties, focusing above all on the *Südtiroler Volkspartei* (Holzer, Schwegler 2003) and the *Union Valdôtaine* (Sandri 2011). It explores those requests from the Constituent Assembly to the proposals for constitutional reform promoted in the last 30 years by parties of those linguistic minorities, whose special regions do not have the power to enact their own statutes, unlike ordinary regions[x]. The second subsection addresses the demands of the Basque Country and Catalonian ethno-regionalist and autonomist parties, mainly looking at the *Partido Nacionalista Vasco* (Acha Ugarte, Pérez-Nievas 2003) and the *Convergència i Unió* (Marcet, Argelaguet 2003). It investigates those requests from the Constituent moment to the proposals of statutes formulated by the regional assemblies at the turn of the new millennium, which allow the positions of parties of the nationalities to be examined directly[xi].

4.1 The spearheaded asymmetry demands of the autonomist and ethno-regionalist parties in Italy

In the Italian scenario, it should first be noted that the representatives of the German-speaking minority did not participate in the Constituent Assembly because of difficulties in composing the electoral lists after the war. In contrast, in the Constituent Assembly, an exponent of the autonomist and non-ethno-regionalist parties won the Aosta Valley's only seat. Against this backdrop, analysing the constituent moment is more complex than in the Spanish experience, where the parties of *nacionalidades* were represented. However, it can be observed that the pre-autonomy arrangements guaranteed to the regions inhabited by the *minoranze linguistiche* and the pacts between the National Liberation Committee and the linguistic minorities' representatives engaged the Constituent Assembly in a sort of 'pact' or 'commitment' between linguistic minorities and the Constituent Assembly (Delledonne, Monti 2019, 188). The request for spearheaded asymmetry, as a combination of the maximum self-government and the differentiation from ordinary regions, had already been made explicit by the political movements representing linguistic minorities with the Chivasso Declaration of 1943. The Chivasso Declaration stated that the bilingual Alpine valleys—the

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Aosta Valley and South Tyrol, above all—should be distinguished from the other regions by establishing a Swiss-type cantonal system for their territories.[xii] This position was also expressed by the draft statute drawn up by the Aosta Valley Regional Council,[xiii] where the influence of the *Union Valdôtaine* (UV) was quite relevant, and by the proposals of the *Südtiroler Volkspartei* (SVP), the leading ethno-regionalist actor in South Tyrol.[xiv] The projects of the autonomist and ethno-regionalist parties can be described by employing the concept of spearheaded asymmetry. The projects provided for a federal-type distribution of competencies for the regions of *minoranze linguistiche*, far higher than the projects and proposals then ongoing for ordinary regions, but also for forms of permanent asymmetry, such as the representation in the Council of Ministers or in the Constitutional Court of members of those regions or such as the protection of their languages. Those projects would have created a federal pact between regions inhabited by national minorities and the central state, regardless of the regional nature of the rest of the territorial system.

Besides, it should be emphasised that even the representative of the Aosta Valley autonomists in the Constituent Assembly, Mr Bordon, pointed out that if forms of territorial autonomy were to be extended to all regions, the special regions should have had a special and higher self-government.[xv] The territorial system provided by the Constitution sanctioned this distinction between ordinary and special regions,[xvi] which responded to a spearheaded asymmetry: the regions inhabited by minorities were guaranteed an asymmetry that took the form of both the highest self-government, given the limited catalogue of powers of the ordinary regions compared to the special statutes, and the protection of their own identity peculiarities, as recognised by the individual special statutes negotiated with the minorities and by Article 6 of the Constitution. In this framework, an important fact to consider about South Tyrolean self-government is that the German-speaking minority did not have its own region, but its province enjoyed territorial autonomy with the Italian-speaking province of Trento, forming the region *Trentino-Alto Adige/Südtirol*. This was due to historical connections between the two provinces and to the fear that a separate region for South Tyrol could have been a stepping stone for secession attempts.[xvii] Such a territorial arrangement caused conflicts and was resolved only with the second Statute of *Trentino-Alto Adige/Südtirol* in 1972.[xviii]

As mentioned above, the general regional system was only implemented in the 1970s, when the ordinary regions were established; it is precisely at this time that new instances of

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asymmetry can be detected. In the proximity of the creation of the ordinary regions,[xix] in order to solve the secessionist and terrorist problems of South Tyrol, a reform process of the South Tyrolean Statute was launched. During the work of the so-called Commission of Nineteen, the SVP's demands for spearheaded asymmetry can be identified. On the one hand, the SVP demanded the powers of the ordinary regions and other special regions that South Tyrol lacked and, on the other hand, claimed a differentiation status that should have been connected with the linguistic peculiarity of the Province of Bolzano.[xx] The second Statute of Autonomy was finally approved by parliament, following the negotiations with the SVP, and a series of progressive enlargement of self-government provided. It is no coincidence that, with the enactment of the Second Statute of Autonomy, Italian constitutional scholars spoke of the creation of a province with the powers of a special region (Pizzorusso 1995: 548) and pointed out that the new Statute was based on a convergence of self-government and minority language protection mechanisms (Toniatti 2001: 42). The new Statute extended the powers of the Province of Bozen/Bolzano in the *Trentino-Alto Adige/Südtirol* region,[xxi] providing it with that "independent" autonomy from the region that had always characterised the SVP's demands since the establishment of the Constitution, and instituted a bilateral mechanism with the state for implementing self-government. What is interesting to observe in this dynamic is that, although the Statute guaranteed the highest self-government compared to the ordinary regions and at the same time safeguarded the differentiation of the province, at the moment of its approval, the SVP pointed out that the Statute could not be said to be a point of arrival due to the regionalisation of the country. The SVP suggested that the advancement of the regionalisation process could lead to the need for new forms/demands of asymmetry.[xxii]

In the same period, this demand for spearheaded asymmetry was also very present in the Aosta Valley. On the basis of the *Union Valdôtaine's* idea of 'integral federalism', the ethno-regionalist party seemed to demand, in various debates at the Regional Council, the preservation of spearheaded asymmetry as a combination of the highest self-government, comparable to that of South Tyrol, and the preservation of differentiation for the Aosta Valley.[xxiii] The only significant modifications of the Aosta Valley Statute—which extended the spearheaded asymmetry of the Region—were the financing reform (1981), allowing the region to keep most of the taxes collected on the Aosta territory, and the institution of a

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bilateral commission with the state (1993), where new forms of self-government could be discussed and implemented.

However, the demand for spearheaded asymmetry emerged in its most straightforward form following the 2001 constitutional reform and the subsequent attempts to reform the Constitution. In this sense, it is worthwhile to look at the constitutional reform projects proposed by the autonomist and ethno-regionalist parties and their political positions concerning the constitutional reform proposals.

Before the constitutional reform of 2001, the Regional Assembly of Trentino-South Tyrol already proposed, in 1991, the creation of an asymmetrical federal state,[xxiv] i.e. a state in which all regions would have obtained the highest self-government, but permanent asymmetries would have been maintained for the special regions. In this historical moment, the SVP drew on so-called 'Voll-autonomie'. The 1991 draft can also be placed alongside the 1996 SVP project[xxv] presented to the national parliament. This project proposed the institution of a federal republic on Germanic models, which, however, did not affect the asymmetrical nature of the special regions. It eliminated the term 'national' from the Constitution and replaced it with federal (Art. 2 Draft), provided for a federal structure for the state with a Senate of the Regions, and envisaged a competencies division with only a few powers reserved for the federal state (Art. 47 and 49). However, despite this federal state-like competencies division and an institutional structure built on Germanic federal models, the asymmetry of the special regions would have been maintained (Art. 48). This approach was also asserted by a motion in the Provincial Council of Bolzano, which emphasised that given the linguistic minority inhabiting South Tyrol, the special region system should, in any case, have been protected even in the event of a federal transformation of the state.[xxvi] These demands by the SVP can be framed within the concept of spearheaded asymmetry. Indeed, in the event of the transformation of the state into a federal system, the character of permanent asymmetry would need to be maintained, meaning the protection of the linguistic and distinctive features of the special regions. But on the contrary, the highest self-government would have been extended to all the regions. Thus, in the event of a federal state, on Germanic models in this case, spearheaded asymmetry would have lost its "edge" (the highest self-government).

A similar position, aimed at the demand for spearheaded asymmetry, can also be found in the pre-reform attitudes of the UV,[xxvii] which emphasised that in a federal state, the

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elements of permanent asymmetry of differentiation—that found legitimacy in the linguistic and identity datum of special regions—should have been maintained. The position of the UV consequently expressed that once all regions had achieved powers superior to those of the special statute regions, asymmetrical features for the special statute regions should have been preserved,[xxviii] clearly framing them as permanent asymmetrical features. The reform project of the Republic presented by the UV to the national parliament in 1991 and then in 1997 called for a federal state with a Senate of the Regions and a minimal competencies catalogue of the federal state (Art. 19).[xxix] In 1997, the Valle d'Aosta Regional Council clearly outlined the UV idea of federal state by supporting the possibility for each region to acquire the highest self-government explicitly, while stressing the importance of protecting the asymmetry of special regions.[xxx] In the resolution of 21 May 1997, the elements of the desired federal state were presented. It envisaged a federal-type self-government for all regions and a recognition of the special regions through the maintenance of their statutes with the rank of constitutional laws, but enacted by a 2/3 majority of the regional councils, and not by the state, and only challengeable on the grounds of constitutional inconsistencies.[xxxi] In the event of federal transformation of Italy, it is evident that UV was open to renouncing the "edge" of spearheaded asymmetry (the highest self-government) while (only) maintaining a permanent asymmetry.

This approach of the SVP and UV also resulted in the Trento Declaration of 1997, in which the representatives of special regions recalled the 'compact' and asymmetrical character at the basis of the creation of special regions.[xxxii]

In this scenario, examining the final declarations of the ethno-regionalist parties concerning the 2001 reform is also interesting. The SVP pointed out that although the reform did not lead to the establishment of a federal state, as long as it extended the special region's competencies without affecting those already acquired—thus without diminishing spearheaded asymmetry—the reform was to be welcomed.[xxxiii] The UV emphasised this position even more clearly. Concerning the maximum self-government, the UV claimed that eliminating the special regions would have been acceptable if a federal system had been established. However, since the reform was still within the framework of the regional state, it was necessary to preserve the special regions.[xxxiv] Because of the non-transformation of the regional state into a federal state, the SVP and the UV persevered with their demand for spearheaded asymmetry as a mix of the maintenance of the highest self-government within

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the constitutional framework and of the protection of the differentiation status of special regions. It is therefore evident that spearheaded asymmetry is a concept that can be employed in the context of regional states to explain the asymmetrical demands of the autonomist and ethno-regionalist parties of the national minorities. In the hypothesis of reaching a stage of full federalism, these parties seem willing to renounce the transitional part of spearheaded asymmetry, the highest self-government, while conserving only the asymmetrical element linked to those salient features at the basis of special regions: the protection of the language and culture of linguistic minorities and the bilateral intergovernmental mechanisms with the central state.

A similar trend can also be observed in the two constitutional reform attempts of 2006 and 2016. About the 2006 reform attempt, it can be noted that with the Declaration of Aosta,[xxxv] the ethno-regionalist and autonomist political actors from South Tyrol and Aosta Valley demanded the preservation of spearheaded asymmetry, i.e. to increase their self-government and at the same time maintain differentiation from other regions. Concerning the 2016 reform, the special statute regions did not proceed as one. The application of the principle of agreement between the state and special regions for amending their statutes and the guaranteed representation for South Tyrol and the Aosta Valley[xxxvi] in the new parliament seem to have played in favour of the support of the SVP (Toniatti 2016: 32) and the UV (Louvin 2016: 147). Assuredly, the 2016 reform would have frozen the ordinary autonomies and protected the special regions through the principle of mutual agreement for reforming special statutes. Against this backdrop, the future application of asymmetry for ordinary regions under Article 116.3 of the IC could lead to further developments and opportunities for demanding spearheaded asymmetry.

This section has shown how the demands for asymmetry by the parties of linguistic minorities can be described through the concept of spearheaded asymmetry. The dual character of this notion makes it possible to most accurately explain the demands by special regions' parties for more self-government than ordinary regions and, simultaneously, for differentiation from the ordinary regions on the basis of their own linguistic and identity characteristics. While the first element of spearheaded asymmetry might disappear in a federal system, as seen in the proposals for the institution of an Italian federal republic, the differentiation element should remain concerning the linguistic/cultural datum and the bilateral relationship between special regions and the state.

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4.2 Spearheaded asymmetry demands of autonomist and ethno-regionalist parties in Spain

As regards the Spanish scenario, I first express a series of preliminary considerations on the party system. From a party system perspective, while the Basque Country political environment has always been characterised by the presence of a hegemonic ethno-regionalist party, the *Partido Nacionalista Vasco* (PNV), with a straightforward territorial approach—based on historical rights—the same cannot be said for Catalonia. Contrary to the Socialist Party of Catalonia (*Partit dels Socialistes de Catalunya*), it is necessary to emphasise that *Convergència i Unió* (CiU), the Catalan main ethno-regionalist party before 2014, did not have a clear idea of a territorial model to which to aspire (Caminal Badia 2001: 168) and based its demands for asymmetry mainly on political negotiation (Ruiz-Rico Ruiz 2001: 71). After these preliminary considerations, it is possible to note that a push towards spearheaded asymmetry was present right from the constituent moment.

The constituent moment is relevant because it followed the 'pre-autonomies' granted before the assembly election:[xxxvii] the creation of the 'pre-autonomies' for Catalonia and the Basque Country directly recalled the 1931 Constitution. This approach was reproduced in the Second Transitory Provision of the Spanish Constitution, which guaranteed a regime of spearheaded asymmetry to the so-called *nacionalidades históricas*. This kind of self-government guaranteed to *nacionalidades históricas* appeared to be something taken for granted. Via the Second Transitory Provision, nationalities acquired the highest self-government provided by the new Constitution; in this sense, it is worthwhile to stress how some members of the Constituent Assembly already affirmed the transitional character of the acquisition of this higher self-government compared to other regions.[xxxviii] The transitional asymmetry of the Second Transitory Provision was complemented by elements of permanent asymmetry, namely Article 2 of the SC and the *hechos diferenciales*. In the perspective of the ethno-regionalist parties of the *nacionalidades históricas*, Art. 2 of the SC stood as the basis for the distinction between *nacionalidades* and regions (Corcuera Atienza 1992), with the PNV also proposing the use of the term 'nation' instead of 'nationalities'.[xxxix] From the constituent debate, the interpretation of Article 2 of the SC as a provision for granting permanent asymmetry to nationalities was quite evident in the attitude of the ethno-regionalist parties (de Esteban Alonso 2015: 86). This reading is confirmed by other regionalist parties' opposition to this interpretation of Article 2.[xl] According to some scholars, the permanent

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asymmetry character of this Article was at the basis of the 'tacit pact' (Herrero y Rodríguez de Miñón 1998: 49)[xli] between Catalan autonomists and the main Spanish parties. This tacit pact would have granted the generalisation of self-government in exchange for the asymmetry for nationalities. This Catalan approach led the PNV to request the First Additional Provision of the SC (Herrero y Rodríguez de Miñón 1998: 62 and ff.); a provision of permanent asymmetry protecting the historical rights of the Basque provinces. The PNV also attempted to include in the First Additional Provision a section on the delegation of state powers to the Basque Country, as a mechanism to gain higher self-government in the future.[xlii] Following the rejection of this amendment, the PNV engaged in the adoption of Article 150.2 of the SC, which provides for the possibility of generic delegation of state competencies to the regions.[xliii] Instead, the *hechos diferenciales* emerged as forms of permanent micro-asymmetry linked to different languages, local customs and legal traditions (Aja Fernández 1999).

From this overview, it is possible to affirm that the demands for spearheaded asymmetry were already evident in the constituent work, in their dual nature of demands for the highest possible self-government and permanent differentiation. On the one hand, the autonomist and ethno-regionalist parties of nationalities obtained the maximum competencies and institutional prerogatives provided by the 1978 Constitution via the Second Transitory Provision; on the other hand, they were guaranteed—or thought to have been guaranteed—a regime of permanent asymmetry beyond the mere *hechos diferenciales*: the Basques through the First Additional Provision and the Catalans through Article 2 of the Constitution and the tacit pact underlying it.

This demand for spearheaded asymmetry became all the more evident during the phase of matching competencies between nationalities and all the other regions in 1992. It has to be noted that the territorial system was fully developed to its limit by then. In the period close to the 'second autonomous pacts', the Catalan[xliv] and Basque[xlv] regional assemblies proposed declarations for self-determination that had the aim of pushing the central state to recognise their asymmetry, both from the point of view of higher competencies than ordinary regions and from that of the acknowledgement of their different identity.[xlvi] The demand behind these declarations appeared precisely that of spearheaded asymmetry. On the one hand, it involved obtaining more self-government than the other regions, even going beyond the limits of the *Estado Autonómico* to obtain it, and on the other hand, ensuring that the

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differential status of these communities was recognised. The request for this spearheaded asymmetry by the CiU and the PNV was also expressed through the Barcelona Declaration of 1998 and the following resolutions of Vitoria and Santiago (De la Granja Sainz 2000: 164). The Declaration emphasised both the importance of the recognition of the special status of *nacionalidades* (in the *plurinacional* state) and the request of a federal-state division of competencies.[xlvii] This demand then emerged individually in the two regions during the attempts to obtain new Statutes. The proposals for Statutes are, of course, only the culmination of demands that had already emerged in the political environment of the two regions.[xlviii] A common aspect of the projects for new statutes in the Basque Country and Catalonia is precisely the request for spearheaded asymmetry, which was articulated in a call for a federal-type self-government and a recognition of the differentiation of nationalities. This trend is clearly identifiable if we examine the two proposals for statutes.

In the Basque Country, the so-called *Plan Ibarretxe* (VV.AA 2003) included the Project for a new Statute. Regardless of its secessionist connotations, the Project started from the very claim for spearheaded asymmetry.[xlix] On the one hand, it required more competencies and, on the other, a quality of self-government appropriate to a special 'region' like the Basque Country.[l] This request also seemed to be shared with the proposal of the Basque autonomist parties, which presented a project also based on spearheaded asymmetry as a combination of the highest self-government and the differentiation of the Basque Country in the so-called 'Guevara Document' (*Bases para la actualización y reforma del Estatuto de Autonomía*).[li] What seems evident is that the PNV project for a new Statute aimed at building a federal compact in a regional state (Castells Arteche 2005: 513): it called for the recognition of the Basque Country's different identity and, at the same time, it demanded a wide range of competencies (Art. 41 and ff.), as well as the possibility of creating sub-national fundamental rights (Art. 10 and 11). A provision was also developed to protect the Statute from unilateral amendments by the central state, and a kind of regime of free association was proposed (Arts. 12 and 13). The proposal also provided for a bilateral intergovernmental mechanism with the central state (such as a special section of the Constitutional Tribunal, *Tribunal de Conflictos Euskadi-Estado* – Art. 16, or such as the *Comisión Bilateral Euskadi-Estado*, Art. 15) and the representation of the Basque Country in some central state bodies (Art. 56-57). Some of these elements, for instance the competencies expansion, would have been extendable to other regions; others represented more a form of permanent asymmetry, for

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example, the co-official regime of the Basque language at the level of the central state (Art. 8) and the special protection of Basque historical rights (Art. 4 and 5). In this sense, it is evident that this demand can be described as a request for spearheaded asymmetry, attempting at establishing a federal/confederal pact between the Basque Country and Spain (Requejo 2003: 240). The Project aimed at acquiring asymmetry as the highest self-government as well as asymmetry as recognition of the unique position of the Basque Country within Spain. The highest self-government seemed to be extendable to all the other regions in the PNV's idea,[lii] while the element of differentiation, such as historical rights, *Euskera* protection or bilateral mechanisms, appears to be an element of permanent asymmetry for the Basque Country. Thus, the "edge" of spearheaded asymmetry as the acquisition of the highest self-government could have been exhausted with the construction of this asymmetrical federal state. It is an asymmetrical state because this new federal state should have protected and guaranteed the permanent asymmetries required by the PNV for the Basque Country.

This demand for spearheaded asymmetry is equally detectable in the Catalan project, which shaped the second Statute of Autonomy. The project was formulated at the urging of the government of the autonomists and nationalities left (*Partit dels Socialistes de Catalunya*, *Iniciativa per Catalunya-Verds* and *Esquerra Republicana de Catalunya*).[liii] The goals of the Statute were to increase the powers of the region—far beyond the limits of the constitutional text—and to emphasise the difference between Catalonia and other regions.[liv] This approach also characterised the alternative Project by the CiU,[lv] the leading ethno-regionalist actor, which eventually converged on the Project of the autonomists and nationalities left government. Like the *Plan Ibarretxe*, the Statute can be read from two perspectives: asymmetry as an increase in self-government compared to other regions and asymmetry as a differentiation from other regions. At the institutional level, intergovernmental mechanisms with the central state were proposed (e.g., a bilateral commission – Art. 183) as well as participation in the designation of members of federal bodies (*Tribunal Constitucional*, *Consejo General del Poder Judicial*, economic and social bodies - Art. 180 and ff.). At the competence level, the competencies of the regional government were extended (Title IV, Art. 110 and ff.), and the so-called 'competence armouring' (*blindaje competencial*) was envisaged. This *blindaje* was a mechanism to limit central state interference in the division of competencies between the state and the region. Beyond those traits,

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attempts were also made to establish sub-national fundamental rights (Title I), protected by regional bodies such as the *Consejo de Garantías Estatutarias* and the *Tribunal Superior de Justicia de Cataluña* (Art. 38). The Proposal also provided for a territorial fiscal system (Art. 202 and ff.). Finally, it claimed the national character of Catalonia (Art. 1) and declared the Catalan language as the official language of the region (Art. 7). Before the Statute's downsizing by the *Cortes*, the Project was a clear example of a request for spearheaded asymmetry going far beyond the limits of the constitutional autonomy granted in the Spanish regional state.[lvi] Regardless of the use of historical rights (Art. 5) to try to achieve this spearheaded asymmetry and of the outcome of the Statute – which the Spanish Constitutional Tribunal severely downgraded (decision 31/2010) – the request for spearheaded asymmetry was quite clear. The draft statute would have provided for a territorial system that almost envisaged a federal compact between Catalonia and the central state. As in the Basque case, this demand appears assimilable to a demand for spearheaded asymmetry that holds together two data, the demand for the highest degree of self-government and the demand for permanent differentiation as linked to Catalonia's 'national' status in the Spanish state and to the protection of its identity. Here again, it can be detected that the acquisition of the highest self-government is limited to the regional moment of the Spanish federalising process; the part of spearheaded asymmetry corresponding to the demand for the highest self-government could have been dropped, with only that of asymmetry as differentiation continuing.[lvii]

In conclusion, what is worth noting is how the two main nationalities required an asymmetry that can be described with the concept of spearheaded asymmetry. An asymmetry that in the constituent phase took the form of the immediate acquisition of maximum self-government, but also the instruments for its expansion (Art. 150.2 of the SC), and that of the recognition of the difference between the *nacionalidades* and common regions (*hechos diferenciales*, First Additional Provision, Art. 2 of the SC). This demand for spearheaded asymmetry became even clearer at the time of competencies and institutional homogenisation, when all regions achieved the same level of self-government (*hechos diferenciales* and First Additional Provision aside). In this perspective, the proposals of the ethno-regionalist and autonomist parties can be read with the concept of spearheaded asymmetry. The asymmetry demanded by the autonomist and ethno-regionalist parties seems to be characterised by two aspects: the demand for the highest level of self-government –

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even beyond the limits of the regional state, in search of a federal compact with the central state – and the demand for a permanent asymmetry linked to the identity datum and factors such as bilateral relations or the representation of those regions in the central state bodies.

5. Final remarks

This article has investigated the asymmetrical demands of those parties representing *minoranze linguistiche* in Italy and *nacionalidades* in Spain and how these asymmetrical demands cannot be framed in the current categories of asymmetry designed for established federal systems.

Common trends emerged in those European regional states concerning the asymmetric demands of ethno-regionalist and autonomist parties. When the powers of the regions inhabited by national minorities were about to be homogenised with those of ordinary regions—by increasing the powers of ordinary regions—we saw new asymmetrical demands from the regions inhabited by national minorities. These demands were demands for higher self-government than ordinary regions but, at the same time, were also demands for the recognition by the central state of the differentiation/the special status of the regions inhabited by minorities (for instance, by the call for the protection of certain cultural aspects but also for bilateral institutional mechanisms between the state and the region). Some of those demands of differentiation and higher self-government were characterised by the attempt to build a sort of federal compact between the central state and the regions inhabited by national minorities. These symmetric-asymmetric dynamics appear to be original challenges strictly inherent in the evolution of those federalising processes moving from a unitary to a regional state or from a regional state to a federal state.

The demands from regions inhabited by minorities that those two regional systems meet can be identified as the demand for spearheaded asymmetry, a concept that holds together both an element of transitional asymmetry and one of permanent asymmetry. The element of transitional asymmetry (the "edge" of spearheaded asymmetry) is the demand for the highest self-government, with broader powers, institutional prerogatives and financial autonomy than ordinary regions. The element of permanent asymmetry (the "base" of

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spearheaded asymmetry) concerns the demand for a recognition of the differential traits of the regions inhabited by minorities. While the differentiation element seems to be an immutable demand of national minorities' parties, ethno-regionalist and autonomist parties seem to be open to renouncing the demand of the highest self-government in the event of the establishment of a federal state, i.e. in the event of the evolution of the regional state into a federal state.

As I have already mentioned, the concept of spearheaded asymmetry needs to be contextualised in various legal systems. Indeed, one issue with this concept is the final model of the federal state to which the ethno-regionalist and autonomist parties aspire. It is impossible to group the federal-state reference models of ethno-regionalist parties into an ideal model. Some ethno-regionalist parties appear to be inspired by Canadian federalism or Belgian federalism, while the German Federation or the Swiss Confederation are the inspiration for others. In this sense, sometimes a dual federalism and sometimes a cooperative model of federalism seems to be desired. Hence, it is fundamental to frame this concept in the various experiences to determine when spearheaded asymmetry may lose its "edge", i.e. its transitional trait: the demand for the highest self-government. The second issue of the concept of spearheaded asymmetry concerns the different connotations of the demand for permanent asymmetry in the various experiences, which is also linked to the type of federal state national minorities' parties propose. The "shape" of the "base" of spearheaded asymmetry can vary a lot. Indeed, in some experiences in which the proposed federal state resembles dual federalism, some features of the asymmetric representation of the region inhabited by minorities in the federal state are missing. In other experiences, also depending on the federal-state reference models, this element is more pronounced: in such cases, the inspiration of models of asymmetric multinational federalism appears more prominent.

In a broader picture, however, it can be argued that the concept of spearheaded asymmetry seems a valuable concept to explain the asymmetric claims of ethno-regionalist and autonomist parties representing linguistic minorities and nationalities. It can be observed from the case studies analysed that in order to read the asymmetrical dynamics, their transitional or permanent characters, their quantitative or qualitative facets, the concept of spearheaded asymmetry can be precious. Bearing in mind the flexibility with which this

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concept has to be applied, this concept appears helpful in understanding many of the asymmetrical challenges faced by those federalising processes known as regional states.

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i (Häberle 1998; Volpi 1995). Not to forgot that beyond nominalistic issues, subnational units in some regional states have more powers than subnational units in nominally federal states: (Palermo, Kössler 2017: 50 and ff.).

ii Although ethno-regionalist parties can also take a position in the left-right continuum: (Massetti, Schakel 2015).

iii This comparison is often made in Spanish- and Italian-language literature but neglected in English-language literature (Rolla 1995; Barquero, Conti 1999; Gambino 2008; Mastromarino, Castellà Andreu 2009; Castellà Andreu, Olivetti 2009; Hernández, Rubio, Carrasco 2012).

iv The exclusion from the analysis of Sardinia and Friuli-Venezia Giulia, where there are linguistic minorities, and Galicia and Navarre, where other nationalities live, is related to the absence of ethno-regionalist solid parties governing these regions.

v The individual territorial forms of government involve various and different dynamics.
For example, in the political system in the Aosta Valley, the fragmentation of the ethno-regionalist front due to schisms in the *Union Valdôtaine* has to be highlighted. However, ethno-regionalist actors control the region, being part of various coalitions. This element has been strengthened at the central level with a kind of unified representation of the Valley by the senator and the deputy elected to the national parliament. In fact, as a matter of praxis and custom, the representatives in the national parliament elected in the Valley have a direct connection with the Aosta Regional Council. On the contrary, in South Tyrol, the ethnic representation of the Germanic group has been, until now, unified under the *Südtiroler Volkspartei*'s leadership, and the national parliament's MPs elected in the province were always an expression of the *Südtiroler Volkspartei*. The *Südtiroler Volkspartei* has designated all the presidents of the province and obtained almost all the seats in the national parliament available in South Tyrol (usually, except for the seat in Bolzano, which went to an Italian-speaking party).
Regarding the Basque Country, the region's three provinces tend to have different orientations, between the less 'ethno-regionalist' province of *Araba* and the more ethno-regionalist ones of *Gipuzkoa* and *Bizkaia*. Since 1980, the *Partido Nacionalista Vasco*, except for a brief interlude from 2009 to 2012, has always governed the Basque Country (in coalitions). A similar point can be raised for Catalonia, where the most ethno-regionalist provinces are the provinces of *Lleida* and *Girona*. In this context, it is also worth mentioning the solid Catalonian autonomism of the Socialist Party of Catalonia, which governed together with the ethno-regionalist left (*Esquerra Republicana de Catalunya*) from 2003 to 2010, interrupting the predominance of *Convergència i Unió*. After the secessionist crisis, the political system was naturally profoundly transformed. Finally, it is possible to say that the electoral system for the *Cortes* and the numerical relevance of the *nacionalidades* has allowed for a broad representation of ethno-regionalist parties from Catalonia and the Basque Country in the national parliament.
For some more general considerations on the role of ethno-regionalist parties in Italy and Spain, see (Tronconi 2015).

vi In this sense, this concept of spearheaded asymmetry can be included in the approach of dynamic federalism outlined by Popelier (2021).

vii For a broad reading of the evolution of the two systems, see Palermo, Kössler (2017).

viii For an overview in English see Arban, Martinico, Palermo (2021).

ix For an overview in English see, Basaguren, Epifanio (2016).

x On this issue see, Delledonne, Monti, Martinico (2021).

xi On this issue see, Carranza (2021).

xii 'La dichiarazione finale, modificando sul punto il testo Peyronel, che a sua volta ha recepito il testo Chabod limitandosi ad aggiungere che dalle regioni italiane le valli alpine bilingui "dovranno essere distinte come circoscrizioni cantonali (Cantone della valle d'Aosta, Cantone delle valli Valdesi, Cantone dell'Alto Adige)", è ben altrimenti incisiva perché inserisce il problema in una visione che postula il federalismo sia per l'Europa, sia per l'ordinamento dello Stato italiano'. (Rotelli 1973: 10).

xiii The UV projects had a clear federal character (Lucat, 1988), providing a cantonal regime for the Aosta Valley with extensive, exclusive legislative powers. The Council's first project also had a clear federal footprint, with a

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short catalogue of matters of state competence (Art. 5), residual competencies to the region, the participation of the President of the Regional Council in the meetings of the Council of Ministers with the rank of minister (Art. 28), a provisional Constitutional Court elected for half of its members by the Aosta Valley region (Art. 77). *See* Regional Council of Valle d'Aosta, object no. 4 of 6 February 1947; Regional Council of Valle d'Aosta, object no. 20 of 13 February 1947.

[xiv] Some reconstructions of the SVP projects and positions can be found in Bertoldi (1958: 218). In particular, the SVP Project of November 1946-May 1947 (Piccoli, Vadagnini, 1988: 216 and ff.) was designed on a federal basis. It provided for a strict division of competencies with exclusive and residual competencies of the Region (Art. 3) and the participation of the President of the Region in the national Councils of Ministers with a deliberative vote when matters pertaining to the Region are discussed (Art. 24). An autonomous section of the Constitutional Court was also envisaged (Art. 45) and Title XII provided for extensive fiscal resources.

[xv] Bordon claimed that he had 'nulla da obiettare a che si emanino "Statuti" – o meglio "Regolamenti – per ogni regione', but he also observed that 'non tutte le Regioni vanno poste su uno stesso piano, perché l'effetto giuridico della legge, rispetto all'autonomia, ha un carattere costituzionale speciale per le quattro Regioni di cui all'art. 2, ed un carattere generale rispetto alle altre'; and he highlighted 'il tipo particolare di autonomia che si è dato alla Val d'Aosta'. Mr Bordon, Constituent Assembly, Second Subcommittee, Session of 15 December 1946, p. 714.

[xvi] This permanent asymmetry was not uncontested: see Constituent Assembly, Second Subcommittee, Session of 15 November 1946, pp. 514. Mr Nobile, on the other hand, proposed a permanent asymmetry only for regions inhabited by linguistic minorities: Nobile, Constituent Assembly, Second Subcommittee, Session of 14 November 1946, p. 496.

[xvii] Besides, one can point out how 'Primäres Ziel der Partei war die Durchsetzung des Selbstbestimmungsrechtes, in zweiter Linie das Erlangen einer Autonomie' (Pallaver 2007: 630). See also Furlani (1974: 312).

[xviii] On this issue see also the SVP 1957 memorandum calling for more powers for the Province (Alcock 1970: 239 and ff.) and what was requested in the regional council by the SVP (Brugger (SVP), Regional Council of Trentino-South Tyrol, Session of 12 March 1957, pp. 7 ff.). See also the SVP constitutional reform proposal of 1958, Tinzl and others: 'Modifica degli articoli 116 e 131 della Costituzione e Statuto speciale per il Sudtirol - Tirolo del sud', Act C.3512 of 4 February 1958.

[xix] The two things (the reform of the Statute and the institution of ordinary regions) would not be unrelated (Palermo 2016: 275, note 13).

[xx] See the positions of *Südtiroler Volkspartei* as reported in Marcantoni, Postal (2012: 312 and ff.) and Alcock (1970: 415).

[xxi] See Art. 8 and Art. 9 regulating the scheme of regional competences. Consider also the possibility for the president of the province to participate in the meetings of the Council of Ministers when dealing with matters about provincial self-government (Art. 52) and Title VI entitled 'Finance of the region and the provinces' that inaugurates the special tax system allowing a large inflow of resources to the provinces. Quite important were also the bilateral mechanisms with the state of the so-called Commissions of 12 and 6, i.e. the regional and the provincial commissions (Art. 107).

[xxii] '…alla luce della nuova esperienza regionale che l'Italia sta attualmente iniziando, l'una o l'altra impostazione troppo ristretta del nostro nuovo statuto potrebbe perfino risultare superata'. Mitterdorfer (SVP), Chamber of Deputies, Session of 15 July 1971, p. 30113.

[xxiii] *Ex multis* 'Au-delà de ces considérations en sens positif, le problème de fond de la situation valdôtaine reste ouvert: notre Région à Statut spécial, qui n'ayant pas obtenu les différents "pacchetti" d'autres Régions à Statut spécial, est, comme je disais au début, pratiquement au même niveau des Régions à Statut ordinaire'. Salvadori (UV), Aosta Valley Regional Council, object no. 580 of 5 December 1979.

[xxiv] Regional Council of Trentino-Alto Adige/Südtirol, Session of 19 February 1991.

[xxv] Zeller-Brugger-Widmann Project, Constitutional Bill No 3709, presented on 18 January 1996.

[xxvi] 'Il cosiddetto secondo statuto di autonomia comprende irrinunciabili clausole di tutela per il gruppo etnico tedesco e ladino, che devono rimanere anche se lo Stato italiano dovesse essere riformato nei suoi principi costituzionali. Ogni Regione a statuto speciale ha una situazione particolare a motivo della sua storia e dei suoi caratteri culturali, territoriali ed etnici. Questa situazione particolare esige il mantenimento delle autonomie speciali anche in futuro'. Motion No. 253/00 'Difendere l'autonomia altoatesina nella riforma dello Stato', Council of the Autonomous Province of Bozen/Bolzano, Session of 6 March 2001, p. 45.

[xxvii] Among others, see the Motion *'Réforme de l'état italien dans le sens de la création d'un véritable état fédéral'* (Regional Council of Valle d'Aosta, object no. 1974 of 8 March 1991) and '*Proposte di modifica della costituzione riguardanti le Regioni'* (Regional Council Valle d'Aosta, object no. 2455 of 24 July 1991). The Motion '*Initiative pour la réforme*

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de l'État italien dans une optique fédérale', 'Confirme l'engagement pris au sujet de la réforme de l'Italie dans une optique fédérale et en même temps souligne la nécessité de sauvegarder expressément les autonomies spéciales vis-à-vis de tout type de réforme de l'organisation régionale visant à effacer les particularités qui les distinguent'. D. Viérin (UV), Regional Council of Valle d'Aosta, object no. 1005 of 10 November 1994, p. 33

[xxviii] 'Mais dans cette croissance des compétences régionales est-ce qu'il a encore raison d'exister une spécialité? La réponse (...) c'est une réponse positive; même en souhaitant que toutes les régions aient non seulement les compétences qu'ont les Régions à Statut spécial aujourd'hui, mais supérieures, nous pensons qu'une diversité doit quand même exister entre les régions et au moins une partie des Régions à Statut spécial parce que des problèmes persistent quand même. Il s'agit de problèmes de type linguistique, de type culturel, de type scolaire, qui doivent pouvoir nous différencier par rapport à d'autres régions (…). Je parle des langues historiques que ces Régions doivent sauvegarder pour sauvegarder leur culture originelle' G.C. Perrin (UV), Aosta Valley Regional Council, object no. 2575 of 21 May 1997.

[xxix] Luciano Caveri (UV), Chamber of Deputies, 'Norme per la costituzione della Repubblica federale italiana', C 3002, draft Constitutional Law presented on 21 January 1997. The Project envisaged a dual federalism based on free association (Art. 16 recognised the right to self-determination), with an international guarantee (Art. 9) protecting the linguistic minorities' regions. The Project was presented the first time in 1991.

[xxx] '…[c]est pour cela que nous avons voulu en parler et que nous avons voulu maintenir une spécialité parce que nous nous souhaitons que toutes les régions italiennes puissent non seulement rejoindre, mais dépasser les compétences actuelles des Régions à Statut spécial, je dirais même de la Province de Bozen qui est celle qui a la plus forte autonomie. Cela ne signifie pas que nous devions nous descendre, mais augmenter encore, et c'est dans certains aspects (culturels, linguistiques, scolaires) que nous devons nous différencier des autres Régions parce que nous avons des problèmes que les autres Régions n'ont pas. Le seul fait d'être des Régions bilingues, où deux voire trois langues sont officiellement reconnues, fait qu'il y a quelque chose différente que nous devons sauvegarder'. G.C. Perrin (UV), Aosta Valley Regional Council, object no. 2575 of 21 May 1997.

[xxxi] Valle d'Aosta Regional Council, object no. 2575 of 21 May 1997.

[xxxii]The text of the Declaration was not found, so we refer to what the *Union Valdôtaine* member councillor Charles said in a Regional council meeting of 1999: 'De toute façon parmi le très nombreux matériel qui nous a été mis à la disposition, je veux bien vous lire le texte d'une résolution qui m'a frappée sur les réformes institutionnelles approuvée à Trento le 4 février 1997 par les Présidents des Assemblées, des Conseils et des Gouvernements des Régions et des Provinces autonomes. La résolution dit: "I Presidenti ribadiscono la natura pattizia e anche precostituzionale degli statuti speciali, che garantiscono le peculiarità, il carattere storico, etnico, linguistico, culturale, socioeconomico, geografico e insulare, nonché quelli derivanti da specifici accordi internazionali che, in considerazione di questi ultimi, riconoscono specificità di organizzazione territoriale diverse dalle attuali"'. Charles (UV), Aosta Valley Regional Council, object no. 743 of 16 July 1999, p. 153.

[xxxiii] '…lieto che l'articolo 10 preveda che i trasferimenti di competenze siano operativi anche per le province autonome di Trento e Bolzano e per le regioni a Statuto speciale, entro i limiti in cui si trasferiscono poteri e competenze maggiori senza, però, alcun restringimento delle competenze già conferite'. Pinggera (SVP), Senate of the Republic, Session of 8 March 2001, p. 34. 'il testo in esame presenta alcune ombre ma anche parecchie luci. Non siamo però di fronte ad una riforma dell'ordinamento nel senso di un federalismo compiuto (…). È però innegabile che il testo preveda miglioramenti significativi e non costituisca un peggioramento della situazione attuale e tanto meno un passo indietro. Dal punto di vista delle regioni a statuto speciale, prendiamo atto con soddisfazione che le ragioni della specialità sono state confermate'. Zeller (SVP), Chamber of Deputies, session of 28 February 2001, p. 83.

[xxxiv] 'se fosse stato federalismo, sarebbe stata condivisibile la "morte" delle autonomie speciali; visto che non si tratta di federalismo, ritengo – sulla base dell'esperienza degli ultimi cinquant'anni – che le autonomie speciali, per come hanno funzionato, debbano continuare ad essere un laboratorio'. Caveri (UV), Chamber of Deputies, session of 19 November 1999, p. 15.

[xxxv] It is 'fondamentale e strategico che si instauri progressivamente un processo di revisione degli Statuti speciali (peraltro già avviato in alcune Regioni), ritenendo insufficiente un mero adeguamento degli stessi al mutato assetto costituzionale – ferma restando la specificità delle situazioni legate alla presenza di minoranze linguistiche e a trattati internazionali - ed invece necessario rafforzare lo sviluppo e la valorizzazione delle singole realtà regionali. Costituendo gli attuali statuti un minimum di garanzia incomprimibile, i medesimi non possono essere riformati in pejus ma solo incrementati'. Declaration of Aosta (2006). Available at the following link: <http://www.regione.vda.it/varie/pdf/Dichiarazione_di_aosta.pdf>.

[xxxvi] See 'Riforma del Titolo V della parte seconda della Costituzione', Aosta Valley Regional Council, object no. 825 of 24 October 2014.

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[xxxvii] Royal Decree-Law of 30 October 1976, Royal Decrees of 4 March and 2 June 1977 and Royal Decree-Law of 4 January 1978 for the Basque Country; Royal Decree-Law of 29 September 1977 for Catalonia.
[xxxviii] 'Carece de sentido positivo la distinción de nacionalidades y regiones. Aunque algunas regiones actuales hayan sido históricamente reinos y otras no, es obligado atender al futuro y hacerlas a todas de la misma condición jurídica, política y económica. De ahí la insistencia en el principio de igualdad, que no quiere decir que todos los Estatutos autonómicos tendrán el mismo contenido, sino, simplemente, que a todas las regiones se les confieren las mismas posibilidades teóricas'. Don Hipólito Gómez de las Roces (*Partido Aragonés Regionalista*), Congress of Deputies, Index of amendments by article, Amendment n. 55, p. 41.
[xxxix] 'La nación y la región son fenómenos sociológicos distintos, en un orden jerárquico y subsuntivo de carácter vertical. Por otra parte, la existencia de una pluralidad de naciones en España aconseja dotar al Estado de una configuración federal.' Ramón Bajo Fanlo (PNV), Amendment n. 1100, Senate, Index of amendments by article, p. 455. 'En este sustento geográfico que es España coexisten comunidades nacionales y regionales diferenciadas entre sí por muchas razones, pero quizá también por un diferente grado de voluntad de autogobierno'. J.M. Bandres Molet (*Euskadiko Ezkerra*), Senate, Session of 19 August 1978, p. 1601.
[xl] 'Señor Presidente, señoras y señores Senadores, el motivo de la justificación de mi enmienda no es otro que el de entender que el concepto de "nacionalidades" es equívoco y carece de precedentes en nuestro ordenamiento constitucional. "Las regiones -decimos en nuestra enmienda- no pueden estar en el futuro abocadas a un tratamiento jurídico y económico distinto, con base a ese testimonio discriminatorio". Pero resulta tan difícil utilizar argumentos originales, cuando prácticamente tedas las enmiendas giran alrededor de una palabra, que los criterios de autoridad de los señores Senadores que me han precedido me servirían únicamente para subrayar, reiterar y reafirmar'. Zarazaga Burillo (independent), Senate, Committee on the Constitution, Session of 19 August 1978, p. 1616. See Don Hipólito Gómez de las Roces (*Partido Aragonés Regionalista*), Congress of Deputies, Index of amendments by articles, Amendment no. 55, p. 41, endnote xxxviii.
[xli] On this issue, see also one of Pujol's statements to the Catalan parliament in proximity of the homogenisation of Spanish regions: 'Un dels resultats de tot això fou la generalització autonòmica; més exacte, no és que des de Catalunya es proposés la generalització autonòmica en la forma que es vit plantejar. No ens semblava realista i, a més, sabíem amb tota certesa que ens perjudicaria; Es més, sabíem que, en part, es feia contra nosaltres. Ho sabíem. Es reia la millor de les interpretacions perquè Espanya… deien: "Espanya no podrà acceptar que només Catalunya, Euskadi i Galicia siguin autònomes". I, en la pitjor de les interpretacions, es feia – o pot ser que es fes – per clara voluntat d'aigualir l'autonomia de les nacionalitats històriques. Amb tot, no podem negar que els nostres propis plantejaments de solidaritat i de governabilitat i de gran prudència nacionalista varen aplanar el camí cap a aquesta generalització. Bé és cert també – i això ho he d'emfasitzar molt –, perquè el compromís assumit el dies d'agost, els primers dies d'agost de 1979, per la UCD i per PSOE era molt precís, molt precís, i és un compromís que no s'ha complert; be és cert també que aquesta generalització estava prevista inicialment d'una manera diferent de corn després s'ha dut a terme, molt diferent, d'una manera molt diferent'. Pujol (CiU), Parliament of Catalonia, session of 11 February 1987, p. 3720.
[xlii] 'Disposición adicional en la que se introducía, después del reconocimiento y garantía de los derechos históricos forales hecho por la Constitución, el siguiente párrafo: "A estos efectos el Estado podrá transferir o delegar materias de su competencia"'. X. Arzalluz Antia (PNV), Congress of Deputies, Session of 21 July 1978, p. 4549.
[xliii] Arzalluz (PNV), Congress of Deputies, Session of 21 July 1978, pp. 4548. Moreover, Pujol (CiU) also claimed this vision of article 150.2 of the SC ex post: 'És una política que s'allunya totalment d'aquell plantejament vigent a l'època d'elaboració de la Constitució en què es distingia entre regions i nacionalitats, entre autonomies històriques i no, en què s'introduí un article 150.2 per a fer possibles ulteriors desenvolupaments autonòmics i en què a ningú se li acudia pensar que pogués passar el que passa ara, és a dir que el Govern Central es negui a traspassar competències pendents'. Parliament of Catalonia, Session of 1 October 2002, p. 6.
[xliv] Parliament of Catalonia, Committee of Organisation and Administration of the *Generalitat* and the Local Government, session of 12 December 1989.
[xlv] Basque Parliament, session of 15 February 1990.
[xlvi] The goal was the recognition 'de manera definitiva la peculiaridad de estas dos comunidades con un nivel mayor y diferenciador de competencias con respecto al resto de las demás'. (de Esteban Alonso 2015: 71). Cf. (Trujillo 1992).
[xlvii] 'Al cabo de veinte años de democracia continúa sin resolverse la articulación del Estado español como plurinacional. Durante este periodo hemos padecido una falta de reconocimiento jurídico-político e incluso de asunción social y cultural de nuestras respectivas realidades nacionales en el ámbito del Estado'. Barcelona Declaration, available at this link < http://www.filosofia.org/his/h1998bar.htm >.

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[xlviii] The goals of the parties of the *nacionalidades* were 'por un lado, en un reconocimiento pleno de su singularidad, frente al resto de las comunidades autónomas y, por otro, en un aumento de sus techos competenciales, exigiendo incluso competencias exclusivas del Estado' (de Esteban Alonso 2015: 213). The PNV had already promoted also asymmetrical institutional demands, claiming a more significant role in the Constitutional Tribunal and the Senate, as well as in the European community (Castells Arteche, Saiz Arnaiz 1992,:159). As far as CiU is concerned, it should be stressed the '[E]minència del nacionalisme sobre el federalisme com a mesura de defensa enfront de la uniformitat federal o "el cafè per a tothom' (Caminal Badia 2001: 141). To be more precise, 'La aspiración de estos partidos ha sido siempre la de dotar a Catalunya del máximo techo de autogobierno posible y del reconocimiento y respeto de sus particularidades culturales. Sin embargo, en ningún caso han sido partidarias de la secesión. Unió, desde su fundación en 1931 ha defendido una solución confederal, mientras que Convergència ha sido siempre más ambigua respecto a la organización territorial de Estado siempre que Catalunya pudiese sentirse cómoda'. (Barrio López 2014: 9). However, the position of CiU is assimilable to a spearheaded asymmetry request: 'l'Estatut és insuficient quant a rang, insuficient competencialment, insuficient econòmicament i insuficient en determinats reconeixements. I preciso que és insuficient quant a rang, és l'única precisió que faré de les quatre, perquè Catalunya és una nació'. Pujol (CiU), Catalonia Parliament, session of 11 February 1987, p. 3728.

[xlix] 'Este pacto político se materializa en un nuevo modelo de relación con el Estado español, basado en la libre asociación y compatible con las posibilidades de desarrollo de un estado compuesto, plurinacional y asimétrico'. *Propuesta de reforma de Estatuto político de la Comunidad de Euskadi. Presentada por el Parlamento Vasco*, in Official Bulletin of the General *Cortes*, 21 January 2005 No. 149-1.

[l] The goal was 'tener más competencias que las actuales, porque interpretamos que así lo desea la mayoría de la sociedad vasca. Pero aspiramos a tener no sólo más cantidad, sino, sobre todo, más calidad en nuestro autogobierno'. Ibarretxe (PNV), Basque Parliament, Session of 26 September 2003, p. 36.

[li] The draft statute provided for new competencies and a series of asymmetries in the field of institutional representation both in Europe and in the central state bodies (e.g. appointment of Constitutional Tribunal magistrates, General Council of the Judiciary's councillors, and the members of the Board of the *Banco de España*, etc.). See (Castells Arteche 2005: 514).

[lii] 'Es una propuesta compatible con el desarrollo futuro de un estado compuesto, plurinacional y asimétrico, y no nos corresponde prejuzgar el desarrollo del modelo de estado ni la tendencia que legítimamente le quieran imprimir otros pueblos'. Ibarretxe (PNV), Basque Parliament, Session of 26 September 2003, p. 28. Besides, at the time of the 1992 autonomy pacts, it was stated: '[N]uestro partido, al que creo que nadie discutirá su voluntad autonomista, aunque su vocación sea federalista, quiere dejar bien claro que defenderá siempre el máximo de competencias para todas las comunidades autónomas (...) Sin embargo, entendemos que la vía institucional elegida no es la más adecuada. En este proyecto subyace un modelo de uniformización del proceso autonómico. El artículo segundo de la Constitución española diferencia la existencia en el Estado español de nacionalidades y regiones. Y el propio Título VIII de la misma, así como todos los estatutos de autonomía en ningún momento contemplan la posibilidad de un proceso de homogeneización o de uniformización de las comunidades autónomas. Por desgracia, actualmente, da la sensación de que el hecho diferencial ya no existe'. Bajo Fanlo (PNV), Senate, Session of 2 December 1992, p. 7784.

[liii] Still in 2000 the CiU's approach was that of political negotiation: 'Sé que hi ha qui defensa que hauríem de reclamar la reforma de l'Estatut i, per tant, quasi amb seguretat de la Constitució. (...) Però vull fer dos comentaris. El primer és que reclamar amb possibilitats d'èxit la reforma de l'Estatut s'ha de fer d'una manera que podria comportar certs riscos i que Convergència i Unió no desitja córrer, si no és que, com deia, queda definitivament tancada la porta de la negociació. El segon comentari és que durant els dos darrers anys s'ha demostrat que la negociació pot donar resultats considerables si es fa en determinades condicions. Quines condicions? Primera, elaborar i vendre bé una interpretació de la Constitució que en destaqui totes les portes que deixa obertes a l'heterogeneïtat i, per tant, a les personalitats diferenciades. Segon, disposar de prou força política i institucional a nivell d'Estat perquè a Madrid no se'ns puguin treure de sobre així com així. A la legislatura anterior es donava una tercera condició, que fou molt favorable, i és que el Govern de la Generalitat disposava a Catalunya d'una majoria que li conferia a Madrid molta llibertat d'acció. Els propers mesos diran si aquesta tercera condició pot ser substituïda eficaçment'. Pujol (CiU), Parliament of Catalonia, session of 13 December 1995, p. 13. This was the case with the Gonzales and Aznar governments until 2000 (Aguilera de Prat 2001: 117). The paradigm shift occurred in the early 2000s, when the party began to think about institutionalising asymmetry in a new statute (Monreal Ferrer 2011: 140). See the *Estudi sulla valoració del desenvolupament de l'estat de les autonomies i de l'aplicació de l'estatut d'autonomia de Catalunya:* the party project can be found in: Parliament of Catalonia, *Comissió d'Estudi per a l'Aprofundiment de l'Autogovern*, Official Bulletin of the Parliament of Catalonia No. 366 of 5 December 2002.

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[liv] The goals were: 'primero, otorgar un trato jurídico singular a Cataluña, dada su condición de nación, que permitiera distinguirla de las demás comunidades autónomas; y, segundo, aumentar y garantizar las competencias de la Generalitat y su financiación. En definitiva, aumentar la esfera de autogobierno a costa de diferenciar a Cataluña del resto de comunidades'. (de Carreras Serra 2010: 45).
[lv] The starting point was in fact the restoration of spearheaded asymmetry: '[A]questa opció generalitzadora no sempre ha afavorit l'autonomia de Catalunya, atès que el seu autogovern i la seva pròpia singularització política i institucional dins l'Estat espanyol s'han vist diluïts en un procés que ha accentuat el principi homogeneïtzador entre les distintes comunitats autònomes'. 'Millora de l'autogovern. Un nou impuls a l'autogovern. Una proposta a favor de Catalunya i la seva gent (Bases per a un desenvolupament alternatiu de l'autonomia)'. Parliament of Catalonia, Committee of Studies for the Development of Self-Government, Official Bulletin of the Parliament of Catalonia no. 366 of 5 December 2002, p. 46.
[lvi] It was a 'new type of statute', different from all previous ones: Castellà Andreu (2011: 24).
[lvii] The goal was indeed a federal asymmetric state through the '[D]esenvolupament federal del pacte constitucional i estatutari, que ha d'articular adequadament l'Espanya plural i el reconeixement de Catalunya com a nacionalitat històrica'. Parliament of Catalonia, Committee of Studies for the Development of Self-Government, session of 5 December 2002, p. 79. Besides, the position of CiU was always been that of favouring the self-government of all regions while maintaining asymmetry: 'En un moment donat vàrem assumir la generalització autonòmica perquè era bo per al conjunt dels pobles d'Espanya i perquè l'època era molt trencadissa. Vàrem optar per garantir la transició democràtica, encara que això ens situés en una moderació poc agraïda, però avui, des de l'estabilitat ja assolida del conjunt de l'Estat i des de la mateixa actitud constructiva d'aleshores, però amb fermesa, diem que ara el fet diferencial català ha de ser assumit per l'Estat'. Puyol (CiU), Parliament of Catalonia, Session of 8 April 1992, p. 15.

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CENTRO STUDI SUL FEDERALISMO

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Fiscal Decentralization in Federal Systems: A Comparative Story of a Principle and its Paradigms

by

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Abstract

The paper endeavors to revise and reframe the traditional categories established in the studies on fiscal federalism. It does so by embracing a comparative constitutional law viewpoint and a comprehensive approach to (fiscal) federalism.

Against the wake of an escalating recentralization, a renewed understanding of fiscal decentralization is adopted. This perspective integrates the institutional framework and the dynamics of intergovernmental relations within federal systems. It appreciates both the self-rule and shared-rule dimensions, with the latter serving as an architectural strategy to offset the centralizing drift, in search of a renewed federal equilibrium.

Keywords

Fiscal decentralization, financial autonomy, fiscal responsibility, tax-assignment problem, fiscal constitutions, decision-making (procedures), emerging paradigms, fuzzy logic approach.

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1. Introduction

Financial relations in the Western world are undergoing a process of re-centralization (Palermo 2018: 382-383). Simultaneously, the decentralization observed in developing countries often encompasses elements beyond tax powers. Fiscal decentralization is facing pressures for decades now, partly due to the relentless globalization and partly due to ongoing transformations, and the economic and financial instability. This includes measures adopted to address the economic-financial distresses that emerged in 2008 and in the aftermath of the Covid-19 pandemic.

These global dynamics have tested the legal foundations and constitutional safeguards of federal systems, highlighting the profound influence of fiscal federalism on the functioning of the legal-political system. A significant mutual interdependence exists between financial and institutional components; the former often influences the latter and, in some instances, can be deemed responsible for its transformation (Palermo 2012: 2, 10). This is particularly applicable to the integration process within the Eurozone's member states and the impact it has on both national and subnational governments.

The legacy of the (fiscal) federal idea, which supported the match between revenue and expenditure, is thus outdated. In its place, alternative solutions are emerging that combine the need for financial and political accountability of subnational governments with an ever-increasing role of the central government in fiscal matters, among other, due its key role in redistribution and stabilization functions.

To identify emerging trends in the field, this article explores the so-called 'tax-assignment problem' (Musgrave 1983) from a comparative constitutional perspective. By delving into various perspectives and frameworks and shedding light on the intricate interplay between fiscal decentralization and constitutional structures across diverse federal systems, main aim is to bring to light the presence of architectural solutions in which fiscal decentralization is articulated, and with it, the enhancement of the financial autonomy and fiscal responsibility of subnational governments is pursued. After providing an overview of the theories on which fiscal decentralization is based and an exploration of the comparative constitutional discourse in relation to these, the recurring paradigms and the main cases attributable to these are

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identified, with the aim to contribute to a revision of the traditional categories within fiscal federalism studies.

2. Theories of Fiscal Decentralization: An overview for the sake of a comparative constitutional analysis

Tax-revenue distribution across and within the different levels of government in a federal system, also mentioned as the tax assignment problem, signifies one of the most compelling challenges in fiscal federalism, although this is just a single facet of the broader concept of fiscal constitutions. Revenue distribution should in fact align with competence and thus expenditure responsibilities, to establish a robust intergovernmental financial framework. Regrettably, practice, has often deviated from this foundational path[I].

In this regard first-generation theories advocate the idea of a perfect match between those benefiting from a collective public good and those paying for it'[II]. This alignment, termed as 'fiscal equivalence' (Olson 1969: 483), calls for a 'perfect correspondence between revenue and spending powers' (Oates 1972: 33-35). Put another way, finance should follow function (Hogg 2000; Ahmad-Brosio 2015: 358-359), thereby necessitating tax assignment to go along with spending decentralization.

The close relationship with 'the expenditure problem' is tied to the role of benefit taxation in the subnational financing paradigm, purportedly designed to prompt democratic control and political accountability (McLure-Martinez-Vazquez 2011). This hinges on the belief that citizens, through elections, evaluate the decisions made by their representatives. This argument relies on the famous Tiebout model 'vote with feet' (1956). Consumer-voters pick the community that best satisfies their own preferences in the selection of public goods and in case they dislike it, they move to another community.

These theories have raised contentious issues. Besides not being entirely converted into practice in any system, they become very tricky when referring to cooperative models of federalism[III]. Existing systems are structured along an asymmetric allocation of expenditure and revenue responsibilities, resulting in a mismatch that has a detrimental effect on the political accountability of subnational entities (Korioth 1997: 268)[IV]. When subnational entities are financed solely or primarily through federal transfers, they become reliant on decisions made by another layer of government, thereby nullifying their autonomy (Blöchliger-King 2006).

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Over the past decades second-generation scholars have elaborated a mitigated concept of fiscal responsibility, embracing a more flexible approach to fiscal equivalence. This acknowledges the varying fiscal incentives generated by different tax systems, which in turn shape public choices and actions (Weingast 2009). They contend that the approach each system undertakes to cover the vertical fiscal gap impacts the extent to which the pursued objectives are satisfied (Anderson 2010:50). Therefore, instruments and procedures of revenue distribution among and within the different levels of government are of paramount importance.

In this context, scholars emphasize the significance of subnational governments retaining a share of the tax revenue generated within their territory. On the one hand, they would be more inclined to promote economic development, on the other hand, the risk of interference from the central government in their businesses would be reduced and their autonomy would be safeguarded, if not enhanced. If all revenue sources were retained by the central authority without regard for their origin, incentives for efficiency and economic growth would be lost. Subnational entities would then bear the political costs, without obtaining economic benefits (Weingast 2009). Against this backdrop, second-generation theories advocate for the concept of 'fiscal responsibility at the margin' championing for subnational government to bear at least partial responsibility for revenue (Bird 2009: 453; Bird 1999: 165).

3. Fiscal Responsibility at the Margin in the Comparative Constitutional Discourse

This theoretical framework projects into the need to entrench into the financial constitutions a distribution of the power to tax so to ensure subnational governments a certain degree of financial autonomy[V]. From a constitutional law perspective, the financial structure turns out to be one of the milestones of the principle of autonomy and within this, the power to tax represents one of the most significant expressions of financial autonomy[VI]. Only if subnational governments are vested with the power to (co-)determine their own financial endowment, they can be considered as autonomous entities. In other words, financial autonomy cannot be reduced to budgetary autonomy - that is to the power to make use of the resources at disposal without any limit (Gallo 1975: 253) - but shall also include tax autonomy.

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That 'the individual states should possess an independent and uncontrollable authority to raise their own revenues for the support of their own wants' (The Federalist no. 32[VII]) was already clear to the founding fathers of the US federation. However, this was reaffirmed by the US Supreme Court as well. In the view of the Court, the states' 'power of taxation is indispensable to their existence' (Gibbons v. Ogden, 22 U.S. [9 Wheat.] 1, 199 [1824]), as being 'one of the most essential to a state, and one of the most extensive in its operation' (Weston v. City of Charleston, 27 U.S. [2 Pet.] 449, 466 [1829]). On the other hand, 'the taxing power of a state is one of its attributes of sovereignty, that it exists independently of the Constitution of the United States, and underived from that instrument' (Railroad Company v. Peniston, 85 U.S. 5 [1873]).

The symbiotic relation between the two facets of autonomy is aptly illustrated also by the German Federal Constitutional Court, that regards the provision of autonomous financial resources as a fundamental trait of the *Länder*'s autonomy, integral to their core statehood and therefore among the essential features of the federal principle[VIII]. Fiscal autonomy hence becomes a guarantee of the scope of autonomy, safeguarding the independence and, along with it, the responsibility of the *Länder* in exercising their constitutionally assigned powers[IX]. The reasoning behind is that the political autonomy of subnational governments would be incomplete if not safeguarded through a measure of financial independence from the federal government, as well as of the *Länder* among themselves (Schneider 1991: 2452). This dimension of autonomy affects the stability and the capacity of a federal system to function, which is based not only on the distribution of competences but also on the division of financial powers, encompassing both spending and revenue responsibilities (Wendt 2008: 876)[X]. This last feature is a determinant of the degree of mutual independence and autonomy of both *Bund* and the *Länder*, whereby financial autonomy comes to be the prerequisite for self-determination, as well as the indicator of *Länder* statehood[XI].

The same principle but through a reversed rationale was followed in older 'coming together' federations. In this context the aim was to secure a certain financial independence of the federal government. The US Constitution expressly allocates to the federal government customs tariffs on imports and exports, which back in time constituted a profitable source of revenues as well as the fundamental tool for the creation of an internal

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market. Not by chance the same was stipulated by the 1901 Australian Constitution and by the British North America Act, 1867 for Canada.

4. Exploring Fiscal Autonomy within Federal (Fiscal) Constitutions: Common Traits, Recurring Features, and Emerging Trends

Despite an agreement in principle, the observation of cases reveals profound differences in the actual implementation through the instruments and procedures of fiscal federalism. Although somewhat simplistic for understanding the phenomenon, the prevailing narrative is that some federal systems may be classified as fiscally decentralized, while others concentrate tax authority mainly at the federal level; anyhow, in the last decades a general trend towards fiscal centralization can be observed. Looking at existing cases, only in Canada, Switzerland and US subnational governments retain meaningful taxing powers related to personal and corporate income and consumption taxes (i.e., the three main tax sources in terms of yield), whereas in all other federal systems – including old federations like Australia, Germany, Austria, India – they have limited tax authority (Blöchliger-King 2006: 155-88).

If a comparative constitutional approach is however adopted, two common traits come to the fore.

A first element that becomes evident is that the distribution of the power to tax is typically addressed in (financial) federal constitutions. In this respect, two major categories emerge among federal systems, albeit with significant variations across different cases.

In mature 'coming together' federations there is a tendency to explicitly enumerate therein the powers and the limits of the federal authority to tax. This occurs because of the process of transferring tax powers that were previously concentrated in the hands of states. This is the case of the United States. While the US Constitution contains a few explicit provisions on fiscal federalism, there are five provisions enumerating the federal government's authority to impose taxes (Hellerstein 2011: 23-24). Whereas, according to the Tenth Amendment, states retain all powers not specifically delegated to the federal government in the Constitution, including the power to tax.

The same approach is embraced by the Australian Constitution. The Commonwealth government is vested with the power to tax under section 51(ii), but this power is characterized as 'concurrent' in nature as it coexists with the power to tax of the states. The

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latter is implied by the sovereign nature of the states: the recognition of plenary legislative powers indeed includes the power of taxation (Stewart 2023: 11). The fiscal constitution is rather open in this respect, as it neither imposes fiscal centralization, nor it excludes it. Over time the federal government has increased its fiscal strength, partly because of political negotiations with the states (via intergovernmental agreement) and partly because of judicial decisions[XII]. Currently, the most relevant taxes like individual and corporate income tax, as well as the good and service tax, are under the exclusive legislative authority of the Commonwealth. States are responsible for imposing a few narrower taxes like the ones on land ownership, various transactions (e.g., transfers of land or other assets), gambling and payrolls. They also impose royalties on mineral extracted in their territory (except for offshore resources whose royalties pertain to the Commonwealth). Besides that, there are no piggy-back taxes.

While falling within the same paradigm, Canada differs from the U.S. case in that the Canadian Constitution lists the powers of both the federal and provincial jurisdictions, with the authority of the federal government being defined in very broad terms in sec. 91.3, and the provincial powers being specifically enumerated in sec. 92.

The approach taken by federal constitutions after World War II follows the Canadian approach. In these cases, in fact, the constitutional guarantees of taxation powers have not been introduced solely in favor of the federal government, but also of subnational governments. This is the case with Germany. The Basic Law enumerates the taxes that are under the (exclusive or concurrent) authority of federal and subnational governments. Pursuant to Article 105 the *Bund* has the exclusive right to legislate with respect to customs duties and fiscal monopolies, while the *Länder* have legislative authority on local taxes on consumption and expenditures (e.g., taxes on beverages and packaging) and can determine the rate of the tax on acquisition of real estate (Art. 105.2a). However, the key-taxes like personal and corporate income tax and VAT fall under the concurrent legislative competence (Art. 105.2).

The fact that currently the German case is based on a mixed paradigm with the prevalence of concurrency over separation is the result of the reforms that have been enacted from 1949 onwards, particularly those adopted in 1955 and 1969. Moreover, the listing of both federal and subnational powers to tax did not prevent the system to be extremely centralized. The fact that a strong fiscal centralization is in place, is the result of the unique

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form of concurrency that regulates the allocation of the taxation powers. Accordingly, the *Länder* can legislate so long and insofar the *Bund* has not. In practice, the federal government has used its power to tax so extensively that the tax autonomy at the subnational level is *de facto* nullified. In other words, the exercise of the power to tax by the federal government exhausts the possibility for subnational governments to make use of it in turn. Furthermore, despite this authority being subject to limits and conditions, the latter are formulated as a loosely knit framework that has enabled the absolute primacy of the federal government in determining the configuration of the tax system (Valdesalici 2018: 365-400).

Similarly, the Indian Constitution (Part XII, Chapter I, Art. 246 to be read with Schedule VII). enshrines the demarcation of the tax handles of union and state governments, but the legislative power over the most broad-based taxes is assigned exclusively to the center. The list includes taxes on income and wealth from non-agricultural sources, corporation tax, taxes on production (excluding those on alcoholic liquors) and customs duty[XIII]. Furthermore, the residual clause in tax matters operates in favor of the center.

The solutions adopted by more recent federal systems -especially if they result from a devolution of powers- diverge widely from the above illustrated paradigms. In cases like Belgium, Spain, and Italy, the foundation of the subnational power to tax is entrenched in the constitution as a proclamation of principle, without providing an explicit assignation of the taxes of either the federal or subnational level of government: basically, autonomous communities and regions have the authority to establish their own taxes in accordance with the national Constitution and the laws. This authority is primarily defined and delimited by federal laws, such as the Spanish LOFCA (*Ley Orgánica de Financiación de las Comunidades Autónomas*) and the Belgian *Loi spéciale de financement*, both holding (quasi-)constitutional value.

In Spain, for instance, the LOFCA itself does not undertake any sort of distribution, but it defines the constraints on the subnational power to tax. Therefore, the delimitation of the subnational power to tax rests widely on the constitutional court[XIV]. Suffice it to say that while Autonomous Communities (ACs) have shown a significant activism in establishing their own taxes, mostly related to so-called 'green taxes', it frequently occurs that the tax laws thereof are challenged in front of the constitutional court, if not replaced by a new federal tax (Rozas Valdés 2013: 103-127).

Furthermore, the provision of the subnational power to tax is embedded in a pre-existing system where the power to tax was entirely centralized. The fiscal room is thus nearly

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exhausted by the central government, and the tax burden is already quite high. Moreover, the fact that the Constitution merely recognizes the tax autonomy of the ACs without allocating the taxes among the different levels of government, deferring this task to the LOFCA (which however fails to take care of that), further contributes to preserving fiscal centralization. On top of that, the prohibition of double taxation must also be considered. In Spain, this translates into a clear preference in favor of the federal government, while still allowing the ACs the right to receive an economic compensation[XV].

An analogous trajectory of (non-)development is observed in Belgium and, with particular strength, in Italy. In all three cases, then, this outcome is strongly conditioned by the 'silent but strong' influence exerted by the European legal order on the tax systems of its member states[XVI].

A reversed approach has been accommodated into the South African Constitution, though substance remains unchanged. In this case only the provincial (and municipal) powers to tax are listed under section 228. The provision enumerates the taxing powers of the provinces, stating that they can levy taxes other than income tax, value-added tax, general sales tax, rates on property, or customs duties, basically excluding the most salient and buoyant taxes. On the other hand, it allows provinces to impose flat-rate surcharges on any tax, levy or duty that is imposed by national legislation, always except for the key tax sources mentioned above. Also this scheme has thus led to a centralization of the taxation authority (Mabugu-Rakabe 2023: 309-310). On top of that, the Provincial Tax Regulation Process Act 2001, in governing the exercise of the taxation power by the provinces, also requires that they obtain approval from the Minister of Finance before introducing a new tax.

The second common element is that the distribution of taxation power in federal systems commonly adheres to one or a combination of the following principles: separation and/or concurrency. Under the first option, a single authority holds exclusive power over a specific tax, meaning that the tax falls entirely within the jurisdiction of one level of government, including autonomy over the tax base and the tax rate, as well as other aspects like tax benefits. Conversely, concurrent taxation results in the co-occupancy of the same tax-base (or taxable-event) by both levels of government, along with the recognition of the autonomous power to set tax-rates and in certain cases also tax-benefits.

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Despite the constitutions might show the prevalence of one principle over the other depending on the case at stake, overall, there is an emergence of mixed paradigms, which show the prevalence of concurrency over separation with few exceptions.

This is the case of Switzerland, a system in which the federal government has the authority to tax only against an explicit constitutional recognition. Separation tends to prevail over concurrency, one notable exception being the power to tax income. The federal government has the exclusive competence over indirect taxation (VAT and excise duties), but the federal power to tax income coexists with the cantonal (and local) one, despite being bound by both substantial and temporal limitations (Rentzsch 2011: 232). Furthermore, the Swiss Confederation takes on a particular degree of detail also in this field that ends up strictly delimiting the powers of the federal level (e.g., the federal power to tax incomes has an expiration date).

It is interesting to note that systems that were initially founded on the principle of separation have evolved over time towards a mixed paradigm as a way of practice and judicial interpretation, or in certain cases also thanks to formal constitutional reforms.

An example of the first type is Canada. Despite the formal adherence of the Canadian Constitution to the principle of separation (i.e., the powers of both the federal and provincial jurisdictions are explicitly enumerated therein), a mixed system of taxation has emerged in practice. Currently, there are taxes under the exclusive authority of one level of government, but for key taxes forms of co-occupancy of the same tax-base are in place (Boadway 2007: 102ff), in certain cases also due to the practice of entering into tax-rental agreements (See further sec. 5a below).

A similar trajectory is reflected in the US system. Even though the federal system is based on the principle of separation and the Constitution enumerates the federal power to tax, both federal and state governments are free to make use of their 'sovereign' taxing powers, with limited restraints. State governments have this power by the nature of things, i.e., because they are sovereign entities (Hellerstein 2011: 26-28, 30-35). Whereas the federal government has the power to tax as it has been surrendered by the states, either expressly or by necessary implication (see further *Railroad Co. v. Penniston*, 85 U.S. 5, 29 [1873]). In practice the two levels of government frequently overlap and shall coexist (as seen in Gibbons v. Ogden, 22 U.S. 1 [1824]). Concurrency of both levels of government is therefore in place for key tax sources such as income (since 1913), wealth transfers, consumption, and other excises.

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India is instead an interesting epitome of such evolution via reforms. A mixed system is currently in force, whereas initially separation was the (constitutional) rule. Pursuant to Art. 246 in conjunction with Schedule VII of the Constitution, taxes are exclusively assigned to either the union or the state governments, with the widest tax-bases belonging to the central government. Nonetheless, concurrency was introduced through the 101st Amendment Act of 2016, along with the implementation of the GST from July 2017 onwards. As a result, both union and state legislatures have concurrent powers to impose and collect their respective shares of GST on a common base of economic activity (Sharma-Valdesalici 2020: 33). Indeed, a generous compensation package was put in place to garner the states' consent for the ratification of the GST bill. States were provided with a larger share of union taxes and their participation in the GST Council, so to ensure them a say in GST policies. This whole process of paradigm shift is thus termed as 'concessionary federalism' (Sharma 2022: 35-36).

5. Revisiting the traditional categories of fiscal decentralization

Despite the predominance of the above-mentioned common traits and dynamics, the comparative constitutional analysis reveals significant differences in terms of legal solutions and their practical implementation, all factors that significantly influence the scope of fiscal autonomy at the subnational level. Moving from the theoretical paradigm of '*fiscal responsibility at the margin*' to legal practice, the need to observe how and to what extent revenues are distributed among and within the different levels of government consequently emerges.

The traditional dichotomy 'own taxes *vs* federal grants' is outdated. The comparative exploration offered in the previous paragraph manifests the existence of subnational systems of financing that are mainly of a mixed nature. Specifically, these combine own revenues - in this specific case, own taxes - with revenues derived from another level of government, namely the federal one, through a set of instruments that cannot be limited exclusively to the composite category of federal transfers. To understand this phenomenon, it is therefore essential to detect the widespread surfacing of different paradigms that align with a fuzzy logic[XVII].

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A tax can be categorized as an 'own tax' of a subnational government only if it falls under its full and exclusive authority. Not only do SNGs collect the revenue and establish regulations thereof, but they also wield control over the tax's very existence. The other category, instead, includes a wide variety of subnational financing tools that realize the vertical distribution of resources to cover the so-called vertical fiscal gap, resulting from the difference between expenditure decentralization and centralization of the tax authority. Basically, this operation occurs through two main solutions: Upstream of the Tax Act, or as an Ex-Post Mechanism. The first one entails a vertical distribution of the authority to tax with reference to the various sources of wealth (or tax bases), and necessarily includes a distribution of the legislative power related to them. The second one is achieved through mechanisms of tax revenue distribution.

According to this revised standpoint, instruments and procedures of revenue distribution are of pivotal importance. While ensuring that subnational governments cover their spending needs, these elements can also contribute to determine the extent to which they have been made responsible for their financing. While Ex-Post Mechanisms serve to ensure the sufficiency of resources for subnational jurisdictions, the first solution is instrumental to fiscal autonomy and, with it, the aforementioned political and financial 'responsibility at the margin'. The legislative power to tax is in fact the typical vehicle for making territorial entities bear the economic and political costs of the decisions they adopt, as long as it is associated with sources whose revenue accrue to the entity that makes the decision. Due to the significance of the legislative power in tax issues, in fact, it turns out to be the best tool to make subnational governments co-responsible for the determination of their financial sources. Along this line, the paper focuses on the different allocative solutions that are accommodated in federal systems, offering a reorganization of the manifestations found in various legal systems. It does so through identification of paradigms, against which to compare and evaluate existing cases and emerging practices. These are: 'The Tax-Base Sharing' Paradigm (5.1), 'The Institutions of Shared-Rule as Co-Legislator' Paradigm (5.2), and finally 'The Tax Varying Power' Paradigm (5.3).

5.1 The Tax-Base Sharing Paradigm

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Even in systems where fiscal decentralization is more relevant, as in Canada, the US, and Switzerland, examples of taxes under the exclusive authority of subnational governments (strictly speaking, own taxes) are residual. In most cases, forms of concurrency of both levels of government emerge concerning the most significant taxes in terms of revenue, which results in the co-occupancy of the same source of wealth, if not of the same tax base (meant as a legal construct), so that these solutions are commonly referred to as 'tax-base sharing' schemes.

Canada is an emblematic case for outlining this paradigm. The British North America Act, 1867 defines the authority of the federal government in very broad terms under section 91(3), which recognizes to the Parliament of Canada the legislative authority to raise money 'by any mode or system of taxation', thus 'granting *prima facie* a plenary and absolute taxation competence to Parliament' (Magnet 1978: 476).

Contrariwise, the provincial power to tax is specifically enumerated in section 92 in rather strict terms; it includes: direct taxation within the province, in order to the raising of a revenue for provincial purposes (2)[XVIII]; and shop, saloon, tavern, auctioneer, and other licenses, in order to the raising of a revenue for provincial, local, or municipal purposes (9). At the time when the Constitution was adopted, on the other hand, it was believed that the provincial jurisdiction was particularly limited, therefore there was no need to have access to substantial resources.

In a decision of 1977[XIX], however, the Supreme Court of Canada stated that: *Only certain of such categories, such as income and property taxes, were to be available to the Legislatures. There were two reasons for this. […] The second reason proved wrong from the start. It was thought that provincial activities would be limited and revenue needs would be slim; the Legislatures, therefore, would have no necessity to resort to most tax pools* (at 538).

Over time, it became evident that although the Constitution theoretically bestows unconditional authority upon the federal government (Alarie-Bird 2011: 81), its power is not boundless. At first, through the exercise of the power to tax, the federal government cannot intervene in areas falling within the exclusive jurisdiction of provincial governments. Some of these areas are formulated in such broad and vague terms that it is frequent that a federal tax measure ends up affecting domains falling under provincial legislative authority. To be considered are, for example, the exclusive power over property and civil rights in the

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province (92.13), as well as over 'generally all matters of merely local or private nature in the province' (92.16).

Furthermore, the above illustrated formal allocation of the power to tax can lead to a significant potential for overlapping in practice. There are in fact taxes that fall within both jurisdictions such as in the case of direct taxation (La Forest 1981: 52).

The provincial power to impose direct taxation under 92.2 is conceived as an exclusive power, but it is limited to 'provincial purposes'. Accordingly, the federal government may impose a direct tax 'for federal purposes'. At the same, the provincial authority to legislate on direct taxation is broadly understood, thus preserving its exclusive (or better concurrent) nature. In the *Lambe* case[XX], for instance, the Supreme Court recognizes the *intra-vires* nature of the provincial taxation of a bank, considered as a valid direct tax, even though the federal government is vested with the exclusive authority to regulate banking (sec. 91.15). The Court came to this decision in application of the 'pith and substance' doctrine[XXI].

Indirect taxation can also be an area of federal-provincial overlapping. The Supreme Court states that if a province imposes an indirect tax, the act is unconstitutional as *ultra vires*. Although provinces are not assigned any power over indirect taxes, they can impose license fees that could to a certain extent be considered as a form of indirect taxation. Moreover, a 'judicial stretching' of the concept of direct taxation has gained ground over time, to cope with growing and substantial responsibilities of provincial governments (Magnet 1978: 486). To pass the test and verify if a tax is indirect or direct, the rule is that the legal form takes precedence over economic substance; furthermore, the ultimate incidence of the tax was deemed not significant in deciding its validity (Bank of Toronto v Lambe [1887]; Shell Canada Ltd. v. Her Majesty the Queen, [1999] 3 SCR 622).

In practice the federal and provincial governments both have access to broad-based tax sources, which includes personal and corporate income tax, sales tax, and payroll tax, thereby setting the prevalence of the concurrent paradigm over separation.

Furthermore, over time most of the provinces has entered into a set of tax-collection agreements with the federal government. Currently, most provincial taxes are therefore collected by the Canada Revenue Agency (CRA) and then transferred to the participating province. Provinces are free to join or opt out, but all (except Québec) have entered into the agreement in respect to personal income taxation (PIT) and all, but Québec and Alberta, have similar agreements with respect to corporate income taxes (CIT)[XXII]. Ontario used to

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have them at some point, but the province did not always participate in the tax rental agreements. Agreeing provinces must use the federal definition of 'taxable income', even though they can still determine their own tax structure and rates, with limits. For instance, they may provide both non-refundable tax credits and refundable tax credits to taxpayers for certain expenses. They may also apply surtaxes and offer low-income tax reductions. Regarding the personal income tax, provinces are allowed to determine the progressivity of the tax and over time the federal government has reduced the federal PIT rate to free up fiscal room for provinces.

This evolution contributes to determine a strong change in the Canadian fiscal decentralization paradigm, and this did not occur by means of a constitutional amendment but through intergovernmental agreements, as such further contributing to the executive drift that characterizes Canadian (fiscal) federalism from its very beginning, while showing mainly a collaborative approach[XXIII].

Unlike income taxes, the sales tax structure varies much more widely. There are three different types of taxes: the Goods and Services Tax (GST) is a federal tax levied by the federal government across the country at a uniform rate of five per cent and is collected by the CRA. In addition to it, some provinces and territories levy a Retail Sales Tax on top of the GST, generally called Provincial Sales Tax (PST), or Québec Sales Tax in Québec. The provinces of British Columbia, Manitoba, and Saskatchewan each levy a PST (in addition to the 5% GST) at 7%, 7%, and 6%, respectively, on most purchases of tangible personal property, software, and certain services. Furthermore, five provinces (Ontario, New Brunswick, Nova Scotia, Prince Edward Island, and Newfoundland and Labrador) currently combine GST and PST into one by enacting a Harmonized Sales Tax (HST), which is collected by the CRA, and the revenues thereof are allocated in proportion to taxable consumption[XXIV]. The sale taxes are thus an interesting example of coexistence of separate taxes of different levels of government over essentially the same tax base, which despite pros and cons has overall worked well in preserving subnational autonomy, while not imposing unreasonable costs on taxpayers (Alarie-Bird 2011: 122).

The high degree of fiscal decentralization is consequently mitigated through the above-mentioned practice to enter into tax-collection agreements, which overall put much emphasis on the process of tax-harmonization in place for a long time now; although the latter has to live with the asymmetry that dominates intergovernmental fiscal relations, i.e., the Québec

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exception. Moreover, the resulting fiscal differentiation is somehow mitigated thanks to an equalization mechanism which works rather effectively in reducing the divide in terms of fiscal capacities among provinces and territories, and ensuring high living standards across the country.

5.2 Institutions of Shared-Rule as Co-Legislator

The second paradigm is composed of those systems in which territorial interests manifest through institutions representing territorial entities and participating in the legislative function at the federal level. Primarily, these are the federal second chambers, among which the *Bundesrat* (Federal Council) model stands out as a federal body representing the *Länder*.

In Germany, the financial system serves as a quintessential illustration of this trend, which German scholars commonly refer to as '*Beteiligungsföderalismus*' (participatory federalism)[XXV]. In financial matters, in particular, the Basic Law entrusts to the Federal Council the role of co-legislator, requiring its approval for all legislative acts in tax and financial matters that intersect with the interests of the *Länder* (more accurately, that affect their financial endowment)[XXVI].

This is what Article 105.3 BL prescribes for tax matters, wherein it is stipulated that '*Federal laws relating to taxes the revenue from which accrues wholly or in part to the Länder (omissis) shall require the consent of the Bundesrat*'. Therefore, all federal laws governing tax obligations (i.e., tax law in its material dimension) and generally all those laws that affect, even indirectly, the tax revenue belonging to territorial entities fall within the scope of this provision. Moreover, should there be an intention to amend the provisions of the financial constitution, the approval of the *Bundesrat* is required with a two-thirds majority (Article 79.3 GG).

To understand the broad scope of this provision[XXVII], it is appropriate to refer to Article 106 GG, which stipulates on the vertical allocation of the power over tax revenue (*Ertragshoheit*). Examining this provision together with the rule under Article 105.3, which mandates approval for legislative acts affecting the financial allocation of the *Länder*, it becomes apparent that this is necessary for two types of revenue: those (indeed few)

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exclusively assigned to *Länder* (Article 106.2) or municipalities (106.6), and the so-called 'joint taxes' (Article 106.3), the revenues of which are shared among the various levels of government. The key sources of the tax system fall under the second group, whereas the ones that are exclusive to the Federation (art. 106.1 GG) are very few. The value added tax as well as individual and corporate income taxes belong in fact to the 'joint taxes' category. Furthermore, in case the Federation wants to impose a tax beyond the list provided by art. 106 GG[XXVIII], a constitutional revision is necessary, and this entails the *Bundesrat*'s approval by a two-thirds majority.

The fact that the Federal Council must approve any federal tax law affecting subnational finances ultimately restrain the legislative authority of the federal government. Any alteration of the financial endowment of the *Länder* requires the consent of both levels of governments. Although the decision-making power lies at the federal level, the legal acts are the outcome of a legislative process that calls for the double approval over the same text of both the *Bundestag* and the *Bundesrat*. Therefore, the act is always a federal law, but the *Länder* in practice co-determine their own financial endowment (Henneke 2011: par. 28). With the paradox that, in the event the federal government itself decides to introduce a new tax (not contained in the constitutional catalogue), a constitutional revision would be necessary, requiring the indirect approval by the two-thirds majority of the votes of *Länder* (via *Bundesrat*). No change can thus be made without the consent of the other side.

The consent of the *Bundesrat*, however, does not uphold the autonomy each single Land is vested with. It rather provides for a form of representation of territorial interests on a merely collective dimension. The intermediate level participates as a whole, and this results in the integration of the single units in the federal legal order[XXIX]. Consequently, the autonomy of the single entity is narrowed down, due to its composition and functioning. First, the *Bundesrat* operates under the majority rule which, indeed, is based on a mitigated formula of territorial representation[XXX]. On the one hand, the representation of the units is not equal and is population-based, on the other hand, the number of representatives is not strictly proportional to the population, but it is adjusted to favor less-populated Länder[XXXI]. Second, the *Bundesrat* does not solely channel territorial interests. Instead, it incorporates a variety of interests of political nature, merging federal and regional claims. This integration is facilitated by both the way the Federal Council functions and the role it has taken up in

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practice of political opposition to the *Bundestag* (Ziller-Oschatz 1998: 64; Anderheiden 2008: parr. 56-60)[XXXII].

5.3 The Tax Varying Power Paradigm

This model is found in different forms and intensity in various federal systems. Besides being the typical way in which a certain degree of tax autonomy (i.e., a margin of fiscal responsibility) is granted to local governments, this is the option most frequently adopted also towards subnational governments. Among these are the regions in Italy and Belgium, and the autonomous communities in Spain. These are systems in which a devolution of powers from the center to the periphery took place. A certain tax-varying power, limited to the rate of the tax on the acquisition of real estate (Art. 105.2a BL), is also recognized in the German *Länder*, though with very limited value in terms of revenue collected.

Architectural solutions of this kind are absent in federal systems born following the dual federalism paradigm but are inherent to those federal systems that can be placed under the cooperative paradigm from birth. In the former, in fact, the tendency towards the separation of competencies has also been reflected in the approach applied to the distribution of the power to tax, so that - as seen in sections 4 and 5.1 above – there is either a vertical separation of tax bases, or at most, there is concurrency over the same tax base of the different levels of government.

Among the various examples cited, the Spanish ordinary system of 'financiacion autonomica' undoubtedly constitutes an emblematic case of tax varying power[XXXIII], as it represents the system in which the widest manifestation of this phenomenon is found, to such an extent that fore certain taxes (e.g., individual income tax) it takes on shapes that at times resemble the tax-base sharing paradigm (sec. 5.1).

The constitutional anchoring is established by Article 157.1 of the Spanish Constitution, which includes the 'ceded taxes' in the list of the funding sources of the autonomous communities (ACs). These are taxes established by the central government, for which the transfer of revenue (in whole or in part) to the autonomous communities, and in some cases, also of a segment of legislative authority on their regulations is provided. However, the ownership of the tax in question, and thus the authority regarding its existence, remains firmly in the hands of the center (otherwise, they would turn into own taxes of the ACs)[XXXIV].

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The transfer of legislative powers over ceded taxes is the main institutional solution introduced by the Spanish national legislature to implement the principle of fiscal co-responsibility[XXXV]. The rationale behind this is based on the belief that granting greater decision-making autonomy over this category of taxes - especially if done through the more impactful form of the legislative power - can ensure greater fiscal co-responsibility of subnational governments.

Through this solution, in fact, ACs are given the authority to regulate for their territory certain elements of the ceded taxes. The legislative authority over the national taxes in question is therefore not exclusively within the competence of the central government, but it is vertically distributed and thus it is open to subsequent and differentiated integration by the ACs in the exercise of the legislative powers transferred to them (Calvo Vérgez 2005: 70). The legal framework of these ceded taxes is thus the result of legislative power of 'shared' or 'concurrent' nature, which combines acts of both the central and the subnational governments (Ramos Prieto 2013: 305; Villarín Lagos 2000: 160)[XXXVI], based on the allocation of competences set forth in national laws[XXXVII].

This evidently comes with a limitation inherent to the national government ownership of the tax measures under consideration[XXXVIII]: the decision to levy a tax remains at the central level and it is always a national legal act that provides for the whole or partial transfer of the revenue and legislative powers thereof to the ACs. Otherwise these measures would be distorted and would turn into ACs own taxes (Quintana Ferrer 2001).

As a result of this allocation scheme, a number of ceded taxes have uniform regulations for certain (essential) aspects, while for others, there is a differentiation on a territorial basis, with each AC enabled to legislate on them, within the margin of maneuver recognized by the central government through the tax assignment process. This solution is consistent with the essence of the category 'ceded taxes', considering that in all cases where ACs are granted some legislative authority over these national taxes, the transfer of (at least a portion of) the related revenue is simultaneously prescribed. This way, each autonomous community will be able to impact the resources effectively available, through decisions made by its own legislature.

Currently, almost all taxes with the significant exception of the corporate income tax, fall into the category of assigned taxes; out of these (15), ACs are entrusted with a margin of legislative autonomy over seven of them, including taxes on personal income, wealth,

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inheritance and gift, and gambling[XXXIX]. Among them, significant differences are likely to be found. A first element bears on the extension of the related autonomy. In some cases (e.g. gambling taxes) the subnational legislative power encompasses the design of essential elements, such as the tax base, being almost comparable to an exclusive competence (always except for the power to impose the tax)[XL]. The allocation of powers is important even in the case of the tax on capital transfers and documented legal acts, or the one on inheritance and gifts. Regarding the latter, ACs hold important competences on the quantification of the tax burden (e.g., tax-base reductions, tax-rate or multipliers). In contrast, there are cases in which the transferred competences are restricted to the power to vary the rate (e.g., tax on hydrocarbons, tax on means of transport). In between these extremes the subnational allocation of competences can vary substantially from one case to the other (e.g. individual income tax). In this context, even the simple transfer of authority to vary the tax rate represents an increase in financial autonomy. Not only the rate is one of the most visible tax elements, but the assignment of legislative competences always goes hand in hand with the entitlement to a tax revenue share. Consequently, through law-making each entity co-determines its own financial endowment[XLI].

A second differentiating factor pertains to the impact of each individual ceded tax on the overall tax-system. Put another way, the revenue generated by each source should be considered. These data are pertinent to understand the impact on the financial autonomy of the subnational entities (Mora Lorente 2004: 146-147). Emblematic in this context is the individual income tax. Not only it serves as a pillar of public finance[XLII], but also 50% of its revenue accrues to the ACs and the latter possess extensive legislative powers associated to it[XLIII].

6. Comparative Observations

The three paradigms exhibit profound elements of differentiation but also common features that lead to potential and partial overlaps, hence the initial reference to the fuzzy logic. To this end, in this section, a comparative observation of these paradigms is offered along two essential investigative directions concerning the final aim pursued with fiscal decentralization, namely the enhancement of the fiscal responsibility at the subnational level of government. These pertain to the scope of decision-making and, in particular, what

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subnational governments can decide, on the one hand, the decision-making procedures and, in particular, how decisions are made, on the other hand.

The first 'substantial' approach considers the object of the law-making process, that is, 'what is decided'. It examines the kind of powers vested in the subnational governments and this is done by distinguishing who can decide whether to impose a tax (*an*), how to structure it (*quomodo*) and, finally, who determines the elements that quantify the tax burden (*quantum*).

If the three paradigms are scrutinized along this first axis, only in the first (Tax-Base Sharing) and second (Institutions of Shared-Rule as Co-Legislator) cases the jurisdiction of subnational governments includes a full taxing power, that is inclusive of the power to impose the tax (*an*), the competence to define the *quomodo* of the tax liability (e.g., the tax base, the taxable event, or the taxpayers), as well as the tax burden that is the *quantum* (e.g., the tax rate, the brackets, or the multipliers).

This is certainly lacking under the third (Tax-Varying Power) paradigm, which in fact follows a very different scheme from a substantial viewpoint. In the Spanish case, for instance, the trick has been to allocate significant legislative competences on well-determined elements of the so-called ceded taxes to the autonomous communities. However, the decision to levy a tax remains firmly in the hand of the national government and it is always a national legal act that provides for the whole or partial transfer of the revenue (and the legislative powers) thereof to the subnational governments. If this trait becomes a characteristic element of the solutions attributable to the third paradigm, it is evident that the possibility for the subnational governments (e.g., in Belgium and Italy, but theoretically also Spain) to introduce a surcharge on federal taxes blurs the borders of the paradigm under consideration, giving rise to a sort of gray zone. While the fact that surtaxes are based on a federal tax implies that the former essentially falls on a tax base like that of the federal tax, thereby limiting the scope of subnational autonomy and bringing this figure closer to the tax varying power paradigm, it is also true that the decision to establish the tax lies with the subnational government. This latter aspect thus exerts significant attraction towards categorizing this tax measure under the tax-base sharing paradigm.

The 'substantial' viewpoint impacts the dynamics of intergovernmental relations, as only in cases under the second paradigm, subnational governments approve each single federal legal act in the tax field and thus have (almost) full control over their financial endowment. Although the act is always a federal law, the subnational level has - although indirectly - the

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competence to co-design all tax elements (quomodo + quantum), including the power to levy it (an). The *Länder* can therefore co-determine the entire tax regime and, in so doing, they entirely co-determine the financial resources at disposal.

Conversely, in the cases under the third paradigm (Tax-Varying Power paradigm), subnational governments only have a say *ex post,* that is only after the central government makes use of its exclusive legislative power to levy a tax and only if it opts to activate the transfer of legislative power. A fuzzy approach, however, reveals that in some circumstances certain dynamics attributable to the second paradigm illustrated above can also materialize. This occurs when the tax varying power co-exists with intergovernmental fora vested with a co-decisional role in tax matters.

Things are different under the first paradigm, as in these cases there is a co-habitation of a two-tier taxation system to the extent that each government ends up determining its respective financial endowment. Notably, in these cases tax-revenue sharing mechanisms are lacking. Each level of government – federal and subnational – decides for itself, although there might be indirect economic repercussions coming from an overall high tax pressure, as well as the adherence to forms of tax harmonization.

The matter becomes even more complex and determinant of federal dynamics if the systems are observed along the second axis, namely how decisions are made.

If the first paradigm is observed from a procedural standpoint, it reveals the 'purest' forms of taxing power, as each entity decides for itself, for its own territory and its inhabitants regarding the tax forms and extent. Nevertheless, adopting a dynamic perspective this paradigm is mitigated out of practice and there is a clear tendency toward tax harmonization. This phenomenon is significantly observed in both Canada and Switzerland, with the US being an exception. In the latter there is no harmonization of tax bases and rates either between the national and subnational governments, or across subnational governments. Each state has its own tax administration, and some states allow the tax bases and rates to vary even across their local governments.

A completely different scheme is found under the second paradigm. In Germany, the *Länder* participate in the decision-making process at federal level and their consent is needed not only for constitutional amendments but also for enacting ordinary laws in financial matters, if these affects their interests. Thus, the procedural solution consists in the assignment of a co-legislative role in tax matters to the *Länder*. The decision-making power

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lies at the federal level, but the legal act is the outcome of a legislative process that calls for the double approval of the same text. Therefore, any alteration of the financial endowment of the *Länder* cannot be decided solely by the federal level via *Bundestag* but calls for an express vote of (the community of) the *Länder* via their mitigated representation in the *Bundesrat*. At the same time, the consent of the *Bundesrat* does not uphold the autonomy each single *Land* is vested with, but it rather provides for a form of representation of territorial interests on a merely collective dimension. The subnational level participates as a whole, and this results in the integration of the single units in the federal legal order, to the extent that the autonomy of each single entity is narrowed down, due to the *Bundesrat* composition and functioning.

The same does not extend to the third paradigm. If the *ex-ante* involvement of subnational governments in the decision-making at central level is absent (or weak at best), this scheme ends up undermining the same guarantee of the financial allocation. The amount of money at the disposal of the autonomous communities is dependent on the political will of the central government that decide which taxes and which legislative powers to transfer to subnational government, thus challenging their financial autonomy. At the same time, however, only the 'tax-varying power' paradigm guarantees effective autonomy to the subnational level. Solely the Spanish communities are free and autonomous in determining their own financial endowment by means of laws enacted by their own legislatures, valid and enforceable exclusively within the territory of reference. Although this is not the case in practice, since fiscal autonomy is substantially nullified by the numerous solidarity funds that follow one another and end up constraining fiscal responsibility[XLIV].

If the phenomenon of fiscal centralization is observed along the two axes – substantive and procedural – outlined above, one can detect the emergence of a common legal category that integrates the dichotomy of own taxes vs. grants. Provided a flexible approach and an in-context interpretation of the various technical solutions are employed, the comparison of the three paradigms of fiscal decentralization in fact resurfaces a third category of subnational revenue that could be labelled as 'tax-power sharing'. This category is wider than (and inclusive of) tax-base sharing mechanisms, but it differs from mere tax-revenue sharing schemes, as it encompasses all the legal tools of subnational financing that aim to achieve a vertical distribution of the legislative power to tax and thus grant subnational governments a margin of discretion in co-determining the available revenue.

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Despite the coexistence of dissimilar features and patterns, there are at least two common denominators that define this emerging category. A first one is the very fact that the tax (system) results from a meeting of wills. The legal framework is a combination of decisions made at both the central and subnational levels of government. This category in turn always results in a path-dependent system of subnational financing, as this kind of power is always associated with the taxes whose revenue flows wholly or at least partially to the subnational level itself. The latter being the second common denominator of this category, as such contributing to strengthen the connection between decision-making and financial endowment and thus making a leap forward in terms of financial and political responsibility.

This scheme of subnational financing is recurrent in federal systems, where various forms of concurrency can be analysed within tax law-making. The translation of this 'meeting of wills' into rules and procedures however varies extensively, not only between different systems but in some cases also between different taxes. This confirms that understanding the reconstructed paradigms in this area requires the adoption of a fuzzy logic approach.

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[I] For a literature review and an analysis of the existing research gaps regarding the tax assignment problem see Valdesalici (2019: 96-99).

[II] On this approach see: Musgrave (1959) and also Oates (1972).

[III] FGFF assumes labor mobility and no entry costs (language, certification etc.) This could have been valid for the US but certainly not the case for Europe.

[IV] Further on this: RUIZ ALMENDRAL (2004: 99-101), Saunders (2018: 41); Watts (2005: 36).

[V] The term is a literal translation of the term *Finanzverfassung*, coined by Austrian (Pernthaler 1984: 21 ff.) and German (Hellermann 2010: 1099-1186; see also: BVerfGE 55, 274 [300] – *Berufsausbildungsabgabe*) scholars and referring to those constitutional provisions that establish the principles and rules of the system of public finance, and having particular regard to the determination, distribution and use made of financial resources by the different levels of government. The concept, in fact, could be considered an evolution of the notion of *fiscal constitution* that first appeared in *The University of Chicago Law Review* thanks to a contribution by Kenneth W. Dam (1977), and later used by two famous American economics scholars—James Buchanan and Richard Wagner (1977) —to refer to those written or unwritten rules that guide fiscal decisions in the United States.

[VI] These are the words of Mortati (1976: 906). See further: Ruiz Almendral (2004: 99-101); Korioth (1997: 268); Puzzo (2002: 45); Bertolissi (1997: 24-25); Gallo (1975: 252). According to the author, political autonomy is inherently linked to financial autonomy. The latter is thus considered – together with the legislative autonomy – essential for the existence of a territorial entity.

[VII] Hamilton Alexander, 1788, 'The Federalist no. 32', in Hamilton Alexander *et al.*, *The Federalist Papers*, https://guides.loc.gov/federalist-papers/text-31-40#s-lg-box-wrapper-25493386 (accessed 5.04.2024).

[VIII] This is taken from the following decision: BVerfGE 72, 330, (383 ss.), in which the Court qualifies the concept *Finanzaustattung* with the adjectives *eigen* (own) and *angemessen* (adequate). The same was already stated in a decision from the previous decade (BVerfG decision of July 26, 1972, BVerfGE 34, 9, (20) - *Besoldungsvereinheitlichung*) in which the Court refers to the guarantee of irrevocability (art. 79, c. 3 L.F.) of the devolution - constitutionally entrenched – of an adequate share of the total tax revenue.

[IX] A safeguard of this kind applies to the entire system and therefore is valid for both the Federation and the

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Länder in order to cover the necessary expenses (*erforderlichen Ausgaben*) to exercise their own competencies; this is obviously within the limit of the resources collectively available (art. 104a, c. 1, L. F.). This is stated in BVerfG decision of March 11, 1980, BVerfGE 55, 274, (300) - Berufsausbildungsabgabe. In a similar sense also: BVerfGE 32, 333 (338).

[X] Consequently, any amendment to the fiscal constitution that results in the consolidation of all powers within the federation would constitute a violation of Article 79.3 BL. In this sense, Sommermann (2010: par. 34).

[XI] This is also a reflection of the degree of democracy. On one hand, financial autonomy allows a certain entity to obtain the necessary resources and through these, exert its influence on its citizens. On the other hand, the will of the people - albeit indirectly - is expressed in the related decisions. In this sense: Gröpl (2006: 1080).

[XII] In hindering the power of the State to raise different types of taxes (e.g., levies on sales of tobacco, petroleum, and alcohol products), the High Court decisions have contributed to further increasing states' dependence on federal transfers.

[XIII] Although the most lucrative taxes in economic terms fall under the Union list, there is a long list of taxes under the power of the states. These include *inter alia* tax on agricultural income, professional tax, state excise duty, land revenue, stamp duty and tax on the sale and purchase of goods. On 1 April 2005, a state-level VAT system was implemented in place of the complex and fragmented sales tax system. India moved towards the levy of a comprehensive GST in 2017.

[XIV] For an overview of the own taxes of the ACs, including the related decisions of the tribunal constitutional, see the annual reports available at: CONSEJO GENERAL DE ECONOMISTAS, *Panorama de fiscalidad autonómica y foral,* https://economistas.es/estudios-y-trabajos/ (accessed 11.04.2024).

[XV] On the interpretation of this clause in Spain: among others, STC 37/1987 and STC 289/2000. For Belgium: Belgian Constitutional Court Nos 04/1998, and 100/2003. On the restrictive interpretation of regional own taxes upheld by the Italian Constitutional Court, refer to judgments No. 296/2003 and No. 297/2003.

[XVI] The expression is quoted from: Bifulco (2001: 5). On the impact of EU legislation on the fiscal sovereignity of Member States: Escribano López Francisco *et al.* (2011); Magliaro (2011: 157 ff.).

[XVII] For a (literature) overview of the fuzzy logic and the fuzzy approach in comparative law, see Baldin (2015).

[XVIII] The Canadian Constitution follows JS Mill's notion of direct taxation which is very different from our modern conceptions. In fact, it is quite the opposite. On this: Mill 1848, chap. 2, § 1.

[XIX] Canadian Industrial Gas & Oil Ltd. v. Government of Saskatchewan et al., 1977 CanLII 210 (SCC), [1978] 2 SCR 545.

[XX] Fortier v. Lambe, 1895 CanLII 85 (SCC), 25 SCR 422.

[XXI] The 'pith and substance' doctrine was elaborated by courts and serves to ascertain the jurisdiction of the different levels of government —whether federal or provincial—over a specific legal matter or issue. Basically, a pith and substance analysis seeks to identify the essential nature or core purpose of a law and guide the distribution of powers among the federal and provincial governments. One of the best explanations of this doctrine can be found in the Reference re Anti-Inflation Act, [1976] 2 S.C.R. 373, p. 450.

[XXII] All provinces, whether or not they have signed a tax agreement, apply an agreed common allocation formula.

[XXIII] Cameron and Simeon (2002) argue that Canadian federalism is moving towards a more collaborative approach in intergovernmental relations. Fiscal decentralization shows this trend, despite the dominance of executive federalism. The same cannot be extended to equalization. The latter is still too much characterized by the dominance of federal unilateralism and limited intergovernmental cooperation, which is generally held behind closed doors and mostly informally.

[XXIV] Source: PwC, 'Canada', in *Worldwide Tax Summaries*, https://taxsummaries.pwc.com/canada/corporate/other-taxes (accessed 10.04.2024).

[XXV] In this respect: Woelk 2014: 161. With reference to participatory dynamics see further: Lhotta 2005: 15-42. In general terms, on the participatory function of federal bicameralism see: Palermo-Nicolini 2013: 135-137. It remains the same, even after the *Föderalismusreform I.* On this aspect: *ex plurimis*, Selmer 2006: 1057-1058.

[XXVI] According to the Basic Law (arts. 50 and 59.2), this body is expressly vested – among others - in financial matters with a legislative function (Kloepfer 2011: par. 13), equal to the one assigned to the Bundestag. Nonetheless, according to the case-law, it cannot be considered as *'a second chamber of single legislative body'* - BVerfG decision of 25th June 1974, BVerfGE 37, 363, (380) – *Bundesrat*. In support to its decision the Tribunal quotes: Friesenhahn 1974: 251 ff. The *Bundesrat* is classified as a *sui generis* body according to Palermo-Nicolini (2013: 147). Along these lines, Kotzur (2006: 258) observes that from a functional standpoint (not from a formal one) the *Bundesrat* can be considered '*a second chamber*' when it takes part in the legislative process. Because of this function, Sturm 2009: 138, considers it as a quasi-parliamentary body. Also Palermo-Woelk (1999: 1106) underline the legitimation of the Bundesrat as an '*actual second chamber, substantially equal to the first chamber in the*

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political management of the State'.
XXVII In Germany, it is estimated that 85% of the overall tax revenues are governed by federal laws requiring *Bundesrat* approval.
XXVIII This is because the enumeration in art. 106 BL is considered peremptory. See, Stern (1980: 1159-1160).
XXIX According to Woelk (2014: 165), it is a federal body and as such it does not safeguard autonomy per se, but the integration of single units in the federal legal order. Along these lines, Palermo-Woelk (1999: 1103) refer to it as a second-level federal pact, which involve the units considered as a whole.
XXX Indeed, this happens only indirectly through the representatives of their executives, who sit in the *Bundesrat*. See further: BVerfG decision of 18th December 2002, BVerfGE 106, 310, (310) – *Zuwanderungsgesetz*.
XXXI The provisions of Title IV (art. 50-53 BL) are devoted to the *Bundesrat,* but for a comprehensive understanding of its structure and powers a systematic reading of the Basic Law is required. On its historical evolution, structure and powers: Kotzur 2006: 264-268; Schmidt 2012: 652-657.
XXXII See also, Dolzer (1999: 7, 15): the author states that this is due to the fact that the *Bundesrat* tackles with multi-faceted interests: of the Federation, of each single Land, of the majority of *Länder*, and/or of the political parties at federal level. For this reason, Palermo-Woelk 1999: 1112, refer to its function as a 'zip-role'. On the role of political opposition of the *Bundesrat*: Badura 1996: 422). Some scholars refer to this phenomenon as *cohabitation à la allemande* (Palermo-Woelk 1999: 1098). In this respect: Anderheiden (2008: par. 7) observes that this happened around half of time elapsed since the entry into force of the Basic Law and that, indeed, it is the rule as of 1969. This tendency is linked to the current praxis of coalition governments even at *Länder* level (Woelk 2014: 166).
XXXIII The 'ordinary system' coexists with the chartered (foral) system that is very different in many respects. It concerns the Autonomous Communities of Navarre and the Basque Country.
XXXIV Further on this subnational revenue source: Ruiz Almendral (2004).
XXXV It is in the agreement of the Fiscal and Financial Policy Council (CPFF n. 1/1996) - incorporated into the LOFCA 3/1996 - that provides the first transposition into legislative act of the function of ceded taxes as a tool instrumental to fiscal co-responsibility. This is to be ensured not only by including a share of the personal income tax revenue, but - especially - by granting some legislative powers over certain ceded taxes to the ACs. However, it is with the 2001 reform that the list of ceded taxes and the legislative competencies of the ACs over them are expanded, with a trend confirmed by the reform of 2009. This brings such a tool to a level that even the system as a whole undergoes a substantial change.
XXXVI For an in-depth analysis of the legal nature of this institute see: Mora Lorente (2004: 127-140).
XXXVII The scope of the subnational legislative competences is defined in general terms in the LOFCA (art. 19.2), while the detailed provisions are included in Law 22/2009 (arts. 46-52) with reference to each single ceded tax. An analysis of the historical evolution of this tool can be found in: Ruiz Almendral (2004: 367 ff.) and Ribes Ribes (2012: 141-242).
XXXVIII Martinez Lafuente (1983: 45-46) focuses on the key-role of the central government's ownership over the ceded taxes. See also: Ribes Ribes (2012).
XXXIX According to art. 25, Law no. 22/2009.
XL However, some scholars question the State ownership of some ceded taxes, due to the extension of powers assigned to the intermediate level. In this respect: Lago Montero (2000: 190) and Ribes Ribes (2012: 128).
XLI Conversely, these could not be considered ceded taxes. The entitlement to a quota of the related tax-revenue is indeed a minimum requirement.
XLII In the words of the constitutional Tribunal: *ex plurimis,* STC 134/1996, of 22nd July, LF 6; STC 47/2001, of 15th February, LF 9. The court also refers to it as a '*fundamental component*' (STC 182/1997, of 28th October, LF 9), and as a '*primary form of taxation*' (e.g., STC 134/1996, of 22nd July, LF 6; STC 182/1997, of 28th October, LF 9; STC 46/2000, of 14th February, LF 6).
XLIII Pursuant to art. 46, Law no. 22/2009, they can determine: personal minimum and minimum per family (±10%), deductions to the autonomic quota, the progressive tax rate and the related tax brackets.
XLIV On the Spanish system of equalization see thoroughly Herrero Alcalde (2020: 177 ff.).

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Nurturing Integration through Dialogue: The Role of Courts in Supranational Contexts

by

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Abstract

Taking the Court of Justice of the European Union (especially its procedure of the reference for a preliminary ruling) as providing a suitable model to emulate for courts of other regional economic communities, the work will examine how the attraction of that model and its case law on integration in the EU has contributed to the development of judicial dialogue within these regional economic communities in Africa. The model's evident utility for these Community courts has assisted them in their own tasks of interpreting Community primary and secondary laws as well as in furthering regional integration through judicial dialogue. This work will examine their pertinent case law instrumental in nurturing judicial dialogue with both national courts as well as with the Luxembourg Court, thereby showing elements of both horizontal and vertical transjudicial communication.

Keywords

Regional economic communities in Africa, migration of law, Court of Justice of the European Union, use of EU principles beyond the Union, judicial dialogue, transjudicial communication

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1. Introduction

The export of legal models is typically based on various pre-existing factors, e.g., language, legal culture, education, judicial and legal networks, etc. (Tatham 2013: 30-39, 41-63). In this way, the Court of Justice of the European Union ('CJEU') model has provided a readily accessible paradigm for the courts of other regional economic communities ('RECs') that are able to draw on it, e.g., to enhance their own legitimacy (Pollack 2018) and that of their decisions in moulding their own REC legal system.[1] This, in turn, reinforces the notion of the CJEU as the purveyor of a highly evolved and successful regional integration culture, and the law and values underpinning it. The present article will look at how this role for the CJEU has played out so far with respect to various REC courts in Africa, by examining these courts' use of some of the CJEU's formative constitutional case law. Since judicial dialogue in the EU has evolved through the strategic use of references for a preliminary ruling (under what is now Article 267 TFEU), relevant REC laws as well as cases from the African REC judiciaries will be examined together with how the CJEU-created principles of primacy and direct effect of EU law have been used by drafters of REC primary law and the said judiciaries in their own task of nurturing regional integration (Tatham 2015).

2. Focus of research and methodology

This work will accordingly concentrate on the influence of the CJEU's case law beyond the confines of Europe as well as the transfer of aspects of its model, focusing on the courts of several RECs in Africa. It seeks to show how these latter courts have deployed relevant case law of the CJEU in their own decisions as a means of reinforcing, confirming or legitimising their own jurisprudence aimed at deepening integration in their own supranational regional legal orders. This horizontal judicial dialogue or transjudicial communication between the CJEU and African REC courts is likewise complemented by the vertical dialogue or communication between the relevant supranational and national

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courts prompted by use of the preliminary reference procedure and also forms part of the present investigation (Slaughter 1996: 38).

Within the overall context of doctrinal research, the chosen methodology for the present short study is that of comparative legal research. Such an approach will enable the work to draw inferences about the similarities and differences from among the case law of the various jurisdictions under comparison and develop arguments as to how the relevant REC courts in Africa use CJEU rulings in their own decision-making. It will also highlight the approach taken by REC courts in their own regional communities as to how they have used (or, in some circumstances, have not needed to use) that CJEU 'constitutional case law'[II] to reinforce and legitimise their own evolution of their respective supranational regional legal orders.

As doctrinal research, an emphasis has necessarily been placed on a combination of using primary sources of law in the form of the actual decisions of the relevant REC courts (available through the courts' own websites or through that of '*l'Association des Hautes Juridictions de Cassation des pays ayant en partage l'usage du Français*' or 'AHJUCAF'[III]) combined with the use of relevant secondary materials in the form of books, journals, edited volumes and monographs in both English and French, with a special reliance placed on those produced by academics and professional commentators from Africa who are specialist in the relevant REC laws and doctrines.

The five REC courts from Africa have been chosen, from the institutional perspective, due to their having been designed following the CJEU model and, from a jurisprudential perspective, due to their emulation of CJEU rulings – to a greater or lesser extent – in their case law (Fall 2021). This selection is additionally underlined by commonalities in the form of language, legal culture and legal education as well as more practical expressions of such common approaches, e.g., in the mode of the REC courts' reasoning in their decision-making, following either the (English) common law or civil (French administrative) law approaches, both of which have had varying levels of influence on that of the CJEU (Dehousse 1998: 9-12; Jacob 2014).

The first REC court to be considered is that for the East African Community ('EAC'), being the still largely anglophone Court of Justice ('EACJ').[IV] The EAC was re-established in 2000 and already possesses a functioning customs union. Membership now also encompasses Burundi and Rwanda (both Belgian colonies before independence) as well as

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more recently South Sudan, the Democratic Republic of Congo and Somalia. In July 2010, it launched the East African Common Market Protocol, expanding the customs union that would lead to the free movement of labour, capital, goods and services within the EAC. Thereafter, the Member States had intended to move to a common currency by 2012 and eventual political federation in 2015. However, a combination of insuperable political problems and the deterioration in the economic outlook led to a delay in implementing this timetable.

The next REC court is the Court of Justice of the Common Market for Eastern and Southern Africa ('COMESA CJ').[V] This REC was formed in December 1994[VI], replacing a Preferential Trade Area which had existed since 1981 between the original signatory States. As the title of the organisation indicates, its membership is spread across the length of the continent, from Egypt in the north to Zimbabwe in the south and including the African island nations in the Indian Ocean.

Three mainly francophone regional courts complete the group under consideration in this brief study. First is the UEMOA Court of Justice ('UEMOA CJ')[VII] which services the West African Economic and Monetary Union (known by its French acronym 'UEMOA'[VIII]). UEMOA is a customs and monetary union that comprises mostly francophone countries in West Africa. It promotes economic integration between its Member States through the use of a common currency, the CFA franc,[IX] and seeks to create a common market. The Union also aims at harmonisation of laws and convergence of macroeconomic policies and indicators as well as of fiscal policies. However, following the recent consolidation of coups in Burkina Faso, Guinea, Mali and Niger, current anti-French sentiment – expressed by coup leaders and in public demonstrations – has prompted a fresh look at the legacy of French colonial rule in West Africa (Brooke-Holland 2023) and, with it, the CFA franc and consequently UEMOA.

The CEMAC Court of Justice[X] ('CEMAC CJ') is the regional tribunal of the Economic and Monetary Community of Central Africa[XI] (as with the other courts, usually known by its French acronym, 'CEMAC'[XII]). This Community of mainly francophone Central African nations has similar aims to those of the UEMOA for West Africa, viz., promoting regional economic and monetary integration by use of the Central Africa CFA franc.

Lastly is the OHADA Common Court of Justice and Arbitration ('OHADA CCJA').[XIII] The Organisation for the Harmonisation of Business Law in Africa (generally referred to by

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its French acronym, 'OHADA'[XIV]) was set up in 1993 by 14 mostly francophone States in Central and West Africa.[XV] OHADA's principal objectives are to harmonise and modernise business laws in Africa so as to facilitate commercial activity, attract foreign investment and secure economic integration in Africa. Its activities are seen as complementary to a number of the other groups, e.g., UEMOA and CEMAC, although the possibility of conflict of jurisdiction between the courts of such regional organisations is more than theoretical (Kamto 1998: 147-150).

3. Migration of laws and models

This research is conducted against the backdrop of the constant transjudicial communication (Slaughter 1996: 38) or transnational dialogue between domestic, regional and international courts. A powerful component of this judicial dialogue (Martinico and Pollicino 2012) is evidenced by the citation of judgments or doctrines from other jurisdictions in courts' own decision-making (Law 2015). Moreover, within and beyond the EU, the pervasive influence of the CJEU model is a pivotal element in such communication and acts to reinforce the 'migration' of its rulings.

Such 'migration' of legal ideas (Choudhury 2006: 21) encompasses a much broader range of relationships between the recipient jurisdiction and constitutional ideas than that expressed in the concepts 'legal transplantation' (Watson 1974) or 'cross-fertilisation' (Bell 1998: 147). The benefits of this migration metaphor may accordingly be summarised (Walker 2006: 320-321):

> Migration … is a helpfully ecumenical concept in the context of the inter-state movement of constitutional ideas. Unlike the other terms current in the comparativist literature such as 'borrowing", "transplant" or "cross-fertilization", it presumes nothing about the attitudes of the giver or the recipient, or about the properties or fate of the legal objects transferred. Rather … it refers to all movements across systems, overt or covert, episodic or incremental, planned or evolved, initiated by giver or receiver, accepted or rejected, adopted or adapted, concerned with substantive doctrine or with institutional design or some more abstract or intangible constitutional sensibility or ethos.

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Migration also serves this role by allowing the movement of ideas across legal orders without necessarily connoting control on the part of the originating order. Migration may thus be the most sensitive description of how courts and judges interact with each other across jurisdictions. In fact, there is already clear evidence of the existence of the horizontal transjudicial communication of case law between Africa and Europe at the regional/continental level. The 1950 European Convention on Human Rights and the model and case law of the European Court of Human Rights have played a pivotal role in the drafting and creation of a similar convention and court (Ben Achour 2020), as well as the evolution of that court's jurisprudence in Africa, in the form of the African Court on Human and Peoples' Rights and its application of the African Charter on Human and Peoples' Rights 1981.[XVI] In this field of inter-regional judicial dialogue, the European Convention and Court have directly impacted on their African counterparts in institutional set-up and jurisprudential development (Diop 2020). In comparison, the present work also looks at such horizontal communication, this time between the CJEU and courts of the same status in African RECs and the way in which these African REC courts have further sought to create the framework for vertical judicial dialogue in their own RECs (Thuo Gathii 2011).

4. The nature of the migration of the CJEU model and its case law

It is important to note that any potential case law and institutional export to African RECs represents a qualitatively different manner for emulation of the CJEU than that experienced vis-à-vis courts in EU Member States and those in associated or candidate countries of the Union, or even the EFTA Court and the ECtHR. Unlike its relations with these courts, the CJEU's relations with regional courts in Africa are subject to no (formal treaty) requirement to follow or even to take account of its institutional set-up, procedural rules or case law. The relationship then is one not of compulsion but rather of horizontal communication or dialogue between equals.

In these circumstances, a certain degree of reticence needs to be displayed when considering any attempt at the migration or transposition of the EU institutional and legal framework in view of the fact that the drafters of the treaties and related instruments of RECs beyond the Union can sometimes overlook the incremental nature of the process of regional integration in Europe (Ziller 2005: 6). Even the EU has itself been reluctant to

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endorse its model. In the mid-1990s, it listed several necessary factors for the success of regional economic integration schemes (European Commission 1995: 9-10): (a) the existence of genuine common interests; (b) compatible historic, cultural and political patterns; (c) political commitment; (d) peace and security; (e) the rule of law, democracy and good governance; and (f) economic stability. Recreating the world in the EU's image was basically not a feasible proposition, given the absence of certain of the above factors in other regional organisations. The Commission argued (European Commission 1995: 8):

> The efforts of the EU to promote and support regional integration among developing countries should not at all be interpreted as an attempt to "export" the European integration model. Clearly, there are different approaches towards integration and economic development. It should be recognised that the European model, shaped by the continent's history, is not easily transferable nor necessarily appropriate for other regions. On the other hand, to the extent that the European model of integration has become an unavoidable "reference model" for virtually all regional initiatives, the EU should share with other interested parties its experience on: improving the functioning of regional institutions … and sharing the benefits from integration.

Consequently, the EU does not seek to promote its model but rather the general lessons drawn from its experience (Smith 2008: 79): e.g., regional economic agreements to liberalise trade to encourage growth and development; and regional institutions as a means to overcome historical grievances and to enhance good governance and the rule of law. In these ways, the EU seeks to use these methods as a way of underpinning peace and security for States in regional groupings (Santander and Ponjaert 2009: 283).

Despite this official reluctance to seek the express export of the EU model, nevertheless (Fawcett 1995: 23) 'there are few regions of the world where the apparently spectacular progress of the European Community towards economic and political union has failed to evince a response. The EU itself, in its external affairs, groups countries together on a regional basis: this is 'a striking and unusual feature of its foreign relations; no other international actor does this to the same extent' (Smith 2008: 76).

With these arguments in mind, it is necessary to view the nature of a model (Klug 2000: 599) as 'a general source of ideas, concepts, examples, and even specific constitutional arguments' rather than it being considered as a mere copy or reproduction of what has

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occurred elsewhere. Transplanting a particular (successful) model into alien soil by simply adopting or cloning it is no sure way of replicating that success in a new context (Klug 2000: 599-600). Instead, a court – within the limits of the relevant treaty or protocol establishing it – whose jurisdiction and operation are based on a particular (earlier) model, may seek to emulate the jurisprudential evolution of that model as a means of reinforcing its own legitimacy and clothing its rulings in the protective garb of comparative case law.

5. The CJEU model and its emulation in African RECS

The leitmotif of EU integration since its inception in the 1950s has been its use of law as a prominent tool to achieve its aims (Ziller 2004: 44), the so-called 'integration through law' paradigm (Cappelletti, Seccombe and Weiler 1986: 3). Although this approach is considered less fashionable than it was (Auer, Bergsen and Kundnani 2021), it nevertheless still expresses the crucial point that the rule of law and rule by law are immutable components of the very foundations – as well as in the manner of development – of the Union (Voßkuhle 2017: 146). The pivotal element of such approach is the CJEU, created as a permanent and independent judicial body charged with ensuring the proper interpretation as well as the validity of EU law: although, like classical international courts, Member States may bring actions before it[XVII], the CJEU is also accessible by Union institutions such as the European Commission and European Parliament[XVIII] and even, where they are the ultimate addressees of EU rules and decisions, companies and individuals.[XIX]

More importantly for the present discussion is the preliminary reference procedure under Article 267 TFEU which was, at the time of its creation, a novel concept under international (and REC) law. In exercising its duty to apply EU law before it, this procedure allows a national court (and, if it is the court of last resort, requires it) to ask the CJEU the meaning of any provision of EU law if that national court is uncertain of its meaning or it wishes to question the validity of EU secondary law. The reference for a preliminary ruling is thus a mechanism by which a national court initiates a dialogue with the CJEU. In posing its questions, the domestic tribunal accordingly promotes two functions of the procedure (Blumann and Dubois 2016: 761): first, it acts as a way of maintaining the unity of application of EU law by encouraging a judge-to-judge collaboration; and, secondly, it forms an

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instrument of protection of litigants, in particular private parties whether individuals or companies.

By locating the CJEU as the final arbiter of what EU law means, the drafters of the founding Treaties attempted to ensure that a level-playing field would be maintained across the Community and later the Union, so that uniformity of interpretation of EEC/EU law would guarantee the same rights under that law across all domestic courts in the Union. Moreover, in their judicial work, in applying such EEC/EU law in cases before them (whether or not occasioning a reference), all national judges were to be considered as EEC/EU judges (Rosas 2014) as well, although this has led, in certain instances – e.g., in protecting national (constitutional) identity – to challenges in the overriding application of EU law in domestic cases (Tatham 2013; Tatham 2022).

Through the judicial dialogue initiated by means of the Article 267 TFEU reference procedure, the CJEU – by an expansive and teleological interpretation (Lenaerts and Gutiérrez-Fons 2013) of the Treaties (and secondary EU law) – has been able to create and mould many of the basic principles of the EU legal order, including the primacy of EU law and its direct effect. These two principles form part and parcel of the 'constitutional case law' of the CJEU, including *Van Gend en Loos*,[XX] *Costa v. ENEL*,[XXI] *Simmenthal*,[XXII] *Internationale Handelsgesellschaft,*[XXIII] *CILFIT*[XXIV] and *Factortame*,[XXV] through which cases the CJEU converted the founding Treaties under international law into the 'basic constitutional charter' of the Community and subsequently the Union.[XXVI]

The success of the CJEU model (Ziller 2004: 44-49) has been based on and enhanced by *inter alia* a developed system of independent national and EU courts; an expert, active legal profession; the proper implementation and enforcement of CJEU rulings before national courts by their agreement or acquiescence (since no Union power exists to compel domestic judges to obey CJEU rulings); and the development in legal processes and, in fact, in the various legal cultures in the Union, whether based on the common law or civil law and their different permutations.

It goes without saying that such factors are unlikely to be precisely replicated in the circumstances of regional organisations located in Africa (Sermet 2018b). Yet, the environment for migration or cross-pollination or transplantation from the CJEU to REC courts in Africa provides fertile ground for such types of reception of rulings from the Luxembourg Court. For example, there is broad agreement between academics and judges

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that the CJEU has been the inspiration for the model of REC courts in Africa (Kamto 1998; Kazadi Mpiana 2014).

In addition, although these African REC courts encompass other distinct jurisdictions (whether derived from international courts or arbitration tribunals), they nevertheless contain at their core the unmistakeable influence of the CJEU, through the presence of their own procedures for references for preliminary rulings and thus the potential for judicial-led integration that this implies. Not only have the REC courts to be discussed in this work been shaped by the CJEU but also, as will be seen, the members of their benches have likewise looked to the case law of the CJEU for inspiration and emulation. The judges sitting on the REC courts in Africa benefit in their decision-making from being members of a network or epistemic community where common languages, legal culture, legal education and training, and received judicial interpretation and reasoning (Sow 2016; Fall 2021: 372-394) together provide ample opportunities for the migration – in whole or in part – of European (legal) integrationist concepts, as developed by the CJEU within the context of the EU.

Turning specifically to the topic of this brief study, there are two main competences which set the CJEU model apart from classic international courts and which have, in general, been imported or emulated by RECs in Africa. First, the possibility of direct actions before the regional courts for judicial review of acts of the regional organisation's organs is available before all the courts listed.[XXVII] Secondly, perhaps most importantly, the preliminary reference procedure from national courts (Virzo 2011: 292-296, 305-308) – either to request the interpretation of REC law or to test its validity or (usually) both – is available in all five jurisdictions.[XXVIII] Indeed the CJEU model for this procedure, under Article 267 TFEU, more specifically provides that all courts may make such a reference but those courts, against whose decisions there is no judicial remedy, must make a reference: of these regional courts, the UEMOA CJ, the CEMAC CJ and the COMESA CJ are particularly faithful in following this distinction (Fall 2021: 113).

Of further interest in the development of judicial dialogue is the fact that the COMESA CJ has an additional jurisdiction under Article 26 COMESA. This procedure allows natural and legal persons – resident in a Member State – to refer (for determination by the COMESA CJ) the legality of any act, regulation, directive, or decision of the Council or of a Member State on the grounds that such act, directive, decision or regulation is unlawful or an

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infringement of the provisions of the COMESA Treaty, provided that such persons have already exhausted local remedies in the national courts or tribunals of their Member State.

The impact of (anglophone) common law and (francophone) civil law approaches in legal reasoning, citation, structuring and general formulation of judgements in informing the way in which they express and render their decisions, is quite evident from a perusal of the judgements of the five REC courts considered in the next part of the article (Fall 2021: 384-394). Even with the enlargement of the EAC to include several civil law systems, the common law approach is still used in the drafting and formulation of its rulings. Despite these differences in approaches, however, they have all used CJEU constitutional case law in their decisions (Martial Zongo 2016). In the next part, then, REC court cases will be examined in turn, dealing with references for a preliminary ruling, the primacy of REC law and its direct effect.

6. Influential CJEU constitutional case law in African REC court judgements

6.1 References for a preliminary ruling

The embryonic African REC case law, that offers guidance to national courts on the use of references, is only slowly emerging and knowledge of this procedure – so vital for the establishment of vertical judicial communication or judicial dialogue between the REC court and domestic courts – still remains to be more widely diffused via the relevant REC legal networks (Sermet 2018a: 149). Nevertheless, in those cases already decided, there is a clear indication that the African REC courts have evinced a clear understanding on the implicit importance of the reference procedure in the formation of African REC law (Ugirashebuja 2017). In the cases discussed below, the focus is on the competence and duties of the national judge to refer cases to the relevant REC court.

In its case law, the CEMAC CJ has dealt with the issue of when a national court is to refer a question to it and the exceptions to this requirement. Its decision in *Société First Trust Saving and Loan c. Siakam*[XXIX], the CEMAC CJ – expressly relying on CJEU case law 'which serves as a reference' – considered that it was not enough for a party in domestic proceedings to maintain that the dispute before a national court of last resort posed a question of

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Community law so that that court was automatically bound to carry out a preliminary reference. In fact, the CEMAC CJ noted that the CJEU had determined three ways according to which such courts could dispense with making a reference.

The first was that if the question was not relevant, i.e., if the response that the Court could give would have no impact on the solution of the dispute, for which point the CEMAC CJ cited to the *CILFIT* case in support. According to the Court, this exception left national judges – who were the only ones to have direct knowledge of the facts of the case as well as the arguments put forward by the parties – the task of assessing the relevance of the questions of law raised, as well as the need for a preliminary question, citing to the *Pigs Marketing Board*.[XXX]

Secondly, referral to the Court was also not obligatory every time whenever the question raised was materially identical to a question already having been the subject of a preliminary ruling in a similar case, the so-called '*acte éclairé*', support for which point the CEMAC CJ found in the *Da Costa* ruling of the Luxembourg Court.[XXXI]

Thirdly, as regards the so-called '*acte clair*', the CEMAC CJ cited again to *CILFIT*[XXXII] as acknowledging the fact that the obligation of compulsory referral – imposed on the courts of last resort – could also be lifted whenever the correct application of Community law was imposed with such obviousness that it left no room for any reasonable doubt as to how to resolve the question posed.

This approach was similarly displayed by the EACJ in *Attorney General of Uganda v. Tom Kyahurwenda*.[XXXIII] Initially, the Court discussed the meaning of the phrase 'court or tribunal' in the preliminary reference procedure under its own Article 34 EAC vis-à-vis to what is now Article 267 TFEU, referring extensively to pertinent CJEU case law. In fact, the EACJ noted:[XXXIV] 'In determining what "any court or tribunal" is, for purposes of the mechanism of preliminary reference, the Court draws inspiration from the jurisprudence of the European Court of Justice [« ECJ »], which is also in possession of the mechanism.' Nevertheless, the EACJ also noted the differences between Article 34 EAC and Article 267 TFEU.[XXXV] However, subsequently in its ruling, the EACJ impliedly adopted the approach of the CJEU in *CILFIT* as to when national courts need not make a reference to Luxembourg, when it stated:[XXXVI]

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> The Court is of the view that the discretion to determine whether a question is necessary or not will in the great majority of cases be exercised in favour of the ruling on the question being necessary, unless: the Community law is not required to solve the dispute (an irrelevant question); or, this Court has already clarified the point of law in previous judgments (*Acte eclair*); or, the correct interpretation of the Community law is obvious (*Acte clair*).

In *Legal Brains Ltd. v. Attorney General of Uganda*,[XXXVII] the EACJ used CJEU rulings to exclude – from its jurisdiction under Article 36 EAC to make advisory opinions – opinions requested based on hypothetical or speculative cases, quoting relevant paragraphs from both *Edouard Leclerc-Siplec*[XXXVIII] and *Robards*.[XXXIX]

6.2 Primacy of REC law

The issue of primacy of REC law – whether primary or secondary – is dealt with in different ways in the various REC treaties and the case law of the relevant REC courts.

For the francophone RECs, the relevant founding Treaty has pre-empted the need for the relevant REC court to stray into the field of judicial activism or even migration of constitutional ideas by having already incorporated the CJEU notion of primacy of EU law – as detailed, e.g., in *Costa v. ENEL*[XL] and *Simmenthal*[XLI] – as an express provision. Thus, in Article 10 OHADA, it states: 'Uniform Acts shall be directly applicable to and binding on the States Parties notwithstanding any previous or subsequent conflicting provisions of the national law.' Such wording follows, in part, that which is provided for EU Regulations under Article 288 TFEU.

Article 6 UEMOA provides similar wording but covers more secondary legislation of the UEMOA institutions: 'The Acts adopted by the institutions of the Union for the achievement of the objectives of this Treaty and in accordance with the rules and procedures laid down by the latter, are applied in each Member State contrary notwithstanding any domestic legislation, before or after.' Article 44 CEMAC reproduces the same provision.

In addition, Article 7 UEMOA and Article 4(1) CEMAC reproduce what is now Article 4(3) TEU, therefore implying the possible migration of CJEU case law interpreting this provision (formerly Article 5 EEC and Article 10 EC) to aid the UEMOA CJ and the CEMAC CJ in their jurisprudential development of the relevant Articles. For example, Article 7 UEMOA states:

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> Member States shall contribute to the achievement of the objectives of the union by adopting any general or specific measures necessary to ensure the fulfilment of their obligations under this Treaty. for this purpose, they shall abstain from any measures likely to impede the implementation of this Treaty and of acts adopted for its implementation.

Within this context, it will not come as a surprise that the OHADA CCJA has held[XLII] that 'the mandatory force of the [OHADA] uniform acts and their superiority over the provisions of national laws' – which is equally called 'a rule of supranationality' directly derived from Article 10 OHADA – in view of the fact that that Article[XLIII] 'contains a rule of supranationality because it provides for the direct and mandatory application in the Contracting States of the uniform acts and establishes, moreover, their supremacy over the antecedent and later provisions of domestic law.' This rule of supranationality is thus extended by the OHADA CCJA beyond the limits provided in the OHADA Treaty to include other types of acts and treaties and putatively its future case law (Tchantchou 2009). The UEMOA Court for its part, obviously in line with and informed by the CJEU case law (Chevalier 2006), has ruled that:[XLIV]

> [I]t is important to underline that the Union [UEMOA] constitutes in law an organisation of unlimited duration, endowed with its own institutions, with legal personality and capacity and above all with powers born of a limitation of competences and of a transfer of responsibilities of Member States which have intentionally granted to it a part of their sovereign rights in order to create an autonomous legal order which is applicable to them as it is to their nationals.

The close wording of the UEMOA CJ's *dictum* to that of the CJEU in *Costa v. ENEL* is quite apparent although it appears that the UEMOA CJ is usually somewhat reticent in referring expressly to CJEU rulings in its own judgements. For example, this Court has even repeated the expression that the CJEU used in the *Les Verts* case,[XLV] referring to the UEMOA Treaty as the 'constitutional charter of the Union',[XLVI] without expressly acknowledging the inspiration for this concept in its decision. In a further case,[XLVII] the UEMOA CJ clearly laid down the principle of primacy of Community law over the national laws of the Member States, recognising in it an absolute character. According to the Court:[XLVIII]

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> Primacy benefits all Community norms, both primary and derived, immediately applicable or not, and is exercised with respect to all national administrative, legislative, jurisdictional and even constitutional norms because the Community legal order prevails in its entirety over national legal orders.

Underlying the general duty of Community loyalty incumbent on Member States in putting Community law into effect,[XLIX] the Court noted: 'The States have the duty to ensure that a norm of domestic law incompatible with a norm of Community law which meets the commitments that they have undertaken, cannot legitimately be in conflict with Community law.' The Court evidently understood that the duty of Community loyalty included national judges applying the principle of primacy and thus, in case of a conflict between UEMOA law and a national legal rule, the judge was required to 'give precedence to the former over the latter by applying the one and disapplying the other', thereby following the CJEU in *Simmenthal*.

Like the treaties governing UEMOA, CEMAC and OHADA, that of the EAC similarly provides an express provision on primacy, under Article 8(4) EAC, that states: 'Community organs, institutions and laws shall take precedence over similar national ones on matters pertaining to the implementation of this Treaty'. The COMESA Treaty is notably much weaker in this matter, providing under Article 29(2) COMESA that: 'Decisions of the [COMESA] Court on the interpretation of the provisions of this Treaty shall have precedence over decisions of national courts.' Moreover, Article 8(1) EAC provides a much looser version of the provisions set out in Article 4(3) TEU on sincere cooperation as does Article 5 COMESA.

Nevertheless, the issue of primacy of EAC law has also come before the EACJ for interpretation in several cases (Ruhangisa 2017: 153-158). For example, in *Professor Peter Anyang' Nyong'o v. Attorney General of Kenya*, the EACJ – having issued an interim injunction in 2006[L] to prevent the swearing in of the Kenyan members as EAC Assembly members on the grounds that the Kenyan selection rules were prima facie contrary to Article 50 EAC[LI] – proceeded to confirm the interim ruling in a final decision in 2007.[LII] In that latter decision, the EACJ considered the basic principle of international law that a State Party to a treaty could not invoke the provisions of its domestic law to justify its failure to perform its treaty obligations and noted:[LIII]

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> We were referred to several judicial decisions arising from national law that contravened or was inconsistent with European Community law, as persuasive authorities on this subject. (See Algemene Transporten Expeditie Onderneming van Gend en Loos vs. Nederlandse Administratie der Belastingen [1963] ECR 1; Flaminio Costa vs. ENEL [1964] ECR 585; and Amminstrazione delle Finanze dello Stato vs. Simmenthal [1978] ECR 629). In some cases the national law in issue was in existence when the Community law came into force, while in others it was enacted after the Community law. In either case where there is conflict between the Community law and the national law the former is given primacy in order that it may be applied uniformly and that it may be effective.

The EACJ then turned,[LIV] for the purposes of illustration, to the *Factortame* litigation[LV] in which the CJEU had ruled that the full effectiveness of Community law would be impaired if a rule of national law could prevent a court, seised of a dispute governed by Community law, from granting interim relief. Compared to *Factortame*, the EACJ opined, the Attorney General of Kenya appeared to be on weaker ground.

In concluding its judgement, the EACJ was forced to observe first that the lack of uniformity in the application of any EAC Treaty Article was a matter of concern since it was bound to weaken the effectiveness of EAC law and, in turn, undermined the objectives of the Community. Secondly, it noted that the Partner States had to balance individual state sovereignty with integration:[LVI] 'While the Treaty upholds the principle of sovereign equality, it must be acknowledged that by the very nature of the objectives they set out to achieve, each Partner State is expected to cede some amount of sovereignty to the Community and its organs albeit in limited areas to enable them to play a role.'

Evidently, the EACJ found it necessary to rephrase *Van Gend en Loos* and *Costa v. ENEL* in this last paragraph to indicate the implicit consequences of the integration proposed by the EAC Treaty, aims which the Partner States had clearly accepted when drawing it up and vesting a regional court with jurisdiction to interpret it. Moreover, the EACJ appears to accept that the EAC should move in this direction of integration through its reference to the CJEU constitutional case law and using it as an inspiration and support for the EACJ's reasoning.

In a later case, *Samuel Mukira Mohochi v. Attorney General of Uganda*[LVII], the applicant was a Kenyan citizen, lawyer and human rights defender. In April 2011, he had travelled to Uganda

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but on arrival at Entebbe International Airport, he had been restrained, confined and detained in the offices of the Ugandan immigration authorities before having been deported back to Kenya. The immigration authorities had not informed him as to why he had been denied entry as well as to why he had been declared a prohibited immigrant and subsequently returned to Kenya. When he sought redress, the case had eventually come before the EACJ. In determining the position of EAC law vis-à-vis national law, the Court opined:[LVIII]

> 52. The import of these provisions [of the EAC Treaty and the Common Market Protocol] is that by accepting to be bound by them, with no reservations, Uganda also accepted that her sovereignty to deny entry to persons, who are citizens of the Partner States, becomes qualified and governed by the same and, therefore, could no longer apply domestic legislation in ways that make its effects prevail over those of Community law.
> 53. Sovereignty, therefore, cannot not take away the precedence of Community law, cannot stand as a defence or justification for non-compliance with Treaty obligations and neither can it act to exempt, impede or restrain Uganda from ensuring that her actions and laws are in conformity with requirements of the Treaty or the Protocol.
> 54. We are of the view, therefore, that while Uganda can declare a citizen of a Partner State a prohibited immigrant and deny him/her entry, it is clear from the foregoing that such declaration or denial of entry can only be valid if it complies with the requirements of Articles 104 and 7(2) of the Treaty and 7 and 54(2) of the Protocol.

In support of their reasoning in finding EAC law primacy over conflicting national law, the EACJ quoted[LIX] the CJEU in *Costa v. ENEL* when the latter had noted[LX] that the transfer by the States, from their domestic legal system to the Community legal system, of the rights and obligations arising under the Treaty carried with it a permanent limitation of their sovereign rights, against which a subsequent unilateral act – incompatible with the concept of the Community – could not prevail.

6.3 Direct effect

The judicial discussion of direct effect in the various African REC courts is even more muted when compared to those on preliminary rulings and primacy of REC law. Nevertheless, there are several cases of note, perhaps most importantly from the COMESA CJ. In its seminal ruling on the free movement of goods within the Community, *Polytol Paints*

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& Adhesives Manufacturers Co. Ltd. v. Republic of Mauritius[LXI], the Court defended the direct effect of provisions of the COMESA Treaty that had created the common market. Using the terms employed by the CJEU in *Van Gend en Loos*, the COMESA CJ – having cited to Article 26 COMESA mentioned earlier – stated:[LXII]

> The content of this rule shows the extent the signatories of the COMESA Treaty have committed themselves to give space in the COMESA territory not only for the Member States but also for individuals. By giving the residents of any Member State the right to challenge the acts thereof on grounds of unlawfulness or infringement of the Treaty, the Member States have in some areas limited their sovereignty. The proper functioning of the Common Market is, therefore, not only a concern of the Member States but also that of the residents. The Treaty is more than an agreement which merely creates obligations between Member States. It also gives enforceable rights to citizens residing in the Member States.

However, the COMESA CJ subsequently quoted[LXIII] directly from the *Van Gend en Loos* ruling, before concluding on this point[LXIV] that residents in the COMESA Member States likewise had an enforceable right before it under Article 26 COMESA 'whenever they establish that they have been prejudiced by an act of the Council or of a Member State that contravenes the Treaty.'

The COMESA CJ appears to have expounded most on the issue of direct effect from among the African REC courts under consideration although this is not exclusively so. The EACJ, for example, in recognising the primacy of EAC law vis-à-vis conflicting national law, has emphasised the necessary ability of individuals and companies to invoke rights conferred by the EAC Treaty and related instruments (like the Common Market Protocol) before national courts which, in turn, are called upon to guarantee their full effectiveness (Ruhangisa 2017: 149-153). In *East African Law Society v. Secretary General of the EAC*, the EACJ acknowledged:[LXV]

> As Partner States, by virtue of their being the main users of the Common Market Protocol on a daily basis, it would be absurd and impracticable if their national courts had no jurisdiction over disputes arising out of the implementation of the Protocol. Indeed, Community law would be helpless if it did not provide for the right of individuals to invoke it before national courts.

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It then referred to a couple of relevant passages from the CJEU ruling in *Van Gend en Loos* to support this reasoning before continuing: 'Put differently, if the Common Market Protocol confers rights onto the individuals within the EAC, these individuals should be entitled to invoke them before their national courts.'

In a similar vein in *Attorney General of Uganda v. Tom Kyahurwenda*[LXVI], the EACJ – with respect to the justiciability of certain provisions of EAC primary law before national courts – expressed itself in almost identical terms, referring to both *East African Law Society v. Secretary General of the EAC* and *Van Gend en Loos*: 'This Court agrees with the postulation of the law by the First Instance Division of this Court that it would be absurd if national courts and tribunals were to be excluded from the application of Treaty provisions should the occasion arise before them'. In affirming the decision of First Instance in the *East African Law Society* case, the Appellate Division in *Kyahurwenda* decided that:[LXVII] 'Articles 6, 7 and 8 of the Treaty are justiciable before national courts. Accordingly, those Articles do confer legal authority to the national courts of the Partner States to entertain allegations of their violation'.

Thus, through its interpretations provided in these cases, the EACJ has recognised the direct effect of the EAC Treaty and its Protocols (EAC primary law) and the concomitant competence of national courts' jurisdiction to entertain cases for infringement of directly effective provisions of that primary law.

7. Conclusion

The main part of this brief study has examined the way in which courts of African RECs use rulings from the CJEU as means of emulation in order to nurture their own brand of judicial dialogue. In particular, by employing the CJEU's interpretations of Article 267 TFEU as well as its own developed principles of primacy and direct effect of EU law, the benches of the relevant REC courts have seemingly drawn the necessary lessons from the CJEU's long experience and used its constitutional case law as a source of inspiration and guidance in their own work in moulding regional integration.

With these African REC courts, it is clear that the use of CJEU rulings in their own case law is regarded somewhat as a given. Imbued with a similar strategic mission, these REC courts – together with the support of the respective legal academic communities through

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articles and monographs – have essentially incorporated CJEU decisions into the body of REC case law, without necessarily acknowledging their source in Luxembourg. That these African regional courts should do so reflects, in part, the way in which both judges and legal academia weave the established case law of the CJEU into their own work: such outcomes, in many instances, stem from judges and court staff having studied EU law as part of their studies in French universities or at the universities in their own particular regional community where the relevant REC law is almost invariably taught as part of degree courses in law (Sow 2016).

For these reasons, African REC judges are comfortable using the decisions of the Luxembourg Court in their construction of and/or confirmation of the supranational nature of their own Community laws and their direct effect in national systems, together with the requirements for making references to them. Citation, both express and implied to CJEU rulings, resonates within their regional Community systems and can be seen as similarly reinforcing their independence vis-à-vis other institutions. In other words, since the treaties – as with the TEU and TFEU – have endowed these African regional courts with the same or similar powers to the CJEU, the signatory States were already well aware of the judicial development of EU law and could not actually object when such Community courts started to develop regional integration along similar lines. This proposition is even more forceful when viewing the primacy given to REC law expressly provided for in the CEMAC, UEMOA and OHADA Treaties. Indeed, use of CJEU case law could arguably be regarded as inevitable since none of these African regional courts had to 'reinvent the wheel', i.e., they were not obliged to create the constitutional underpinnings of a regional legal order from scratch.

As a consequence, despite the vagaries of politics and security impinging upon the further evolution of the RECs, it will become more interesting in the future to see – as a result of further deepening and expansion of judicial dialogue within the African RECs – to what extent the domestic courts in these Communities follow the example, e.g., of the French courts (Tatham 1991), in their protection of national constitutional identity in the face of further encroachments upon the sovereignty of their States.

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I Some of the cases and ideas set out in this study were previously discussed in Tatham 2015.

II For an explanation of this term, see below in section 5.

III For some of the relevant cases from francophone REC courts, see <https://www.ahjucaf.org/grands-arrets-des-cours-supremes-francophones>.

IV The EACJ was established under Art. 9 of the 1999 East African Community Treaty; its jurisdiction is dealt with in chapter 8 of that Treaty (Arts. 23-47). The EAC Treaty is available at: <www.eacj.org>.

V The provisions dealing with the COMESA CJ are set out in Arts. 19-44 COMESA.

VI 1993 Treaty establishing the Common Market for Eastern and Southern Africa. Relevant materials on COMESA are available through <www.comesa.int>.

VII The UEMOA Court of Justice was re-established in Arts. 16 and 38 of the 2003 modified UEMOA Treaty (originally signed in 1994) and its jurisdiction is provided in Arts. 5-19 in Additional Protocol No. 1 relating to the UEMOA Supervisory Organs. All relevant materials on UEMOA are available at: <www.uemoa.int>.

VIII In French, 'UEMOA' represents '*l'Union économique et monétaire ouest-africaine*.'

IX The CFA franc, where 'CFA' stands for '*Communauté financière d'Afrique*' ('Financial Community of Africa'), is strictly speaking, two different currencies: the West African CFA and the Central Africa CFA franc. These two CFA francs have the same exchange rate with the euro (1 euro = 655.957 CFA francs), and they are both guaranteed by the French treasury. Such was confirmed by the EU, even though France itself now uses the euro as its currency in Council Decision 98/683/EC of 23 November 1998 concerning exchange rate matters relating to the CFA Franc and the Comorian Franc: 1998 OJEC L320/58. However, it should be noted that the West African CFA franc cannot be used in Central African countries, and vice versa. A third CFA, with its own separate central bank, exists for the Comoro Islands.

X The relevant rules governing the CEMAC CJ are set out in Art. 29 CEMAC, Acte Additionnel No. 3/21-CEMAC-CJ-CEE-15 and Acte Additionnel No. 4/21-CEMAC-CJ-CEE-15.

XI 1994 CEMAC Treaty (revised in 2009) and related materials is available through <www.cemac.int>.

XII In French, CEMAC signifies '*Communauté économique et monétaire de l'Afrique centrale*'.

XIII The OHADA Common Court of Justice and Arbitration was established under Art. 3 of the 1993 OHADA Treaty (as amended in 2008) and its jurisdiction is set out in Arts. 6-7 and 14-20 OHADA. All relevant treaty materials on OHADA are available at: <www.ohada.org> or <www.ohada.com>.

XIV In French, the acronym 'OHADA' represents '*l'Organisation pour l'Harmonisation en Afrique du Droit des Affaires*.'

XV Other States have subsequently joined, with Guinea-Bissau being lusophone.

XVI African Charter on Human and Peoples' Rights, Banjul, 27 June 1981, entered into force 21 October 1986: 1520 UNTS 217.

XVII Arts. 259, 263 and 265 TFEU.

XVIII Arts. 258, 263 and 265 TFEU.

XIX Art. 263 TFEU.

XX ECJ, Case 26/62, *N.V. Algemene Transport - en Expedite Onderneming van Gend en Loos v. Nederlandse administratie der belastingen*, ECLI:EU:C:1963:1.

XXI ECJ, Case 6/64, *Costa v. ENEL*, ECLI:EU:C:1964:66.

XXII ECJ, Case 106/77, *Amministrazione delle Finanze dello Stato v. Simmenthal SpA*, ECLI:EU:C:1978:49.

XXIII ECJ, Case 11/70 *Internationale Handelsgesellschaft mbH v. Einfuhr-und Vorratsstelle für Getriede und Futtermittel* ECLI:EU:C:1970:114.

XXIV ECJ, Case 283/81, *Srl CILFIT v. Ministry of Health*, ECLI:EU:C:1982:335.

XXV ECJ, Case C-213/89, *R. v. Secretary of State for Transport, ex parte Factortame Ltd. (Factortame No. 1)*, ECLI:EU:C:1990:257.

XXVI ECJ, Case 294/83, *Parti écologiste Les Verts v. European Parliament*, ECLI:EU:C:1986:166, para. 23, p. 1365; ECJ, Opinion 1/91, *Re Draft Treaty on a European Economic Area*, ECLI:EU:C:1991:490, paras. 20–21, p. 6102; and ECJ, Joined Cases C-402/05 P and C-415/05 P, *Kadi v. Council and Commission*, ECLI:EU:C:2008:461, para. 81.

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XXVII Arts. 28 and 30 EAC; Art. 24 COMESA; Art. 8, Protocol 1, UEMOA; Art. 43, Acte Additionnel No. 4/21-CEMAC-CJ-CEE-15, CEMAC; and Arts. 14-20 OHADA.
XXVIII Art. 34 EAC; Art. 30 COMESA; Art. 12, Protocol 1, UEMOA; Art. 43, Acte Additionnel No. 4/21-CEMAC-CJ-CEE-15, CEMAC; and Art. 14(2) OHADA but, in the last example, the CCJA must only provide a consultative opinion to national courts.
XXIX CEMAC CJ, *Société First Trust Saving and Loan c. Siakam*, No. 7/2015-16 du 3 mars 2016.
XXX ECJ, Case 83/78, *Pigs Marketing Board v. Redmond*, ECLI:EU:C:1978:214.
XXXI ECJ, Joined Cases 28-30/62, 27 March 1963, *Da Costa en Schaake NV v. Nederlandse Belastingadministratie*, ECLI:EU:C:1963:6, p. 38.
XXXII ECJ, Case 283/81, *CILFIT*, ECLI:EU:C:1982:335, para. 16, p. 3415.
XXXIII EACJ, *Attorney General of Uganda v. Tom Kyahurwenda*, Case Stated No. 1 of 2014 of 31 July 2015, paras. 39-49, pp. 15-20.
XXXIV *Ibid.*, para. 39, p. 15.
XXXV *Ibid.*, para. 45, p. 18; and para. 47, p. 19.
XXXVI EACJ, *Kyahurwenda*, para. 57, p. 23.
XXXVII EACJ, *Legal Brains Trust (LBT) Ltd. v. Attorney General of Uganda*, Appeal No. 4 of 2012 of 19 May 2012 (Appellate Division), pt. 20, pp. 12-13.
XXXVIII ECJ, Case C-412/93, *Société d'Importation Edouard Leclerc-Siplec v. TF1 Publicité SA*, ECLI:EU:C:1995:26.
XXXIX ECJ, Case 149/82, *Robards v. Insurance Officer*, ECLI:EU:C:1983:26.
XL ECJ, Case 6/64, *Costa v. ENEL,* ECLI:EU:C:1964:66, p. 594, in which the CJEU stated: 'The precedence of Community law is confirmed by [Article 288 TFEU], whereby a regulation 'shall be binding' and 'directly applicable in all Member States'. This provision, which is subject to no reservation, would be quite meaningless if a state could unilaterally nullify its effects by means of a legislative measure which could prevail over Community law.'
XLI ECJ, Case 106/77, *Simmenthal*, ECLI:EU:C:1978:49, para. 24, p. 644, where the CJEU held: 'A national court which is called upon, within the limits of its jurisdiction, to apply provisions of Community law is under a duty to give full effect to those provisions, if necessary refusing of its own motion to apply any conflicting provision of national legislation, even if adopted subsequently, and it is not necessary for the court to request or await the prior setting aside of such provisions by legislative or other constitutional means.'
XLII OHADA CCJA, *Avis consultatif, No. 002/99/EP*, du 13 octobre 1999 (Demande d'Avis de la République de Mali).
XLIII OHADA CCJA, *Avis consultatif, No. 001/2001/EP*, du 30 avril 2001 (Demande d'Avis de la République de Côte d'Ivoire).
XLIV UEMOA CJ, *Avis No. 002/2000*, du 2 février 2000 (Demande d'Avis de la Commission de l'UEMOA relative à l'interprétation de l'article 84 du traité de l'UEMOA).
XLV ECJ, Case 294/83, *Les Verts v. Parliament*, ECLI:EU:C:1986:166, para. 23, p. 1365. This was used subsequently in ECJ, Opinion 1/91 *Re Draft EEA Treaty*, ECLI:EU:C:1991:490, paras. 20-21, p. 6102; and ECJ, Joined Cases C-402/05 P and C-415/05 P *Kadi*, ECLI:EU:C:2008:461, para. 81.
XLVI UEMOA CJ, *Avis No. 003/2000*, du 27 juin 2000 (Demande d'Avis de la Commission de l'UEMOA relative à l'interprétation des articles 88, 89 et 90 du traité relatifs aux règles de concurrence dans l'Union).
XLVII UEMOA CJ, *Avis No. 001/2003*, du 18 mars 2003 (Demande d'Avis de la Commission de l'UEMOA relative à la création d'une Cour des comptes au Mali).
XLVIII *Ibid.*, p. 7.
XLIX The principle of Union loyalty or sincere cooperation with respect to EU Member States is provided for under Art. 4(3) TEU: 'The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union. The Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which

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could jeopardise the attainment of the Union's objectives.' It extends, *inter alia*, to the judiciary: Case 103/88, *Fratelli Costanzo v. Comune di Milano*, ECLI:EU:C:1989:256.
L EACJ, *Professor Peter Anyang' Nyong'o and Others v. Attorney General of Kenya and Others*, Reference No. 1 of 2006 of 26 November 2006.
[LI] Art. 50 EAC provides: '(1) The National Assembly of each Partner State shall elect, not from among its members, nine members of the Assembly, who shall represent as much as it is feasible, the various political parties represented in the National Assembly, shades of opinion, gender and other special interest groups in that Partner State, in accordance with such procedure as the National Assembly of each Partner State may determine.'
LII EACJ, *Professor Peter Anyang' Nyong'o v. Attorney General of Kenya*, Reference No. 1 of 2006 of 30 March 2007.
LIII *Ibid.*, pp. 41-42.
[LIV] *Ibid.*, p. 42.
LV ECJ, Case C-213/89, *Factortame*, ECLI:EU:C:1990:257.
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[LVII] EACJ, *Samuel Mukira Mohochi v. Attorney General of Uganda*, Reference No. 5/2011 of 17 May 2013 (First Instance).
[LVIII] *Ibid.*, paras. 52-54, p. 29.
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[LXII] *Ibid.*, p. 17.
[LXIII] *Ibid.*, pp. 18-19.
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Federalism and the *Unit* Question

by

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Abstract

This contribution engages with the unit question in federal systems. The key claim presented here is that we may need to re-think federal units according to different sets of criteria than traditional ones such as, for example, economic factors, urban/rural concentration, and aboriginal/indigenous representation. A subsidiary claim is that the unit question is an important issue to raise, not only because it contributes to the (comparative) debate on how to make federalism more responsive to 21st century challenges and problems, but also because it contributes to some broad questions of constitutional design and constitutional theory. The essay is divided in three parts. Part 1 introduces federal units in general and looks at the distinction between physical (geographical) and authority boundaries; it also engages with debates in federalism theory on the unit question itself. Part 2 describes three alternative factors that may be used to guide the way some unit boundaries are drawn: economic factors, cities and the urban/rural concentration, and aboriginal/indigenous representation. Part 3 looks at a set of questions of constitutional design and theory triggered by the unit question that may enrich the comparative doctrinal debate.

Keywords

Federal units, federal boundaries, cities, aboriginal rights, economic regionalism, spatial economic areas

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1. Introduction

In this contribution, I engage with what I refer to as the *unit question* in federal systems. My main claim is that we may need to re-think federal units according to different sets of criteria than traditional ones such as, for example, economic factors, urban/rural concentration, and aboriginal/indigenous representation. A subsidiary claim is that the unit question is an important issue to raise, not only because it contributes to the (comparative) debate on how to make federalism more responsive to 21st century challenges and problems, but also because it contributes to some broad questions of constitutional design and constitutional theory.

The contribution is divided in three parts. First, I introduce federal units in general terms, and look in particular at the distinction between physical (geographical) and authority boundaries; I also briefly engage with current debates in federalism theory on the unit question itself. Next, I describe three alternative factors that I believe should inform the way some unit boundaries are drawn. To this end, I focus on (i) economic factors, spatially concentrated economies, and economic regionalism; (ii) cities and the urban/rural concentration; and (iii) aboriginal/indigenous representation. Finally, I look at a set of questions of constitutional design and theory triggered by the *unit* question that may enrich the comparative doctrinal debate.

2. An overview of federal units

2.1 Introducing federal units: physical and authority boundaries

Federal systems are a prevalent feature of modern liberal constitutionalism, as an increasing number of constitutions provide for federal or federal-like forms of government. Federalism is thought to bring many benefits, from fostering peace by reducing internal conflicts, to increasing democratic participation in governance (especially of marginalised groups), to implementing stable development across the various territories of a polity, to limiting centralised rule, particularly when this is the source of discrimination, exclusion, or inequality.

As Blank points out, federalism is commonly understood as a theory of two recognised types of jurisdictions, the federal and the constituent units (however called), while other types

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of units remain 'unrecognized theoretically and constitutionally' (Blank 2010: 525), although there are exceptions to this.

The existence of two (or more) levels of jurisdictions implies that federal systems are characterised by at least two types of boundaries: *physical* and *authority* boundaries (Bednar 2019: 27, 29). Physical boundaries pertain to the actual geographical borders of the federal units (in other words, the borders of the various *cantons, states, provinces, Länder,* etc.) (Bednar 2019: 27), while authority boundaries pertain to how legislative powers are distributed among and between the various tiers of government, as normally ingrained in the federal constitution (Bednar 2019: 29).

Authority boundaries represent an important feature of federal systems, and an abundant literature exists on the different ways in which powers, especially legislative powers, are assigned to each level of government (*ex multis*, see Watts 2008; Hueglin and Fenna 2015; Palermo and Kössler 2017). For example, such powers can be assigned exclusively to either level of government, but more often they are shared or concurrent (as outlined in the constitution or as carried out in practice). Furthermore, by dividing powers and responsibilities among various levels of government, federalism allows to reconcile the unity and integrity of the state with the many forms of diversity (ethnic, linguistic, socio-economic, etc) that characterise the federal territory.

Geographical boundaries, on the other hand, have historically been drawn following various criteria: sometimes physical elements like mountains or rivers were used for this purpose (although rivers may change course, thus creating more boundary disputes (Bednar 2019: 27)), while other times historical or ethnic boundaries were employed (Bednar 2019: 27-28).

Watts observed that federal systems greatly differ from each other in the number of constituent units (Watts 2008: 71). Sometimes, this number is particularly high, like the 50 states that compose the United States: as he further noted, such a large number of constituent units usually means that 'none of them is in a position to dominate politics … or to individually counterbalance the federal government', although most federations normally count a smaller number of units (Watts 2008: 71-72). Federal units also vary significantly in size, population, and wealth: for example, Uttar Pradesh in India is a state with more than 166 million people, thus being much larger than the population of many federations (Watts 2008: 72). Furthermore, in some federations one or two constituent units may include most

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of the population: this is the case of the Flemish Region in Belgium, which counts for almost 60% of the population, but the situation is similar in Canada with Ontario and Quebec, or in Australia with the population in New South Wales and Victoria (Watts 2008: 74). Federal units can also considerably vary in wealth, especially in relation to the presence of natural resources, and 'this is significant in terms of their capacity to perform the functions constitutionally assigned to them' (Watts 2008: 74). I will revert to this aspect later in the contribution.

Watts further observed that all the factors just mentioned (size, population, wealth, etc.) may affect the balance of a federal system: when units are too large or too populous, they may naturally play a predominant role in the federal politics of their federation and 'exert more political influence' to the detriment of smaller constituent units; at the same time, larger and populous units may be less responsive to the interests of local communities and individual citizens (Watts 2008: 72).

In certain federations there are also 'secondary classes of constituent units' enjoying less autonomy than the fully entrenched ones: federal territories fall into this category, like for example the Northwest Territories, Nunavut, and Yukon in Canada, or the Northern Territory in Australia (Watts 2008: 75). Local governments are another example: even when they are recognised as levels of government in the constitution, their autonomy is more limited. Other federations may also have a looser federacy or associate state relationship with certain units, as is the case of the United States and Puerto Rico (Watts 2008: 75-76).

In light of the above, the way unit boundaries are drawn may play a role in 'shaping the dynamics of political relationships' within a federation (Watts 2008: 71).

2.2 Drawing unit boundaries

As Bednar points out, the way both physical and authority boundaries are drawn affect the way a federal system works and how it achieves its functions (Bednar 2019: 27): consequently, physical and authority lines 'can be drawn in ways that aid or abet a federal system's capacity to bring security, prosperity and well-being, and justice to a society' (Bednar 2019: 35).

Therefore, to understand how a federation performs, we need to pay attention to the way units are drawn and authority is allocated, also because both physical and authority

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boundaries have the potential to cause tensions (Bednar 2019: 35). In case of authority boundaries, the most common tension pertains to the level of government entitled to legislate on a certain subject matter, as constitutional texts may not be clear or there may be some overlapping between subject areas assigned to different levels. In such cases, constitutional or supreme courts are called to safeguard authority boundaries, by ultimately deciding which level of government has authority over a certain subject matter (Bednar 2019: 31), although other forms of safeguard may also exist, such as constitutional change preceded by changes in practice (Bednar 2019: 35). Regarding geographical boundaries, and especially in the context of decolonisation, a specific criterion that has been used to draw unit boundaries has been ethnicity, Ethiopia being a case-in-point. This way of unit formation, however, is not exempt from problems, as ethnofederalism (Hale 2004: 165) can indeed lead to secessionist claims: in fact, as Bednar observes, '[b]y organising political boundaries around ethnic groups, tensions become more salient and competing groups are equipped with the institutional capacity to make demands that the rest of the union cannot tolerate, leading to conflicts or secession' (Bednar 2019: 28).

This contribution will mainly focus on the physical or geographical boundaries of federal units (although this has reverberations also on authority boundaries, see *infra*), to assess whether alternative factors should be considered in drawing unit lines, as further detailed in part 2 of the contribution.

2.3 The current debate on federal units

While an extensive literature exists on authority boundaries, not many federalism theorists have devoted time to think, also in comparative terms, about what would be the ideal territorial or population size of a federal unit: in other words, as Hirschl notes, broad questions like whether federal units as they currently exist reflect ideal boundaries in terms of size, population, or socio-economic fabric rarely if ever find space in federalism discussions (Hirschl 2020: 33-34). If some literature exists, it is sporadic and not systematic. Yet, considering the modern trajectory of federal models, and the changes brought by the economic, demographic, social and ethnic development to the boundaries of federal entities, it would be desirable to return to a discussion on the unit question.

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In the following paragraphs, I summarise some of the main observations made by federalism theorists on federal units. Some very first theorisations in federalism are very insightful in this regard. For example, in the XVII century, the German Calvinist Johannes Althusius – commonly regarded as the first intellectual and theoretical godfather of federalism (at least of its continental European strand) (Elazar 1994: 41) – conceived of a multi-layered society 'built up from below' (Burgess 2000: 8), where the societal chain was composed of several rings, including families, collegia, cities, provinces and the commonwealth (Althusius 1995: 27). In other words, as emerged in his major work *Politica Methodice Digesta* of 1603, Althusius espoused a rather inclusive idea of a compound society, with several units, some private and some public, including cities and collegia (Althusius 1995: 27). However, Althusius' *Politica* did not receive enough attention in his own time, and remained unnoticed for almost two centuries, perhaps because he was offering a view of the state that was conflicting with the vision offered at about the same time by thinkers like Jean Bodin (1530-1596), whose *Les Six Livres de la Republique* of 1576 became a classic theorisation of the unitary, monarchical, and strongly centralised state which would dominate European culture for a long time (Burgess 2000: 2, 9).

More recently, Kenneth Wheare spelled out the features of an ideal federal unit, contending that '[i]t is undesirable that one or two units should be so powerful that they can overrule the others and bend the will of the federal government to themselves': consequently, for a properly working federal government, a balance and harmonisation between the 'conflicting interests of these differing units' should be found (Wheare 1963: 52). This means that '[t]he size of the units concerned – in wealth, area and population – is … of prime importance' and it is the responsibility of 'those who frame and work a federal government to see that no unit shall be too large, and, equally important, none too small.' (Wheare 1963: 52-53). Wheare further contended that adequate economic resources are important to form a federal union, and states 'must possess sufficient economic resources to support both an independent general government and independent regional governments' (Wheare 1963: 53). Also, a small population is not capable of supplying the workforce of a larger population, so the size of a unit affects 'its capacity to form part of a federal union' (Wheare 1963: 53). This means that sufficient economic resources are necessary both for sub-units and the federal government so that they can be 'financially independent' (Wheare 1963: 54).

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Issues of unit size and population have been raised also by Levy. First, he observed that, although federalism is usually understood as an 'arrangement of one central government and a number of states or provinces' in fact other units of government exist, even if they 'lack constitutional status' (Levy 2007: 463). Next, he noted that most existing federated entities are too large, since they are 'the size of *ancien régime* French provinces' (Levy 2007: 461). He further noted that, in a range of federations like the United States, Canada, Australia, or Nigeria, or even decentralised systems like South Africa, 'the mean state, province, or regional population lies somewhere in the 2 million to 6 million range…' (Levy 2007: 461). This means that, in contemporary federalism, classic units are 'too few, too large, too tightly associated with ethnocultural and linguistic cleavages and too rigidly fixed' thus lacking 'smallness and flexibility' (Levy 2007: 464). Levy also observed that, in many modern federations, 'one of the most conspicuous features of federalism is its association with ethnocultural or, especially, linguistic pluralism' meaning that one or more federated units are 'understood as the province of an ethnic, cultural, or linguistic minority' as is the case of Quebec in Canada (Levy 2007: 461). Because most federations are characterised by 'relatively few, relatively large provinces many of which are defined linguistically or ethnoculturally' this does not favour mobility or competition (Levy 2007: 462). This point is particularly pertinent: in multinational federations, units are sometimes carved out of specific ethno-linguistic cleavages, regardless of size and population. Oftentimes, the boundaries of such units are drawn on paper, or are imposed from the top, and are designed at central level, regardless of any pre-existing sovereignty. Such units can be mono-ethnic or pluri-ethnic but, since such demarcation comes from the top, it is often contested and triggers conflicts. Against this backdrop, Levy noted how jurisdictional competition would 'proceed better if the jurisdictions were municipalities or metropolitan regions.' (Levy 2007: 461).

Hirschl recently noted how, in traditional federal systems, 'province- and state-sized entities are the default constituent unit …' (Hirschl 2020: 176). As a result, in modern federations, 'the near-exclusively applied "unit" of federalism is the state and its equivalents' since the Westphalian model 'continues to dominate the theory and practice of federalism, with its notion of sovereign territorial states divided along ethnic, religious, and linguistic cleavages and reflecting conventional notions of nationhood, peoplehood, and/or historical patterns of conquest and settlement' thus leaving no space to other, less visible units (Hirschl 2020: 33). Hirschl thus invites theorists to reflect more deeply on the 'unit' question, properly

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contending that federalism has never really discussed other units, preferring to focus on 'the dominant status of state-sized, sub-national units.' (Hirschl 2020: 34).

Contemporary federal theorists are thus aware of the unit question, with concerns orbiting mainly around the socio-economic viability of ideal units (Wheare), jurisdictional competition among units (Levy), or the Westphalian state-model and how it still affects federal units (Hirschl).

In an essay on boundaries, democracy and territory, Miller also explored the unit question, by asking what are the 'values that should inform political boundary-drawing' and then noting that constituent units elicit several questions about the constitution of political power, such as 'on what basis should political units be formed', 'what powers should they have' and '[h]ow widely or narrowly in space should their bounds be set' (Miller 2016: 33-34).

In discussing what boundaries political units ought to have, there are several approaches that can be adopted (Miller 2016: 37). First, the *functional* approach to boundaries, meaning that units shall be viable, they 'must be able to protect the basic rights of their members adequately' and 'the human and natural resources' they contain (Miller 2016: 38). They must also be 'economically viable' to provide for themselves and their members goods or services (Miller 2016: 38). Second, the *political* approach**,** which suggests not only to create viable units, but legitimate and democratic ones as well (Miller 2016: 40). This approach 'will enquire into the social and psychological characteristics of the "people" that will be brought into existence if a particular boundary proposal is adopted' (Miller 2016: 40). If there is a majority group and a minority group that is hostile to the majority, the political approach suggests that boundaries should be drawn in such a way that 'these two groups are not forced to cohabit within a single political unit' (Miller 2016: 41). Third, the *homeland* approach, which postulates that 'boundaries should circumscribe pre-existing homelands, where these are identified by reference to the beliefs and actions of the peoples who live on them or aim to do so' (Miller 2016: 44). Beginning with one social group (a tribe, an ethnic group, a nation), the homeland approach tries to find out what such group considers to be its land (Miller 2016: 44). The problem with this approach is that such territorial claims may be both indeterminate (since it is not always clear where a group's homeland begins and ends) and conflictual (as rival groups can make similar claims to the same area or territory) (Miller 2016: 44).

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Another way to look at the unit question is to consider the way in which federal systems have emerged, the classic distinction being between 'coming together' (or aggregative), and 'holding together' (or devolutionary) federations (Palermo, Kössler 2017: 45). Coming together federations reflect the 'old' way federal systems have formed, with previously independent states or units joining into a federal compact, as was the case with the United States, and later also with Canada or Australia: here, the pre-existing units were independent states or enjoyed a high degree of autonomy before joining the federal structure (Palermo, Kössler 2017: 45). Not much discussion occurred on the size, dimensions, and other features of such units, as they already enjoyed sovereignty, including law-making powers (Hirschl 2020: 33). Although other units existed (like local governments or cities) they were neither considered partners in the federation nor fully-fledged federal subjects: they simply lacked constitutional status and were considered as simple creatures of the state.

Coming together federations stand in sharp contrast with holding together or devolutionary systems (of which South Africa, Spain, Belgium, and Italy are examples), whereby a unitary state progressively devolves powers to specific sub-units to control centrifugal forces, better deal with internal ethnic cleavages or tame secessionist aspirations (Palermo, Kössler 2017: 45). In comparative perspective, they have become more common, especially in the last few decades: under such devolutionary patterns, it is not unusual to see the entrenchment of a third level of government – the municipal or even the urban sphere, in addition to the classic division in two levels. In such instances, the unit question may assume a different meaning, because new units need to be formed.

However, the classic distinction between coming together and holding together federations just illustrated needs to be nuanced, as the two often coalesce. In fact, while it is undeniable that the United States emerged in 1787 from the coming together under the constitution of 13 previously existing former colonies, the 37 other states that joined the Union over time did not necessarily enjoy sovereign status and/or clear boundaries, which were often imposed from the top or following natural elements like rivers or mountain ranges. And also in holding together federations the picture may be blurred. Take Italy for example: there is an extensive record of very interesting discussions within the Constituent Assembly in the years 1946-1947 where members were trying to figure out how to create the regions that would become the building blocks of the regional state under formation. But such discussions applied only to a limited number of regions, those that were not existing

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yet, because other regions already existed with their own boundaries, being them historical territories that pre-dated unification (like for example Lombardia and Veneto, former semi-autonomous provinces of the Habsburg Empire) or islands (like Sicilia and Sardegna).

To conclude this overview of the unit question through the lens of comparative scholarship, it can be argued that the overall picture is quite complex, and several elements are considered and come into play. Federalism theorists are aware of the unit question, but I contend that the intellectual debate is still scarce and sporadic, especially in comparative terms. One consequence is that, by not engaging with the unit question more systematically, constitutional and federalism theory and practice tend to neglect important factors that may potentially guide the way unit boundaries are drawn, as the next section will further illustrate.

3. Suggesting alternative factors in drawing units' boundaries

As noted in previous sections, contemporary federalism scholarship has not systematically engaged in a discussion on federal units, the intellectual debate being in fact still scarce and sporadic. One consequence is that, by neglecting the unit question and fixating on the state and its equivalents as the basics of analysis (Hirschl 2020: 219), constitutional law and federalism theory fail to consider certain important factors that might also potentially drive the way unit boundaries are designed. In other words, besides the criteria discussed *supra* to draw units' lines (former sovereign status, ethnicity, rivers, mountain ranges, etc.), factors like economic distribution, cities and more generally the urban/rural concentration, or aboriginal/indigenous representation are rarely if ever considered. By sharpening focus on such additional factors, some territories or spaces that do not currently enjoy *unit* status may be constitutionally recognised and, consequently, become better equipped to face some of the challenges emerging in increasingly complex federations, thus making federalism more responsive to 21st centuries demands.

The three factors discussed here are not intended to exhaust all the possible, novel criteria to be used in carving the boundaries of new federal units, but may nonetheless offer some preliminary thinking on the unit question.

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3.1 Economic factors: spatially concentrated economies (SCEs)

As Watts reminds us, variations in terms of wealth 'have been a factor affecting the influence of particular constituent units in the dynamics of federal politics' (Watts 2008: 74). To this end, the concept of *spatially concentrated economies* (hereinafter "SCEs")(Van Houten 2013: 143) is proposed here to rethink geo-political and authority boundaries of federal units in such a way that considers issues of economic wealth and/or the presence of natural resources as an important factor (Arban 2023: 185).

The concept of SCEs is strictly related to that of *economic regionalism*. Economic regionalism can have both a supra-national and a domestic/local dimension. At supra-national level, it has been used in international economic relations as an idea to restructure the global economy into regional blocs (Van Houten 2013: 140; Gordon 1961: 231; Arban 2023: 103). In its domestic/local acceptation, it describes the role played by economic factors in territorial politics (Van Houten 2013: 140; Arban 2023: 103). In other words, it refers to the phenomenon of economically wealthier regions or areas that mobilise politically to acquire more powers and autonomy (Van Houten 2013: 144; Arban 2023: 103).

Economic regionalism at the domestic/local level, however, is a term that defines a constellation of different situations, from industrial clusters or districts (like the Silicon Valley or the media industry in California) to regional economies or local/territorial production systems (like small and medium size enterprises in the fashion industry concentrated in certain parts of Italy) (Van Houten 2013: 141; Arban 2023: 103). The presence in one specific territory of natural resources like oil or gas can also be traced back to such broad umbrella term: in fact, in some polities, natural resources like gas, oil, timber or minerals are concentrated in limited spaces (Arban 2023: 103). The often-unequal distribution of natural resources has emerged as a serious problem especially in post-colonial and post-war polities (ie Nigeria), considering that in certain African and Asian countries the national GDP depends largely on non-renewable or natural resources, which are often distributed unevenly among regions; however, it is not an entirely foreign phenomenon in the Global North (see for example Australia and Canada) (Arban 2023: 103).

Economic regionalism has been the object of several studies in the social sciences, especially economic geography, sociology, and political sciences (ex multis, Cruz, Teixeria

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2010), but its 'political and institutional effects' remain largely unexplored (Van Houten 2013: 140; Arban 2023: 103).

But why do we have to concern ourselves with spatially concentrated economies in public law, considering that patterns of economic disparity are a common feature, especially in countries characterised by large geographical territories or by a very diverse geographical landscape regardless of size? My argument is that economic factors like spatially concentrated economies can represent an aspect that constitutional drafters should consider in designing unit boundaries because they can be an element of fragmentation and affect social cohesion and the enjoyment of basic rights, thus bearing consequences for the people living therein.

The presence of economically richer territories, however, does not represent an issue *per se:* in fact, most of the time such economic disparity does not cause any tension. Economic regionalism may become a problem only when a political dimension is added to the economic dimension, in other words when the successful performance of a certain region is coupled with a strong political performance: it is at this point that political parties may mobilise and claim more powers and autonomy for the territory, sometimes even stirring secessionist or exit claims (Arban 2023: 104). This is because economically strong regions often display potential for self-government based on features such as strong governance, strong economy, and strong social solidarity (Arban 2023: 104). Because of that, they often seek some forms of acknowledgement of their (economic) specificity as this distinctiveness is sometimes associated to some identity feeling of belonging to a particular region (Fitjar 2009: 3). Furthermore, more assertive examples of the type often belong to privileged circles, as individuals live in wealthy and developed areas and are fully socially and politically active and integrated: yet, while not repressed or disadvantaged, they often feel badly governed by institutions – at times even neglected – and accuse public institutions of remaining indifferent to their specific interests (Arban 2023: 104). In fact, a common aspect is a shared feeling that the central government is very distant and does not adequately respond to the needs of the area and of the people living in it. For this reason, they seek more control of the economic aspects related to the territory: because of this perceived bad administration from the centre, richer (or more successful) regions often feel that it is the centre and/or the other territories that fully benefit of the wealth produced there (Arban 2023: 104). The veracity of these claims is always hard to assess, of course; however, unless these claims are overtly unfounded, their existence is a function of the relevant societies' self-perception (Arban 2023: 104). As

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Fitjar observes, this phenomenon can be explained by the fact that economically successful regions depend less on the central government as they are better equipped to succeed on their own; and since they play an important role in the overall economy of the state, such sense of economic power justifies some requests for more autonomy, mainly at the political and fiscal levels (Fitjar 2009: 28).

The destabilising effects on social cohesion and the impact on the enjoyment of fundamental rights caused by economic regionalism are both endogenous and exogenous. The claims advanced by such regions can in fact lead to exit threats that exacerbate the relations with the central government and with other parts of the territory, what is known in scholarship as nationalism or secessionism of the rich (*ex multis*, Dalle Mulle 2019). At the same time, the adverse impact on interregional solidarity may negatively affect social cohesion and the enjoyment of fundamental rights in different parts of the territory. It thus needs to be taken seriously. Furthermore, the selfish desire for more autonomy and financial emancipation that lurks behind claims made by economically strong regions seems to collide with the spirit of collaboration and solidarity that should inform the relations among territories and regions of the same state (Arban 2023: 135).

Similar dynamics occur also in situations of unequal distribution of resources, especially when disputes over natural resources are interlinked with ethnic divisions. Here, territories that are richer in natural resources may seek more powers to control the revenues coming from the natural wealth as they feel badly managed by the central government, and/or feel that the central government is using the revenues coming from these resources to the benefit of other regions and to the detriment of the resource-producing territory. In Nigeria, for example, the populations living in the southern littoral states of the area known as Niger Delta complain because most of the revenues coming from the oil and from other natural resources present in that region is taken and administered by the central government and mainly used in the North or elsewhere, thus leaving the South in a condition of significant environmental degradation that puts at serious risk the health of the population living there. Local communities also lament a certain lack of representation and control of their territory, with consequent deprivation of basic environmental rights and a disruption of their traditional economic activities such as fishing and farming due to the extreme exploitation of the area by oil-producing multinational companies acting with the consent and support of the central state (*ex multis* Obi 2009: 193; Obi 2010: 443; Onuoha 2015: 69; Osaghae 1995:

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325). The presence of natural resources can thus be an element of fragmentation that constitutional drafters should consider when allocating powers over resources.

In any event, designing units along economic factors as suggested here raises at least two sets of additional questions. The first is that, when describing the boundaries of SCEs, the territorial or spatial component may be more porous and, as such, more difficult to define. In other words, the exact boundaries of such SCEs may not be clearly identifiable or fixated: they could transcend the territory of already existing units or occupy smaller portions thereof, but they may also fluctuate over time: one solution might be to consider non-territorially defined units (see *infra*). The second problem is that also resource-poor areas (like arid or arctic lands) could just as easily be identified as particular potential units of self-government. Linked to this, is the question of areas or spaces uninhabited by human beings and populated only by animals and plants (like for example natural reserves).[I] For example, in Canada, the arctic territories (Northwest Territories, Yukon and Nunavut) are under federal control. Such extreme territories are often very sparsely if at all populated, and this explains why federal control is at times implemented. The fact that they are sparsely populated also implies that political mobilisation for increased powers may be non-existent, differently from economic regionalism. Furthermore, units should have enough people to supply the required workforce for them to properly function (at least according to Wheare as discussed *supra*); again, this may be a problem in sparsely populated/arid/arctic lands. Nonetheless, they could still be considered as possible units of self-government insofar as there are a set of overlapping interests and concerns that are not shared with resource-rich areas.[II]

To conclude, '[t]he dispersed endowment of resources and industries creates an economic geography that shapes policies' as Bednar puts it (Bednar 2019: 28): consequently, SCEs should be considered as an important element in/of constitutional design.

3.2 Cities and the urban/rural concentration

While in these past few years there has been an increased interest for cities as constitutional actors, the role of urban areas continues to remain at the margins of constitutional law scholarship (Hirschl 2020: 1, 28). In fact, cities are seldom recognised as independent federal subjects and, when that happens, it is often as cities *qua* local governments. In older, classic federations like the United States, Canada or Australia, cities

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have no constitutional personality and remain creatures of the states or provinces. Only when it comes to federal capitals various strategies are adopted. For example, federal districts or federal territories may be created under the exclusive jurisdiction of the federal government, like Washington, DC or Canberra, ACT (Watts 2008: 79). Other times, federal capitals may be given the status of fully-fledged units, as happens with Berlin, Brussels, or Vienna, but capital cities may also fall under the jurisdiction of one, larger unit, like Ottawa (Ontario), or Pretoria (Gauteng) (Watts 2008: 79).

Cities, however, are rapidly emerging as key players domestically and internationally, thanks to their historical relevance and increased economic, political, cultural prominence (Arban 2021: 324). At the same time, as Hirschl observes, urban centres are at the forefront of the fight against poverty, as extensive urbanisation leads to major policy challenges, including environmental protection, public health, and extreme poverty, in addition to creating differences between the centre and the periphery as well as between the urban and the rural (Hirschl 2020: 5). This is true particularly (but not exclusively) for megacities in the Global South, which are spoiled by 'inadequate and dilapidated infrastructure, insufficient housing and sanitation ... vast socio-economic gaps.' (Hirschl 2020: 8).

Megacities, in particular, may display levels of inter-metropolitan inequalities both between the centre and the periphery, but also between neighbouring suburbs. In this regard, Hirschl persuasively shows how large metropolitan areas and megacities may face fiscal inequalities between the different suburbs or neighbourhoods that are not dissimilar from the fiscal unbalances existing between richer and poorer regions and territories in unitary and multilevel systems alike, and briefly sketched above in reference to SCEs (Hirschl 2020: 207): this divide between the centre and the periphery is common to many large cities, to the point that in several Organisation for Economic Co-operation and Development countries income inequality within a metropolitan area may be higher than the national average (Hirschl 2020: 208).

Inter-metropolitan differences, on the other hand, run along the urban/rural axis. This phenomenon may be evident not so much in Europe, where rural areas are quite developed, but especially in large countries in the Global South, where access to basic services (health, education, etc.) significantly decreases when moving away from city centres, as well as in other parts of the Global North, the United States being a case in point. All this, of course, presents risks for social cohesion and for the enjoyment of basic rights.

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Similarly to SCEs, a question that has been asked is whether cities should be considered constitutional or federal units on their own, considering the unique features that characterise them (Hirschl 2020; Arban 2021). Legal scholarship has just started to scratch the surface of this phenomenon, but re-thinking the physical boundaries of units also along the centre-periphery and the urban-rural axes may assist in taming some local tensions.

3.3 Aboriginal, first nations, or indigenous representation

One last example of factor that may be used to guide units' boundaries is represented by aboriginal, indigenous or first nations communities. Public law scholarship has extensively analysed the relationship between such communities and national or local governments (*ex multis*, Gover 2010; Lino 2018; Cook, Lindau 2000). In traditional federations like the United States or Canada, aboriginal communities or indigenous affairs are almost always under the exclusive control of the federal government, something that rarely leaves these communities in a position to fully administer their affairs. Furthermore, because the controlling government is not always interested in developing such territories, tensions emerge between the two groups.

The question thus becomes: would it be worth considering the transformation of aboriginal, first nation or indigenous communities into fully-fledged federal units? My instinctive answer would be in the positive. However, a range of issues might be considered as potential obstacles. A first problem has already been mentioned *supra* in relation to what Miller defines as the homeland approach to the creation of units: it will be recalled that, according to Miller, the homeland approach postulates that 'boundaries should circumscribe pre-existing homelands, where these are identified by reference to the beliefs and actions of the peoples who live on them or aim to do so' (Miller 2016: 44). The problem is that such territorial claims may be at the same time *indeterminate*, because it is often unclear where a group's homeland begins and ends, and *conflictual*, since more than one group may claim as its own territory the same area (Miller 2016: 44). Secondly, and linked to the above, indigenous communities do not constitute a homogeneous group; rather, there can be hundreds of different indigenous communities in a polity, speaking different languages, having different customs, religions, etc., thus representing a tapestry of very diverse communities. And when there are too many groups, the system might not work properly.

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Third, we mentioned *supra* – drawing on Levy – that unit boundaries drawn on ethnicity (of which aboriginal representation may be considered a variant) may slow down mobility and competition among units. Finally, it should also be considered that a common thread linking aboriginal or indigenous communities in various parts of the world is represented by the open wound that is the relationship with the central government, especially regarding issues such as sovereignty, representation, and dispossession (the latter meaning exclusion from the land they were born and that they used, which then led to loss of control over the space). For this reason, the issue is still quite complex. However also in the case of aboriginal, indigenous or first nation communities, the disruption of social cohesion and the impact on the enjoyment of basic rights is often self-evident: indigenous peoples are often left at the margin of societies, and the attempts to mend the relationships with the central government have often failed.

To be sure, some federal constitutions include provisions protecting pre-existing indigenous people and their legal capacity. For example, article 75(17) of the Constitution of Argentina, which spells out the powers of the federal government, includes a federal authority in recognising "the ethnic and cultural pre-existence" of Argentinian indigenous peoples, and guarantee the respect for their identity, their right to bilingualism and intercultural education, to "recognise the legal standing of their communities and the possession and community property over lands they have traditionally occupied". It also assures "their participation in the related administration of their natural resources and of other interests affecting them…" The provision further mandates that provinces may exercise such powers concurrently. Other examples can be drawn from federal states, but the point is that such communities are normally ruled by the federal government (exclusively or concurrently) thus leaving them little autonomy.

To conclude, drawing units' boundaries according to the three factors just illustrated may bring two potentially related benefits: on the one hand, it may allow territories that do not normally enjoy *unit* status to be constitutionally recognised and, on the other hand, it may provide them the autonomy needed to properly cater to the specific needs of local communities because it has implications for how federalism helps addressing emerging challenges.

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4. The unit question and issues of constitutional design and theory

In addition to making specific territories more equipped to respond to 21st century challenges, the unit question also invites to reflect on several issue of constitutional design and constitutional theory. This is the focus of this final part of the contribution.

4.1 Constitutional design

We noted above – drawing from Bednar – that how physical and authority boundaries are designed affects the way a federal system works and fulfills its functions, and such boundaries can aid or abet the capacity of a system to bring security, prosperity, and justice to society (Bednar 2019: 27, 35). Consequently, the first matter of constitutional design that needs to be considered relates to how authority is distributed: in other words, the creation of new units reflecting economic factors and SCEs, cities and urban/rural concentration, and aboriginal/indigenous representations invites constitutional drafters to carefully assess which powers (legislative, but also executive and judicial) should be granted to such units, to allow them to manage local demands more effectively. In distributing authority, asymmetrical solutions could also be considered, for example by locally granting enhanced powers over fiscal matters. Asymmetry however is not always praised as ideal, for the risk of lack of solidarity and other problems that may emerge (*ex multis* Sahadzic 2021): for this reason, fiscal or economic asymmetry needs to be counterbalanced by some other measures at the national level (Arban 2023: 135).

A second issue of constitutional design triggered by the use of new factors in drawing unit boundaries pertains to constitutional change. It would certainly be easier to draw physical boundaries of federal units reflecting the patterns described in this contribution when drafting new constitutions, but it would be much more difficult in established federal systems where changing the constitution is virtually impossible due to the very demanding rules of constitutional change. When it comes to changing the physical boundaries of units, some constitutions allow for boundary changes following specific procedures (Watts 2008: 78), but the question is also one of democratic participation: what would be the proper way to proceed with such changes and who shall decide? Likewise, boundary changes can occur also when the constitution remains the same, they can arise in practice first, and then be

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followed by a constitutional change (Bednar 2019: 35). An alternative solution, which could be applied also when constitutional change is difficult or impossible, is this: instead of creating new geographically demarcated units, units can be drawn non-territorially, along invisible lines, and be demarcated by belonging to a certain group or community. In some countries, like for example Belgium, communities are non-territorial. Likewise, in countries like Nigeria, one of the reasons that political divisions have not worked well is that self-governing communities are impossible to neatly contain within territorial boundaries.[III]

I mentioned democratic participation in the context of changing unit boundaries: in fact, democratic participation is another element of constitutional design that needs to be assessed in a broad sense. For example, the creation of new units elicits the question of how such units will be represented, if at all, at the central level, say, in a federal senate. More generally, as is the case when discussing local governments, a question emerges of how citizens in the territory can participate in local bodies of government.

Finally, certain constitutions, especially in the Global South, have resorted to directive principles to entrench economic-policy directives in their constitutions, which could thus become an element of constitutional design to consider when discussing unit boundaries (Weis 2017: 916). For example, ss 16 et seq of the Nigerian constitution (as part of Chapter II on Fundamental Objectives and Directive Principles of State Policy) target economic development and well-being; article 27(2) of the Sri Lankan constitution (ingrained in Chapter VI on Directive Principle of State Policy and Fundamental Duties) also includes some economic-related objectives. These provisions deal with a range of principles targeting equitable economic development and the welfare of people. Therefore, their potential transformative role and contribution in eradicating poverty, at least in certain regions, cannot be disregarded (Adugna 2017: 29). One major issue with directive principles is that they are rarely justiciable; as such, they can be easily disregarded, thus nullifying their potential for change (Weis 2017: 916; Khaitan 2018: 389).

4.2 Constitutional theory

But reflecting on the physical boundaries of units would allow to contribute also to issues of (federal) constitutional theory more broadly, particularly in relation to constituent power,

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sovereignty, subnational constitutionalism, and loyalty. Such issues will just be briefly outlined here, and not discussed in depth.

For instance: do federal units enjoy constituent power and, if so, in which terms this power differs from constituent power at the national (central) level, and how this would be impacted by the creation of new units following the criteria described here? Similar observations can be made regarding sovereignty and sub-state constitutionalism. Let us first consider sovereignty. In older federal systems, those that emerged from the coming together of previously independent units (as was the case with the United States, Canada, or Australia) it was common to say that sovereignty was split between the federal government and the states or provinces that formed the federation. It could be asked to what extent this idea of split sovereignty could be applicable for example to cities as new constitutional subjects, considering that they do not generally enjoy constitutional status and/or were not previously independent units. Insofar as aboriginal, first nations or indigenous communities, their sovereignty most of the time is still an open wound. Moreover, acknowledging sovereignty to these new units could further lead to discussions on their power to self-determination and/or secession.

Sub-state constitutionalism is another constitutional principle that would be open to further probing. In federalism theory, sub-state constitutionalism is often painted as the power of the sub-units to give themselves a constitution and/or decide for themselves, in autonomy, which institutions are the best fit. Sub-state constitutionalism, however, is a complex topic: for instance, not all federal sub-entities have their own written constitutions (most famously, Canadian provinces have, at most, uncodified constitutions, but similar considerations can be made for South African provinces). To what extent would units like cities, industrial districts or any other of the territorial or spatial instances illustrated in part 2 above enjoy sub-state constitutionalism? Presently, there is only one city that has official status as federated entity, that is Mexico City. It also enjoys a constitution. In Brazil, discussions exist about some alleged municipal constitutionalism, to complement sub-state constitutionalism, but it is a concept that is far from being universally accepted (Popelier et al. 2021).

Finally, the interrelated aspect of loyalty and solidarity. Solidarity is a two-pronged concept. On the one hand, it overlaps with loyalty which, in turn, originates from the *Bundestreue* doctrine, which literally means faith or fidelity to the federal contract. In practical

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terms, it invites both the federal level and the levels of the sub-units to respect each sphere of responsibility and legislation, roles, etc. while at the same time collaborating in the interest of the federation. It also embeds aspirational values such as preserving the peace and unity of the federation, or loyalty to the constitution (Arban 2023a; Arban 2023b). This idea of loyalty is well captured by article 41(1) of the South African constitution, which directly builds on the *Bundestreue* doctrine.[IV] The second prong of solidarity entails a more fiscal or financial dimension, and relates to all those mechanisms – usually referred to as equalisation payments – that help curb the socio-economic differences that exist between different parts or units of the same federation. These tools usually run vertically, from the federal government to the sub-units. A discussion on the unit question along the lines suggested in this contribution would elicit also reflections on issues of loyalty within potential new units carved out following the factors just discussed, including whether it would be possible to have non-territorial unit identity and solidarity/loyalty.

To conclude, a more in-depth conversation on the unit status of SCEs, cities, and aboriginal communities, elicits a thorough consideration of some of the issues of constitutional design and theory just mentioned. The goals or advantages of this exercise would be two-fold. On the one hand, it would offer an opportunity to enrich the doctrinal discussion in constitutional law and federalism theory on some constitutional principles, since it would consider all the theoretical and practical challenges of composite, multi-layered polities. On the other hand, such theoretical engagement might offer responses to dilemmas faced in older federations like the United States, Canada, or Australia, where constitutional amendment or otherwise radical changes are hindered by a tradition of constitutional rigidity.

5. Conclusion

Boundaries are about including but also excluding someone or something. In this essay, I engaged with the unit question in federal systems and argued that we may need to rethink federal units according to new factors (economic factors, cities and urban/rural concentration, and aboriginal/indigenous representation) so as to make federalism more

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responsive to present needs and challenges, something that also has a direct impact on certain issues of constitutional design and theory.

This topic has the potential to be applied both to older federations as well as to more recently formed federal and federal-like systems. It presents some original ideas that allow to depart from older conceptions of the state, and considers the constitutional status of units of subjects of spatial territories that are not usually considered as such. In any event, the sub-state level adopted here can be applied at the state level as well: in fact, if one sub-unit succeed in separating from the main country, it can become a federation on its own.

I have deliberately set the unit question within the theoretical framework of federalism, which is thus conceived in a rather progressive way: in the 21st century, federalism should be more broadly understood not just as sharing powers, but also as a mechanism to empower cities and enhance fundamental rights, especially at local level. At the same time, it could be asked whether federalism has the capacity to accommodate ideas that fall out of an alternative framing of the unit question, or whether federalism theory should be reformulated or left behind in favour of something else.[V]

Certainly, there are complexities both at a normative level and at the level of constitutional design, as illustrated *supra.* It may also be the case that societies are not ready to accept new units. In any event, the discussion on the unit question also highlights the numerous avenues of potential discussion and development of the topic.

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[I] I am grateful to Konrad Lachmayer for this remark.

[II] I am grateful to Lael K. Weis for this remark.

[III] I am grateful to Lael K Weis for this remark.

[IV] Article 41(1) of the South African Constitution provides that '[a]ll spheres of government and all organs of state within each sphere must (a) preserve the peace, national unity and the indivisibility of the Republic; (b) secure the well-being of the people of the Republic; (c) provide effective, transparent, accountable and coherent government for the Republic as a whole; (d) be loyal to the Constitution, the Republic and its people; (e) respect the constitutional status, institutions, powers and functions of government in the other spheres; (f) not assume any power or function except those conferred on them in terms of the Constitution; (g) exercise their powers and perform their functions in a manner that does not encroach on the geographical, functional or institutional integrity of government in another sphere; and (h) co-operate with one another in mutual trust and good faith by (i) fostering friendly relations; (ii) assisting and supporting one another; (iii) informing one another of, and consulting one another on, matters of common interest; (iv) co-ordinating their actions and legislation with one another; (v) adhering to agreed procedures; and (vi) avoiding legal proceedings against one another.'

[v] I am grateful to Lael K Weis for this remark.

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The European Union as a Form of 'Functional Federalism'

by

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Abstract

In this contribution, I shall explore the concept of 'functional federalism' as developed by Peter Hay in his book *Federalism and Supranational Organizations: Patterns for New Legal Structures*, a seminal work that should be rediscovered by scholars interested in EU law.

Keywords

Federalism, Supranationalism, Integration, Court of Justice, European Communities, European Union

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1. Rediscovering What Should Be Considered a Classic

The experiment of the Conference on the Future of Europe[I] seemed to have reawakened the never-dormant federal ambition of the European Union (EU), although, for the time being, there has been no concrete follow up to its forty-nine proposals. The debate on the federal or non-federal nature of the Union is enormous and I make no claim to map here such an interdisciplinary and multidisciplinary discussion (among others, Burgess 1991; Elazar 1998; Hueglin 2000; Castaldi 2007). More modestly, I shall explore the concept of 'functional federalism' as developed by Peter Hay in his book *Federalism and Supranational Organizations: Patterns for New Legal Structures*, a work that represents the first legal analysis of the relationship between supranationalism and federalism.

'Functional federalism' is a formula that could be perceived as an oxymoron. In the past, scholars have defined Monnet's method by relying on the formula of functional federalism to differentiate it from Spinelli's federalism (Mitrany 1950; Chiti-Batelli 1950; Mitrany 1965). Hay gave this concept a legal dimension, and his reflection represents an important starting point for lawyers interested in the EU.

Federalism and Supranational Organizations is a work that could be defined as a classic, but for mysterious reasons, it is almost never cited in the most important essays on this subject (Weiler 1991) or in recent, very interesting contributions on EU federalism (Zglinski 2023; Gentile 2023).

Of course, some important books recognise the importance of this volume or at least cite it (Schütze 2009). Historians have grasped the importance of Hay's thought but have often seen it as secondary in comparison to another giant of European and comparative law, Eric Stein (Boerger 2014: 872). Of course, no one denies the influence Stein had on Hay, but it is possible to point out some autonomous profiles of the latter's thought. By writing this short contribution, I would like to explain why Hay's works on supranational federalism should be considered mandatory reading, in particular, this important volume, which is approaching the sixtieth anniversary of its publication.

Federalism and Supranational Organizations has a simple structure comprised of three parts that, in turn, develop into eight chapters. Chapter one is the introduction and precedes the beginning of the first part of the book. It focuses on framing the legal problems of the concept of integration, which is defined in the very first lines of the book as 'the

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amalgamation of two or more units or of some of their functions. It is a nontechnical, descriptive – often political – concept which emphasizes the process of integration as well as a particular condition or level of integratedness' (Hay 1966: 1). Chapter two opens the first part of the volume (like the book, entitled *Federalism and Supranational Organizations*) and deals with an analysis and critique of the (at that time) current classifications of the European Communities. In this chapter, Hay defines supranationalism as a 'political quality, rather than a power or a right. It does not depend on express stipulation, but follows from powers and functions actually accorded' (Hay 1966: 30). Chapter three develops the concept of functional federalism, and Hay comes to terms with the ambiguous distinction between federation and confederation in comparative studies. Hay does not fail to refer to national law to develop the key concepts of his reasoning, and he defined the European Communities as 'limited federations to the extent of their sovereign powers' (Hay 1966: 89). However, federations are not the only manifestations of federalism, as he immediately clarifies on the same page, which is why 'the task is therefore to identify evidence of federalism, regardless of the institutional form' (Hay 1966: 89-90).

Chapter four is devoted to the jurisdiction of the Court of Justice (ECJ) and insists on the federal potential of Article (at that time) 177 of the EEC Treaty governing the preliminary ruling mechanism. These considerations on the relationship between national courts and the Court of Luxembourg pave the way for the fifth chapter, which is devoted to the relationship between Community and national law. On these pages, *Van Gend en Loos*[II] and *Costa Enel*[III] are analysed in detail and the principle of primacy ('supremacy', as he called it, relying on the federal analogy) is seen by Hay as a confirmation of the 'assumption of a transfer of sovereign powers to the Community' (Hay 1966: 181). Part two is entitled 'Accommodating Supranationalism and National Constitutional Law' and opens with Chapter six. This chapter confirms the importance of comparative law in Hay's research because it focuses on US constitutional law, which is seen as an important laboratory of federal techniques and concepts. As the author immediately makes clear, 'the United States is not at present a member of any "supranational" international organization…An analysis of U.S. law will be particularly useful because its own federal character also permits considerations of the relation of an internally federal state and its constituents to the new regional federal structure' (Hay 1966: 205). Chapter seven proposes an in-depth view of a case study, that of German co-constitutional law in its relation to EU law. This is not a coincidence. Germany has a

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federal system (even though the new Basic Law had only recently come into force when the book was written) and the author, also for biographical reasons (Boerger 2014: 872), was very familiar with the German legal system. These pages also point out possible difficulties in the coordination between legal systems that would later emerge in the 1970s. Part three is entitled 'Conclusions and Outlook' and comprises Chapter eight devoted to 'Significance and Problems of Supranational Organizations'. It revolves around two questions. The first question has to do with the consequences of the emergence of a supranational organisation in a context still dominated by the dichotomy of national law versus international law. The second question is in retrospect perhaps even more interesting: 'What is its effect on the preservation of democratic values as developed by national constituent states and of the manner in which these values are secured, for instance, by constitutionalism?' (Hay 1966: 299). In these pages, the author truly anticipates some of the burning issues that characterise the current phase of the integration process, including potential tensions with national constitutionalism, challenges related to the democratisation of Communities and challenges related to the emergence of a supranational rule of law.

Having recalled the structure of the volume, in the following pages I will focus on the contribution of these reflections to European legal studies.

2. Peter Hay's Contribution to Comparative Supranational Studies

As has already been seen, Hay wrote in the sixties of certain 'federalizing features' (Hay 1968) of Community law and contributed to the spread of a comparative language, which would then be used by other scholars interested in the legal implications of the integration process. A very good example is given by the *Integration through Law* multivolume project, edited by Cappelletti, Seccombe and Weiler (Cappelletti, Weiler, Seccombe 1986), an initiative that gathered many American and European authors in order to compare American and European federalism and to study the Community integration process through the federal lens. In the words of Cappelletti, Seccombe and Weiler, the *Integration Through Law* scholarship was 'characterised as a highly pluralistic research endeavour… the product of the efforts of close to forty contributors from many countries in three continents, with almost every contribution being, in its turn, the joint product of a team' (Cappelletti, Weiler, Seccombe 1986: 5).

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Building upon these premises, the authors explored the connection between federalism and integration, seen as 'twin concepts' (Cappelletti, Weiler, Seccombe 1986: 15). Their philosophy was inspired by the comparative approach understood as a third way; that is, different from both legal positivism and natural law. In their view, comparison serves as a laboratory that allows the test of theoretical hypotheses that need to be verified. Weiler himself (Weiler 1991; and Weiler, 2001, among others) used the conceptual and terminological apparatus of federalism in his works while stressing that the EU is not a federation. On another occasion, Weiler wrote that 'the Community is not destined to become another America or indeed a federal state. But I am convinced that the relevance of the federal experience to Europe (and the European experience to any novel thinking about federalism in the United States and other federations) will become increasingly recognized' (Weiler 1984: 1161).

In studying the relationship between federalism and integration, Hay again became a forerunner. In his mind, supranationalism had to do with federalism because both concepts are based on a transfer of power from the state to a higher entity. In presenting this idea, Hay endorsed a dynamic notion of federalism without paying too much attention to the institutional form, distinguishing in this way, 'the federal elements from the international elements':

> "Federal" is therefore used in an adjectival sense: it attaches to a particular function exercised by the organization and is used to denote, as to that function, a hierarchical relationship between the Communities and their members. (Hay 1966: 90)

By relying on 'functional federalism' to describe the activity of the Court of Justice and the relationship between national and supranational law, Hay used an approach that resembles that adopted by Carl J. Friedrich. According to Friedrich, studying federalism means more than only studying federal states/federations, and his understanding of the federalising process overcomes the distinction between 'federal state' (*Bundestaat*) and 'confederation' (*Staatenbund*), as Friedrich explicitly argued in his works:

> The American concept, at this point, may be called the discovery of the "federal state", because that was the term which the Germans and others attached to it when they contrasted it to a

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> confederation of states. Actually, no such dichotomy was ever faced by the master builders of the American system (Friedrich 1968: 18).

Friedrich also argued that 'federalism should not be considered as a static pattern, as a fixed and precise term of division of powers between central and component authorities. Instead, federalism should be seen as the process of federalizing a political community' (Friedrich 1962: 514). This came as no surprise since Friedrich was part of the same intellectual atmosphere shared by other scholars at that time, including many other commentators of Community integration based in the US. Friedrich himself was familiar with Hay's work because he also wrote a review of his volume, which was later published in the *American Journal of International Law* in 1967 (Friedrich 1967).

The book review was mostly descriptive and short, but it showed appreciation for the work, defining it as a 'very interesting and well documented study' (Friedric 1967: 636). Of course, there were also important differences between these two authors that were primarily related to the concept of sovereignty. As we have seen, Hay does not renounce the notion of sovereignty in his analysis, whereas for Friedrich, 'no sovereign can exist in a federal system; autonomy and sovereignty exclude each other in such a political order' (Friedrich 1968: 8). Based on this premise, in his works Friedrich heavily criticised the classical vision of federalism, which is rooted in a very static approach.

Returning to Hay, other evidence of the impact of the comparative language he used can also be found in the debate concerning the effects of the Charter of Fundamental Rights of the European Union. Some authors in writing of the possible centralisation effect caused by the Charter evoked the concept of incorporation as experienced in the US after the entry into force of the Fourteenth Amendment (Eeckhout 2002).

Another terminological and conceptual borrowing refers to the 'implied powers doctrine', which was intended by American scholars to mean the expansion of federal power and the progressive centralisation of federal power[IV] even in areas not expressly mentioned by the US Constitution but necessary to achieve the federal objectives (also in light of the 'necessary and proper' clause[V]). Scholars have deployed the same concept formula to describe the ECJ activity despite the differences existing between the European and American contexts (Weiler 1991: 2415).

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Hay has been one of the first legal scholars to spread the word about the importance of a comparative approach in the study of the European integration process. In his *Federalism and Supranational Organizations*, he wrote that 'one of the important reasons for the success of European integration is the organizational form which it adopted for the three "European Communities". Described as "supranational" ... these organizations possess both independence from and power over their constituent states to a degree suggesting the emergence of a federal hierarchy' (Hay 1966: 4).

Even earlier, in 1963, in an article published in the *American Journal of Comparative Law*, Hay referred to an 'imperfect' federalism, stating that imperfect federalism that 'derives from the limited economic federalism of the organization need not change the characterization, especially since the developing case law may correct imperfection' (Hay 1963: 24).

Perhaps the most important contribution by Hay concerns his work on the very concept of 'supranationalism' from a legal point of view. 'Supranational' was the word used in the first version of the European Coal and Steel Community (ECSC) Treaty; for example, it is possible to find reference to supranationalism in Article 9 of the ECSC Treaty, which is understood as independence from national governments:

> The members of the High Authority shall exercise their functions in complete independence, in the general interest of the Community. In the fulfillment of their duties, they shall neither solicit nor accept instructions from any government or from any organization. They will abstain from all conduct incompatible with the supranational character of their functions.
> Each member State agrees to respect this supranational character and to make no effort to influence the members of the High Authority in the execution of their duties.

Another key provision was represented by Article 13 of the ECSC Treaty, which provided for majority rule for the activity of the High Authority.[VI] These two provisions were taken into account by Hay, and the shift from unanimity to majority and the independence from national governments were reflected in two of the six requirements he identified in defining the legal concept of supranationalism:

> 1) "Independence of the organization and of its institutions from the member states';
> 2) '…the ability of an organization to bind its member states by majority or weighted majority vote';

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> 3)'…the direct effect of law emanating from the organization on natural and legal persons in the member states, i.e., a binding effect without implementation by national legislative organs';
> 4)'…supranationalism, at least in its present European form, involves a transfer of sovereign powers from the member states to the organization';
> 5) '…supranationalism depends on the extent of functions, powers, and jurisdiction attributed to the organization';
> 6)'Finally, supranationalism has been defined in terms of the institutions with which the European Communities have been equipped. This suggestion does not draw support from the existence of a Council and a Commission because all international organizations which are more than mere treaty arrangements, alliances, or associations, must necessarily have policy-making or administrative organs or both (Hay 1966: 31-33).

Of course, Hay was influenced by other scholars, and he was Eric Stein's research assistant in 1958 (Boerger 2014: 872). Stein was probably the pioneer of the comparative approach in European Studies, as he wrote an important article in 1955 on the case law of the ECJ entitled 'The European Coal and Steel Community: The Beginning of Its Judicial Process', which was published in the *Columbia Law Review* (Stein 1955). Stein was much more than a lawyer; he was a true European intellectual. He organised two important conferences on the relationship between international organisations and Member States in Bellagio[VII] and then launched a comparative project on the US and the EU. He established a transnational network of scholars and officials, as shown by his important friendship with Michel Gaudet from the Legal Service of the ECSC High Authority.[VIII]

As Weiler put 'he has used this distance to maintain a constant overall synthetic view of the Community' (Weiler 1984: 1161). His essays about Europe and America in a comparative perspective have been collected in the book *Thoughts from a Bridge: A Retrospective of Writings on New Europe and American Federalism*. The first part of this work contains the article *Lawyers, Judges and the Making of a Transnational Constitution,* which became a classic of European Studies (Stein 1981: 1).

Hay and Stein cooperated a lot, indeed they edited together *Cases and Materials on the Law and Institutions of the Atlantic Community*, a two-volume textbook which 'constituted the first attempt to present to American students the new European developments, and to showcase interactions between regional and universal institutions' (Boerger 2014).

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Together, these scholars played a crucial intellectual role because their resort to the federal categories, which were borrowed from American constitutional law,[IX] was essential to describe the process of emancipation of Community law from the logic of international law. To catch such a transformation from public international law into something resembling a federal entity (still partial in *Van Gend en Loos*, in which the reference to international law is still present), they also introduced the constitutional jargon in European Studies, as confirmed by the very well-known incipit that opens the most famous article by Eric Stein in which federalisation and constitutionalisation are seen as two sides of the same coin:

> Tucked away in the fairyland Duchy of Luxembourg and blessed, until recently, with the benign neglect by the powers that be and the mass media, the Court of Justice of the European Communities has fashioned a constitutional framework for a federal-type structure in Europe (Stein 1981: 1).

These words will influence generations of scholars and, at the same time, confirm the court-centred approach that has characterised EU law studies for many years.

3. What is left of Hay's functional federalism?

Many things have changed with the passage of almost sixty years since the publication of *Federalism and Supranational Organisations*, but the amazing aspect is that it is truly a mine of insights for all scholars interested in EU law. I will try to emphasise the relevance of these considerations by looking at some aspects that seem to me still relevant today, touching on the issues of direct effect and primacy, convergence in terms of values and the relationship between supranationalism and intergovernmentalism.

The pillars of supranationalism are still present and have been strengthened: the scope of the majority principle has been extended in the EU lawmaking process, the Commission has strengthened its independence over the years and has recently even attempted – with the Treaties unchanged – to change its nature. I am referring to the notorious debate on the *Spitzenkandidat*, which has not yet produced the desired results but is brought up again and again in the European elections. At the same time, the European Union has never renounced its intergovernmental component, which has experienced a new youth with the emergence

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of different crises (such as financial and political). For instance, the financial crisis has opened a season of evident decline for European mega-constitutional politics. The need to deal with contingent emergencies has led to the end of grand designs for reform (with the exception, perhaps, of Macron's vision[X]) and the emergence of a managerial approach aimed at responding in a timely manner to urgent issues.

It has also produced a policy of austerity that has led to much criticism and the casting of further blame on the European Union, and which has made evident the limits of an – unfortunately still weak – interstate solidarity that exploded in the migration crisis. The financial crisis also confirmed the existence of a different British political agenda, and the nation did not agree to sign the Fiscal Compact. As is well known, this difference of views (among other things) later led to Brexit.

In addition, it fostered the emergence of sovereigntist populisms (De Spiegeleire, Skinner, Sweijs 2017) that have ended up challenging the values of the Union as set out in Article 2 TEU (Spieker 2023).

Finally, the financial crisis marked a revival of intergovernmental dynamics and, according to some, a constitutional mutation of the Union (Dawson, de Witte 2013).

The constitutional ambitions of the EU suffered a severe blow with the economic crisis, leading many scholars to argue for a radical change in the structure of the European order.

In particular, the new economic governance that emerged in those years with the use of a combination of acts formally under EU law and agreements under public international law triggered a very interesting debate on the fate of supranationalism. The contents of all these measures have been extensively analysed by scholars,[XI] but the aim of this contribution does not include an in-depth exploration of this debate.

Within the new European economic governance, the asymmetric dimension of the EU has been amplified by the nature of the instruments employed since some of the introduced measures have been adopted out of the EU law framework, namely via the conclusion of international agreements. This factor has permitted the creation of a set of rules shared by a group of the EU Member States in the form of a public international law treaty.

As Bruno de Witte has pointed out, this 'turn to international treaties' (de Witte 2013) is not new; since even in other cases, this path has been followed.[XII]

The first reaction to this trend may be to interpret it as a return to intergovernmentalism and as a loss in terms of supranationalism. But as Fabbrini pointed out, the use of

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differentiated agreements among members of a union is known even in federal experiences.[XIII] The Treaty on Stability, Coordination and Governance in the Economic and Monetary Union (TSCG) was the solution chosen to challenge the crisis after the evaluation of a list of alternatives, first of all, the revision of the EU Treaties, that is, the Treaty on the Functioning of the EU (TFEU) and the Treaty on the European Union (TEU). Another option considered was the use of the enhanced cooperation as regulated under the EU Treaties.[XIV] This path was suggested by some leading scholars as the way to overcome many of the EU's difficulties (Piris 2011). As mentioned, this was not the first time in which the international law instruments have been employed to face a supranational issue, even in the field of the European economic governance.[XV] However, scholars do not see a common strategy behind this trend; rather, this path was chosen because of the flexibility[XVI] that it can offer:

> Basically, in the case of the EFSF and of the ESM, EU law did not offer any suitable instruments because of the insufficiency of the EU's financial resources, a problem that can be remedied only in the long run, but not in the immediate context of the unfolding euro crisis. As for the Fiscal Compact, one could say that the states accidentally stumbled into the conclusion of a separate international agreement, for a mix of reasons including the rigidity of the TFEU amendment process, the belief (especially on the German side) in the symbolic power of a treaty, and also – admittedly – the wish to avoid going through the cumbersome and lengthy procedures of EU legislation (de Witte 2013).

The debate is far from over, and the pandemic crisis and the crisis linked to Russian aggression against Ukraine have given rise to new developments and even prompted talk of a Hamiltonian moment for the European Union. Regardless of the nature of the Next Generation EU as a Hamiltonian moment or not, it has certainly offered important arguments to confirm that it is far from being a technocratic depoliticising instrument and, thus, that the EU is actually capable of fuelling and enhancing important political conflicts even at the supranational level. This has been confirmed by empirical research looking at the negotiations behind the Next Generation EU (de La Porte, Dagnis Jensen 2021), but evidence of this can also be seen in the recent disagreements between the Parliament and the Commission with reference to the choices regarding the externalisation of the migration crisis and the problematic migrant deal with Tunisia (Sorgi 2023) or with reference to the

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choices made by the Commission concerning the Rule of Law crisis (Hanke Vela, Chiappa 2024). This is also to a certain extent good news because it means that politics is alive at the supranational level and the hope is that the EU can complete its democratisation process in this sense. Having reasoned about the relationship between supranationalism and intergovernmentalism, I can turn my gaze to two other pillars of the concept of supranationalism developed by Hay, namely direct effect and the primacy of Union law. The nature of EU law primacy has changed over the years, and the idea of primacy devised in *Costa Enel* is different from the absolute version of it endorsed by the ECJ in *Internationale Handelsgesellschaft,*[XVII] which famously triggered a reaction at the national level, thereby contributing to the explosion of the first constitutional conflicts (understood as conflicts between EU law primacy and constitutional supremacy) in the seventies. The challenges posed by national constitutional court judgments, such as the *Frontini*[XVIII] *and the Solange cases,*[XIX] *have certainly contributed to changing the original understanding of primacy. Today, primacy* faces great challenges that range from the Rule of Law (ROL) crisis to the identity politics of illiberal populists in Hungary and elsewhere to the entry into force of the Lisbon Treaty with the new version of Article 4, which expressly stipulates the EU's duty to respect the 'national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government' (Article 4.2 TEU). As Faraguna has argued, this provision has been used more by national constitutional courts than by the Court of Justice of the EU (Faraguna 2021), and this has in some cases created abusive interpretation of this clause (Scholtes 2023).

How should primacy be adapted in this context? Should we call for a return to an absolute concept of primacy to deal with these phenomena? Should the Court of Justice give up national identity and Article 4.2 TEU? I do not think so, as I have tried to argue elsewhere (Martinico 2021). National identity is not a bad thing per se, especially if used appropriately. In fact, avoiding the use of Article 4.2 risks leaving grounds for illiberal populists who would monopolise the identity argument, as has already happened, for instance, in some decisions of the Hungarian Constitutional Court.[XX] In some cases, these courts have used 4.2 TEU as if it were decontextualised from sincere cooperation under Article 4.3 to justify the violation of values and fundamental rights principles under Articles 2 and 6 TEU.[XXI] This is not acceptable, but avoiding the reference to national identity or claiming to interpret it without taking into account what national constitutional courts have said (at least when they duly

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refer to preliminary references using Article 267 TFEU) would be a boomerang that could end up with a loss of the cooperation of national constitutional courts, especially of those courts that have acted in good faith, respecting sincere cooperation as requested by Article 4.3 TEU.

Direct effect has also changed its nature over the years, as Robin-Oliver argued (Robin-Oliver 2014): at first, it was a feature of those norms capable of passing the *Van Gend en Loos* test, but later, it became something different, especially in cases in which directives were at stake. In these cases involving directives, the norms have been systematically denied horizontal direct effect regardless of their characteristics. This 'no horizontal direct effect rule' has created inconsistencies in the case law of the CJEU and issues in the protection of fundamental rights (Gennusa 2023). The CJEU has tried to deal with this by devising what AG Bot called 'palliatives' in his Opinion in the *Kücükdeveci* case.[XXII] This is not enough, and sometimes these palliatives produce shortcomings. It is sufficient to recall the *Mangold* case[XXIII] and the tension created at the national level by this doctrine,[XXIV] not to mention the uncertainty concerning the case law in which the horizontal direct effect is based on the combination of directives and the provisions of the Charter of Fundamental Rights.[XXV]

If the EU already has federal characteristics, then beyond the question of its new institutional and political form, as Hay argued almost sixty years ago, these features need to be readjusted in light of the progressive importance acquired by fundamental rights and other challenges encountered by the EU. In this respect, while some of the statements made in that book may inevitably bear the weight of years, the final lines of Hay's book are of rare foresight:

> European integration has provided a remarkable legal structure. It is useful both as a model for new ways of multistate cooperation an association and as a highly sophisticated application of federal relational concepts to an institutional framework for regional association. But especially in the case of regional association (as distinguished from functional supranational cooperation), what goals provide the "will to integrate"; what is the common political, philosophical, and ethical heritage (homogeneity) which creates common value goals; and what minimum guarantees constitute the "rule of law" which is indispensable, even when balanced against the larger regional interests? All of these questions are beyond purely legal analysis; they require comparative and interdisciplinary evaluation of the common fond of law. All are vital: if the

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> trend of necessity is toward multistate cooperation, national issues of "due process" must find their reflection in a multistate "rule of law" (Hay 1966: 307-308).

The references made to a 'multistate rule of law', many years before the delivery of *Les Verts* of the Court of Justice (which stated that 'the European Economic Community is a community based on the rule of law' [XXVI]), to the need for structural compatibility (in terms of homogeneity of values) between the EU and its Member States are issues at the heart of the current political agenda, as confirmed by the important novelty represented by the approval of Regulation 2020/2092 (the so-called Conditionality Regulation)[XXVII] that allows the EU to take measures to protect the budget in case of rule-of-law violations at a national level that threaten EU financial interests. Do these developments go in the direction of a progressive federalisation of the Union? Conditionality, often described as a Trojan horse by which the EU threatens sovereign choices, actually belongs to the history of federal systems (Baraggia 2023). Far from being an instrument to be incensed by or to condemn a priori, conditionality is an instrument of constitutional law that can and must be rationalised, which includes consideration of past mistakes made by the EU and its Member States. The attempt to link 'money to values' (Baraggia, Bonelli 2022), as has been written, is part of a necessary strategy to overcome the dangerous democratic retrogression in some EU Member States.

The approval of measures in Hungary and elsewhere that attack the independence of the judiciary, centralise the power of the executives in office, restrict the freedom of the press and close universities represents a threat to the EU values enshrined in Article 2 TEU. Article 7 TEU provides for the possibility of sanctions in accordance with a complicated procedure in cases of serious and persistent breaches of the Article 2 TEU foundational values. And although Article 7 TEU has proven ineffective so far, the CJEU has managed to remedy this by adapting the infringement procedure to comply with cases of violations of values. The entry into force of the Conditionality Regulation and the recent case law of the CJEU in this respect[XXVIII] represent the maximum effort made by the EU to act as an antidote against illiberal populism. The debate on how to guarantee the values of Article 2 confirms another of Hay's insights, this time concerning the role of homogeneity clauses in classical federal systems, starting with the experience of the Republican Guarantee Clause in the United States.[XXIX] Far from being exhausted, the doctrinal debate on the federal nature of the Union is fuelled by the innovations introduced to address crises in the integration process.

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For all these reasons, if the concept of federalism today has ceased to be an 'f-word' (Puder 2003: 1583) in European studies, we owe it to the work of scholars like Peter Hay, who at the dawn of the European integration process and writing from across the ocean, inaugurated a new strand of studies without being afraid to use the language and tools of comparative analysis.

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[I]https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/new-push-european-democracy/conference-future-europe_en. On the conference, see Blokker 2022.

[II] ECJ, 26-62, NV Algemene Transport- en Expeditie Onderneming van Gend & Loos, ECLI:EU:C:1963:1.

[III] ECJ, Case 6-64, Flaminio Costa v. E.N.E.L., ECLI:EU:C:1964:66.

[IV]See Section 8, Article I of the US Constitution.

[V] 'The Congress shall have Power ... To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof' (Article I, Section 8, Clause 18).

[VI] Article 13 ECSC Treaty: 'The High Authority shall act by vote of a majority of its membership. Its quorum shall be fixed by its rules of procedure. However, this quorum must be greater than one half of its membership'.

[VII] A series of conferences organised in Italy between 1965 and 1967.

[VIII] See the work by Boerger (Boerger 2014: 866) on the relationship between Gaudet and Stein.

[IX] 'We must stop measuring the EC in terms of incipient federation. American lawyers and political scientists are quite compulsive about this. I plead guilty with everyone. . . . The federal perspective automatically leads to wrong questions about the Court of Justice. Most Europeans do not know what we are talking about when we speak of the federalizing function of the Court. I entirely agree that the Court of Justice is not the most important organ in the integration process and that its role in Community policy-making has been limited. Letter from Eric Stein to Stuart Scheingold (8 March 1962)' (Boerger 2014: 882).

[X] See the launch of the Conference on the Future of Europe, https://futureu.europa.eu/

[XI] See, for instance, the contributions included in de Witte, Héritier, Trechsel 2013.

[XII] 'And yet, what happened then, and what happened later when the ESM Treaty and the Fiscal Compact were concluded by groups of Member States, seems less shocking when seen within a broader evolutionary perspective of European law. In fact, there are numerous earlier examples of international treaties concluded between groups of member states of the EU. They have concluded, ever since the 1950's, agreements in areas such as tax law, environmental protection, defence, culture and education. The most prominent example of an inter se agreement (that is: an agreement between some but not all the EU member states) was the Schengen cooperation regime, composed of a first Agreement signed in 1985, and an implementing Convention adopted in 1990. The Schengen instruments were expressly designed as interim arrangements in preparation of a final regime at the level of the European Community, rather than as a rival co-operation regime. The same was true for the Social Policy Agreement concluded, as a separate part of the Maastricht Final Act, between 11 of the then 12 member states; and for the Prüm Convention later on. In the course of the evolution of European integration, the importance of international agreements between the EU member states has declined' (de Witte 2013).

[XIII] 'As the comparative analysis makes clear, also the US Constitution is endowed with an instrument – the "compact clause" – which allows states to pursue flexible and differentiated action within the American Union. Yet, the comparison reveals that this instrument is not subject to a specific finality and has consequently been utilized in the US for a wide variety of purposes having to do generally with interstate adjustments. In the EU context, instead, it emerges that the function of the enhanced cooperation is essentially circumscribed to ensuring multispeed integration in the EU. The identification of a clear pro-integrationist ratio in the structure of the enhanced cooperation mechanism, however, has important implications, both for the kind of cooperation that can be launched by the states and for the role of the EU institutions in policing the constraints

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that surround its use' (Fabbrini 2012).
[XIV] This is not an exhaustive list; authors like Beukers, for instance, identified a more complex scenario (Beukers 2013).
[XV] For instance, the Treaty Establishing the European Stability Mechanism was signed by the Member States of the Eurozone to create the European Stability Mechanism (ESM). http://europa.eu/rapid/press-release_DOC-12-3_en.htm
[XVI] 'Separate international agreements, which do not involve an amendment of the TEU and TFEU, can define alternative requirements for their entry into force. Not only can such agreements be concluded between less than all the EU states, but they can also provide for their entry into force even if not all the signatories are able to ratify. The Fiscal Compact offers a spectacular example of this flexibility in that it provided that the treaty would enter into force if ratified by merely 12 of the 25 signatory states, provided that those 12 are all part of the euro area. The fact that the authors of the Fiscal Compact moved decidedly away from the condition of universal ratification for its entry into force has created a 'ratification game' which is very different from that applying to amendment of the European treaties, where the rule of unanimous ratification gives a strong veto position to each individual country' (de Witte 2013).
[XVII] ECJ, Case 11-70, *Internationale Handelsgesellschaft*, ECLI:EU:C:1970:114.
[XVIII] Italian Constitutional Court, *Frontini v Ministero delle Finanze*, 183/73 [1974] 2 CMLR 372 ().
[XIX] *Solange I-Beschluß*, BVerfGE 37, 271; 2 BvL 52/71; *Solange II, Re Wuensche Handelsgesellschaft*, BVerfG, 22 October 1986, [1987] 3 CMLR 225265.
[XX] Hungarian Constitutional Court, Decision 22/2016, https://hunconcourt.hu/dontes/decision-22-2016-on-joint-excercise-of-competences-with-the-eu/
[XXI] Hungarian Constitutional Court, Decision 22/2016, https://hunconcourt.hu/dontes/decision-22-2016-on-joint-excercise-of-competences-with-the-eu/, par. 62-66.
[XXII] 'The Court compensated for that firm refusal to accept a horizontal direct effect of directives by pointing to alternative solutions capable of giving satisfaction to an individual who considers himself wronged by the fact that a directive has not been transposed or has been transposed incorrectly.
The first palliative for the lack of horizontal direct effect of directives is the obligation on national courts to interpret national law, as far as possible, in the light of the wording and the purpose of the directive concerned in order to achieve the result sought by the directive. (18) The principle that national law must be interpreted in conformity with Community law requires national courts to do whatever lies within their jurisdiction, taking the whole body of domestic law into consideration and applying the interpretative methods recognised by domestic law, with a view to ensuring that the directive in question is fully effective and achieving an outcome consistent with the objective pursued by it.
In Pfeiffer and Others , the Court set out the procedure to be followed by the national courts in regard to a dispute between private parties, thereby reducing a little bit further the boundary between the right to rely on an interpretation in conformity with Community law and the right to rely on a directive in order to have national law which is not in conformity with Community law disapplied. The Court stated that if the application of interpretative methods recognised by national law enables, in certain circumstances, a provision of domestic law to be construed in such a way as to avoid conflict with another rule of domestic law, or the scope of that provision to be restricted to that end by applying it only in so far as it is compatible with the rule concerned, the national court is bound to use those methods in order to achieve the result sought by the directive.
It is agreed, however, that the obligation on a national court to refer to the content of a directive when interpreting and applying the relevant rules of domestic law is limited by general principles of law, particularly those of legal certainty and non-retroactivity, and that obligation cannot serve as the basis for an interpretation of national law contra legem.
The second palliative for the lack of horizontal direct effect of directives may be brought into play precisely in cases where the result required by a directive cannot be achieved by interpretation. Community law requires the Member States to make good damage caused to individuals through failure to transpose the directive, provided that three conditions are fulfilled. First, the purpose of the directive in question must be to grant rights to individuals. Second, it must be possible to identify the content of those rights on the basis of the provisions of the directive. Finally, there must be a causal link between the breach of the Member State's obligation and the damage suffered.
Finally, the third palliative consists in disconnecting the horizontal direct effect of directives from the right to plead them to exclude contrary national law in proceedings between private parties. That solution holds that, although directives cannot be substituted for a lack of national law or defective national law in order to impose obligations directly on private individuals, they can at least be relied on to exclude national law contrary to the directive, and only national law cleansed of the provisions contrary to the directive is applied by the national

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court in resolving a dispute between private parties.
That disconnection of the 'substitution' direct effect of directives from the right to plead them in exclusion has, however, never been accepted by the Court in a general and explicit way. At the moment, therefore, the scope of this third palliative remains very limited.
In sum, the current line of case-law concerning the effect of directives in proceedings between private parties is as follows. The Court continues to oppose recognition of a horizontal direct effect of directives and seems to consider that the two principal palliatives represented by the obligation to interpret national legislation in conformity with Community law and the liability of the Member States for infringements of Community law are, in most cases, sufficient both to ensure the full effectiveness of directives and to give redress to individuals who consider themselves wronged by conduct amounting to fault on the part of the Member States'. Opinion of Mr Advocate General Bot delivered on 7 July 2009. *Seda Kücükdeveci v Swedex GmbH & Co. KG*, ECLI:EU:C:2009:429, par. 58-65.
[XXIII] ECJ, Case C-144/04, Mangold, ECLI:EU:C:2005:709.
[XXIV] For instance, the decision of the Danish Supreme Court, *Dansk Industri (DI) acting for Ajos A/S v. The estate left by A*, case no. 15/2014.
[XXV] ECJ, Case C-30/19, *Diskrimineringsombudsmannen Contro Braathens Regional Aviation AB*.
[XXVI] ECJ, Case 294/83, *Parti écologiste 'Les Verts' v European Parliament*, ECLI:EU:C:1986:166, par. 23.
[XXVII] Regulation (EU, Euratom) 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget. https://eur-lex.europa.eu/eli/reg/2020/2092/oj
[XXVIII] ECJ, Case C-156/21, *Hungary v European Parliament and Council of the European Union*, ECLI:EU:C:2022:97 and Case C-157/21, *Poland v Parliament and Council*.
[XXVIII] Article IV , section IV US Constitution: 'The United States shall guarantee to every state in this union a republican form of government, and shall protect each of them against invasion; and on application of the legislature, or of the executive (when the legislature cannot be convened) against domestic violence'.

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Two Western Canadian Provinces Asserting Provincial Sovereignty Seek to Challenge the Fundamentals of Canadian Constitutional Democracy and Order

by

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Abstract

This article analyses how two western Canadian provinces, Alberta and Saskatchewan, have used the concept of provincial sovereignty to argue for a form of autonomy that violates the fundamentals of Canadian constitutional democracy and the rule of law. A former secessionist government in Quebec had used the sovereignty concept to claim a right to unilaterally declare independence regardless of the norms of the Canadian constitution. The Supreme Court of Canada, in a landmark decision in 1999 rejected the claim as a violation of the fundamental unwritten principles of the Canadian constitution. The two western provinces are using the provincial form of sovereignty to assert maximum autonomy in key areas of their economy and society in which they share jurisdiction with the central government. This article argues that these laws are being used to win or keep political power or to get the federal government to limit their legitimate roles in key areas. Finally, the article will discuss how the Alberta Sovereignty Act is triggering imitation by the US State of Utah and potentially dangerous consequences of such sovereignty laws.

Keywords

Canadian Constitution; Autonomy of Provinces; Sovereignty; rule of law; independence of the judiciary; Supreme Court of Canada

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1. Introduction

This article focuses on determining what are the real motivations, both political and legal, behind seemingly serious challenges to the Canadian rule of law and constitutional order from two Western Canadian provinces. In some regards, these challenges seemed similar to those from the formerly secessionist government in the province of Quebec.

The first two sections will focus primarily on the political motivations behind the proposed Alberta Sovereignty Act, while the following two sections will focus on challenges from the actual provisions of the Act, once introduced and then applied to a contested area of federal regulation. The examination of these actual provisions could reveal there less a threat to the Canadian constitution and more a form of seeking a stronger bargaining or leverage position in relations with the federal powers and government. However, the analysis will examine both the deleterious consequences for the Canadian constitutional order and the rule of law from the threats by the Alberta government to use the unconstitutional parts of the law as a form of bargaining or leverage against the federal powers and jurisdiction.

One such political consequence of Alberta's Sovereignty Act was the neighbouring province of Saskatchewan looked to be imitating its neighbouring province with the introduction of what seemed to be an equally unconstitutional law titled 'The Saskatchewan First Act'. This article in the sixth section also researches whether this was another attempt to create a more creative form of bargaining and leverage based on clearly unconstitutional provisions in the Act. However, like many parts of the Alberta Sovereignty Act, some of the most contentious provisions in the Saskatchewan law would most likely be ruled invalid by the Canadian Supreme Court based on its previous rulings. There are also challenges to both the Alberta and Saskatchewan laws by the indigenous peoples in both provinces who are claiming their own sovereignty rights have been violated by such laws.

Finally, the conclusion will discuss how the Alberta Sovereignty Act and its constitution challenging approach has been an incentive to the American State of Utah, and perhaps others, to follow suit with a similarly dubious state law. The conclusion then warns of the political and legally deleterious consequences of the implementation of such clearly unconstitutional laws or actions by subnational units of federal states. It focuses on the actions of the American State of Texas where state officials and agencies are ignoring and

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violating federal powers and jurisdiction in the immigration and refugee area with dire consequences for the most vulnerable.

2. The provincial politics leading to the proposed Alberta Sovereignty Act

In June of 2022, Danielle Smith, the newly elected Premier of Canada's energy rich province, Alberta announced she would introduce in the Albert legislature, what she termed 'The Alberta Sovereignty Act'.

It would be based on a political document called the 'Free Alberta Strategy'[I] that she and the party promoted during the election.The threat of introducing such a popular but constitutionally dubious law during the election led to her politically right-wing party, the United Conservative Party (UCP), obtain the majority of votes and become the government of the province. Danielle Smith, as leader of the majority party, was appointed to the office of Premier of Alberta.Not just the title of the political document, but also some of the leaked content of the proposed law echoed for many Canadians, the position of the former province of Quebec secessionist government that had asserted the right to ignore fundamental norms in the Canadian constitution due to that province's unique nature and identity. Such claims would eventually lead to the claim that the province had a right to unilaterally declare independence and secession from Canada after a successful referendum[II].

The claim to sovereignty by the former Quebec government was used to try to unilaterally secede from the Canadian federation. In contrast most of the claims of sovereignty asserted by Alberta and followed later by a similar initiative in the neighbouring western province of Saskatchewan was an assertion of greater autonomy from the central government rather than a preliminary step towards a claim to secession. However, it is asserted that these autonomy sovereignty claims could accelerate to the potential for a similar undermining of Canadian national unity and are potentially equally destructive to the Canadian federation as the sovereignty claims of the former secessionist government in Quebec.

Some of the Canadian western provinces could also be encouraged to stake out their autonomy sovereignty claims discussed below as they witness the actions of the present Quebec government and the political party in power, the Coalition Avenir Québec (CAQ),

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led by Premier Francois Legault.While this francophone nationalist government is not seeking secession from Canada, its main political agenda is to continually push for a substantially independent autonomous province within the Canadian federation. The CAQ, since its election on October 1, 2018, and re-elected in 2022, has pushed successfully for substantial autonomy in key shared jurisdictional areas in order to maintain the majority francophone culture and language and control over the major levers of the political and social economy in the province. In particular, it has used its political power in the federal Parliament to seek substantial autonomy in politically sensitive areas such as immigration levels and federal funds used for social and economic spending in the province[III].

3. The Proposed Alberta Sovereignty Act which propelled Premier Danielle Smith into power

The following analysis of proposed Sovereignty Act is based on the information and brilliant analysis provided in a legal blog by three constitutional experts at the faculty of law, University of Alberta (Olszynski, Watson Hamilton, e Fluker 2022).

The proposed Act would give the Alberta legislature the power 'to refuse enforcement of any specific Act of Parliament or federal court ruling that Alberta's elected body deemed to be a federal intrusion into an area of provincial jurisdiction' (Olszynski et al. 2022).

It was expected by those in the government and their supporters that the Sovereignty Act would, for example, protect the vital provincial energy sector from any federal attempt to regulate energy projects that would be within its jurisdiction concerning environmental emissions that could impact beyond the province. There was hope by the supporters of the UCP that such federal regulation would be overridden by the Alberta legislation which would allow the project to go ahead and begin operation without any approval from the federal government. The areas that supporters of the Sovereignty Act expected to be used the most, was not only in the area of energy and natural resources regulation that includes shared federal jurisdiction with the province, but also in the area of firearms and other areas covered by the criminal law jurisdiction of the federal government (Olszynski et al. 2022).

The three Alberta constitutional law experts described above, almost immediately publicly argued that the proposed law was constitutionally dubious. This was because the law

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as proposed was seeking to give the provincial legislature and the province's executive the power to order the public and private sector in Alberta to ignore or deem inapplicable valid federal laws normally deemed obligatory. This would be a stunning violation under any understanding of the Canadian Constitutional Order and the traditional notions of the rule of law. The same experts also asserted that the Alberta Sovereignty Law purported to give the Alberta executive and legislature the power to be the ultimate decider on what federal normally obligatory laws would be applicable in the province rather than the federal courts appointed by the federal government (Olszynski et al. 2022).

This is the antithesis of the fundamental principle of the independence of the courts and the rule of law as confirmed in several landmark rulings of the Canadian Supreme Court[IV]. Stunningly, some supporters of the proposed law acknowledged that the federal government could ask that the law may be struck down by a federal court as violating the national constitution, but the Alberta executive and legislature can still just ignore it (Dawson 2022).

For these supporters, it seemed that the centuries old norms of Canadian parliamentary democracy, the rule of law, the separation of powers between the legislature and the judiciary, along with the lawfully implemented laws of the federal government mean very little. Indeed, the purported Sovereignty Act would allow the Alberta legislature to claim paramountcy over the courts and allow partisan politicians to determine the validity of federal laws. Not surprisingly, the three Alberta constitutional experts mentioned above regarded the implementation of such a disregard of centuries old norms as a profound violation of the Canadian constitution that entrenches the independence and powers of the federally appointed courts under section 96 of the Constitution Act 1867 (Olszynski et al. 2022).

The purported Sovereignty Act also takes a sledgehammer to the constitutionally entrenched division of legislative powers between the federal government and the Canadian provinces. While there are perfectly constitutionally legitimate disagreements on whether the federal government has properly exercised a particular exercise of jurisdictional powers, since the birth of the country, it is the courts who determine which level has strayed outside of their permitted jurisdiction.

On numerous occasions the Canadian Supreme Court has ruled both levels of government are autonomous within their respective jurisdictions, but neither can claim to be totally sovereign when there are disagreements on whether powers have been properly exercised. Indeed, the rather than asserting that each level is sovereign within their allotted

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powers under the national constitution, the Supreme Court of Canada in their rulings have urged both levels to engage in co-operative federalism and co-ordination between the exercise of powers which are often overlapping and require acceptance of a double jurisdictional exercise of many of the enumerated powers[V].

The level of blatant disregard for the foundations of Canada's constitutional and democratic order by the purported Sovereignty Law led constitutional experts, start to compare the attitude of the newly elected Alberta Premier to the use of sovereignty principle by the secessionist government in Quebec in the 1990s that also sought to ignore the letter and spirit of the Canadian Constitution. The then Quebec secessionist government claimed that it had the right to unilaterally declare Quebec's independence and status as an international sovereign power on the passing of a referendum allowing it to do so, regardless of whether the national Canadian constitution permitted it[VI].

Ultimately the Supreme Court of Canada had to rule on the constitutional constraints on any unilateral declaration of independence in the internationally renowned ruling in 1999 after the reference to the Court to determine the issue by the federal government[VII]. The federal government felt compelled to seek the ruling from the top court as the secessionist government in Quebec claimed that it did not have to seek the guidance of the courts in Quebec on its claim of unilateral independence. It claimed that its self-declared right to sovereignty after a successful referendum did not require it to do so (Mendes 2019).

In what seemed like an echo of the 1990s attitude of the secessionist government in Quebec, Premier Smith and her Alberta government seemed to be arguing under their proposed Sovereignty Act, that it is only their executive and legislature that can decide when the federal government is illegitimately violating what is within the provincial area of asserted exclusive powers. According to the proposed law, such decisions can be made even without seeking the advice of the courts as to whether it was an exclusive or shared jurisdiction that does allow federal involvement.

What should have been a reminder and warning to the Alberta government seeking to ignore the fundamental norms of the Canadian constitution was the decision of the Supreme Court of Canada in its historic 1990 ruling against the claim of the right to the unilateral declaration of independence by the former secessionist government in Quebec. The Court included statements that are also relevant to the use of the sovereignty principle and law being proposed by the Alberta government:

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> For both theoretical and practical reasons, we cannot accept this view. We hold that Quebec could not purport to invoke a right of self-determination such as to dictate the terms of a proposed secession to the other parties: that would not be a negotiation at all. As well, it would be naive to expect that the substantive goal of secession could readily be distinguished from the practical details of secession. The devil would be in the details. The democracy principle, as we have emphasized, cannot be invoked to trump the principles of federalism and rule of law, the rights of individuals and minorities, or the operation of democracy in the other provinces or in Canada as a whole. (*Reference re Secession of Quebec,* 1998 CanLII 793 (SCC), [1998] 2 SCR 217, para. 91).

In short, like the claim of unilateral declaration of independence by the separatist government in Quebec, the proposed Alberta Sovereignty Act seemed to defiantly thumb its nose at all the constraints of the Canadian constitutional and democratic order in order to claim a form of sovereignty that is also at odds with the norms of the Canadian constitution. In particular, like the secessionist Quebec government, the Alberta government and legislature was proposing to deny the Canadian courts, its role as the only proper constitutional adjudicator of transgressions in terms of division of powers, federalism and the rule of law under the national Canadian constitution.

4. The Introduction of the Alberta Sovereignty Act in the Alberta Legislature

However, this author and the three Alberta constitutional experts, mentioned above, wondered whether the proposed Sovereignty Act was more a political bluffing game that was aimed primarily for the UCP Party gaining power in the Alberta legislature. There was a suspicion that that Premier Smith and the governing party would not actually go through with passing what was clearly an unconstitutional law or, if they did pass it, they would not act unconstitutionally when applying the law to actual areas of conflict between the Alberta government and the federal government regarding existing or future federal laws.

When the Sovereignty Act was actually introduced in the Alberta legislature, there was some attempt to address the most clearly unconstitutional aspects of the proposed

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legislation. Yet, what remained in the law introduced in the legislature demonstrated a continuing desire to breach the underlying foundations of the Canadian Constitution and the rule of law.

The provincial government introduced on November 29, 2022, Bill 1 titled 'The Alberta Sovereignty Within a United Canada Act'[VIII]. In the preamble to the actual provisions of the law, the government lead by Premier Smith seemed to be imitating the perspectives of former separatist Quebec governments regarding the unique identity and sovereignty of the province. The Bill proclaimed in the preamble before the operative provisions, that Albertans had a 'unique culture and shared identity'[IX]. The Bill also argued that the province under the Canadian constitution was not 'subordinate to the Government of Canada'[X]. Some in the Indigenous peoples in the province would argue about whether there is one unique culture and shared identity in Alberta. Indeed there was severe criticism of the Alberta Premier for equating the oppressive treatment of indigenous peoples in the province and Canada by the federal government with how the federal government was treating the province of Alberta.[XI]

One indigenous tribe, the Onion Lake Cree Nation has started legal action[XII] against the Alberta government alleging that the law ignores it own form of sovereignty in terms of infringement of its own treaty rights and promised to start an action to declare it of no force and effect. The indigenous tribe alleged that the government also did not consult them or determine what the impact of the law would be for the indigenous groups in the province.

Given the past examples of detrimental environmental impact of natural resources in Alberta on the indigenous peoples in the province, especially during the production from the extensive tar sands, many in those indigenous communities may wish to have the federal government's jurisdiction over the deleterious environment impact on indigenous peoples in the province not be limited by the actions of the Alberta legislature[XIII].

It was clear that the main focus of the preamble and indeed the law was to warn the federal government about violating Alberta's 'sovereign provincial rights', and against any 'unjustified and unconstitutional infringements of Albertans under the Canadian Charter of Rights and Freedoms. The preamble also stressed that the Executive, not only the legislature as a whole, could take 'measures that the Lieutenant Governor in Council should consider taking in respect of actions of the Parliament of Canada and the Government of Canada that are unconstitutional or harmful to Albertans'[XIV].

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The substance of the Bill defines extremely broadly what federal initiatives could come within the countermeasures that the legislature and government could use against them and goes beyond federal laws to include "program, policy, agreement or action, or a proposed or anticipated federal law, program, policy, agreement or action"[XV]. In another publication, two Alberta constitutional experts have correctly stated that this definition is essentially unbounded to could include any federally proposed but not yet legislated policy in the energy or environment areas (Olszynski and Bankes 2022). The 19th Century architects of Canada's federation would probably never have dreamed that in the future, a provincial government felt comfortable in threatening unconstitutional actions against federal laws and regulations that may or may not substantially affect provincial powers.

In a similar fashion, the actual provisions of the Sovereignty law labelled Bill 1 also defines what provincial entities the legislature and executive can issue directives to, regarding what they can or can't do to counter the federal initiatives. These directives could also be extremely broad, even extending to the education and health sectors or who receive grants or funds from the government. The law surprisingly stated that the government can even issue these constitutionally suspect directives to its own officials when acting as the Crown or Ministers which could be regarded as a promise to itself that they can and will behave unconstitutionally.

However, when it comes to precisely what this Sovereignty Act does to demand provincial entities to do or not do to act as countermeasures to the federal regulations, laws or even proposals, the façade of a fig leaf of acting tough and daring to act unconstitutionally become clear when one examines the Interpretation Section 2 of the Bill which sets out critical provisions on how the law can be interpreted and applied. It states:

> Nothing in this Act is to be construed as
> (a) authorizing any order that would be contrary to the Constitution of Canada,
> (b) authorizing any directive to a person, other than a provincial entity, that would compel the person to act contrary to or otherwise in violation of any federal law, or
> (c) abrogating or derogating from any existing aboriginal and treaty rights of the aboriginal peoples of Canada that are recognized and affirmed by section 35 of the Constitution[XVI].

As the Alberta constitutional experts described above have concluded, these actual limitations on who and what the provisions of the Sovereignty law applies to, could make

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the professed desire to disregard the foundations of the Canadian constitution more of a fig leaf than an actual threat to the Canadian constitutional order (Olszynski and Bankes 2022).

The wording in section 2 (a) acknowledges the supremacy of the Canadian Constitution. Even the more constitutionally suspect provision in Section 2(b) seems to limit any order regarding non-enforcement of federal laws that apply only to provincial entities. As the Alberta constitutional experts have observed, even without a provincial directive to contest a valid federal law, provincial entities could contest federal laws in the courts at any time, which happens frequently. Indeed, on the actual wording of the Bill, nothing in it actually gives, private or public entities the authority to ignore or nullify valid federal laws (Olszynski and Bankes 2022).

These interpretation provisions reveal the fig leaf behind the political posturing by the Alberta government that includes the Government executive threatening to disobey the Canadian constitutional order. Other provisions relating to the scope of the Act seem to set up the division of powers equivalent of the pre-emptive use of the massively controversial "override" clause, namely Section 33 of the Canadian Charter of Rights and Freedoms. This much critiqued clause if used in legislation allows legislatures to pass laws that would likely violate the Charter. The clause would prevent the courts from striking down or deem inoperative such laws if they are passed and they do violate key provisions of the Charter[XVII].

First under the Alberta Sovereignty law, a resolution of the legislature must first specify that in its own opinion, without any court ruling that 'a federal initiative' is either unconstitutional in that it intrudes into an area of provincial legislative jurisdiction or it violates the rights and freedoms of one or more Albertans under the Charter, or that it causes or may cause 'harm to Albertans' under Section 3(b) (i) and (iii) of the Act[XVIII].

In the case of the resolution that alleges harm to Albertans, the resolution would have to set out what the nature of the harm is. The Cabinet in Smith's government, in its role as Governor in Council, must identify what measures they should consider taking, regarding such federal initiatives. It will not be the courts, but only the elected members of the Alberta legislature passing the resolutions on what actions of the federal government are unconstitutional. Then under Section 4 of the Act, the cabinet can then take the actions needed, if it is satisfied that doing so 'to the extent that it is necessary or advisable' in order to carry out a measure that is identified in the resolution. The Cabinet may then direct a Minister responsible for an Act by order to do the following actions under Section 4[XIX]:

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> suspend or modify the application or operation of all or part of an enactment, subject to the terms and conditions that the Lieutenant Governor in Council may prescribe, or specify or set out provisions that apply in addition to, or instead of, any provision of an enactment, subject to the approval of the Lieutenant Governor in Council.

The Act under Section 4 also gives the Cabinet the power to 'direct a Minister to exercise a power, duty, or function of the Minister, including by making a regulation under an enactment for which the Minister is responsible'[XX].

Finally under the Act, a provision that could potentially give rise to the most likely constitutionally challenged actions under Section 4 (1) (b) and (c) of the Act, the cabinet may issues directives against complying with federal initiatives which could be within the legitimate federal jurisdiction directed at provincial entities and its members, officers and agents[XXI]. The section also again suggests the cabinet can also issues directives to the Crown and its Ministers and agents[XXII].

Since the establishment of constitutional democracy in Canada, it is the courts not provincial executives or resolutions of provincial legislatures that can decide which provincial laws can still operate, notwithstanding a conflicting law of the federal government passed under its division of powers in Section 91 the Constitution Act, 1867 and 1982. There is no "override" clause similar to section 33 of the Canadian Charter of Rights and Freedoms under Sections 92 and 92A of the Canadian Constitution Act 1867. There is no such clause outside the Charter which allows a provincial legislature or executive to unilaterally deem federal laws invalid or allows conflicting provincial regulations or laws to continue operating regardless of what would be a serious breach of the national rule of law.

It is suggested that the Sovereignty Act as it was originally politically announced, or the text of the Act when introduced in the legislature, was intended to be a political fig leaf designed for Premier Smith's party to gain and keep power. However, when looking at its actual provisions, especially the provisions in the interpretation Section 2, the Bill would not trigger actual constitutional battles between the province and the federal government. However, politically motivated unconstitutional laws can damage the unity of the federation. It does it by shattering accepted norms of the Canadian constitutional democracy and understanding of the rule of law by even suggesting it can be ignored. These include the

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norms relating to the separation of powers, the rule of law and the accepted division of powers between the federal government and the provinces.

5. The first threatened use of the Alberta Sovereignty Act; another political fig leaf?

In November 2023, the Alberta government using the Sovereignty Act, introduced an Alberta legislature resolution[XXIII] to resist and counter the federal government's proposed *Clean Electricity Regulation* (CER)[XXIV] when it came into force. These regulations aimed at fulfilling Canada's climate change goals would likely be within the federal government's powers to reduce fossil fuel emissions to protect the national environment and fulfill Canadas climate change obligations[XXV].

In part the intention to defy the CER regulations was encouraged by a Supreme Court ruling[XXVI] against the federal Impact Assessment Act (IAA)[XXVII] which Alberta successfully argued that there was an overreaching of the use of federal jurisdiction over certain designated natural resources and energy projects within the province. In the wake of the Supreme Court's ruling the aim of this Alberta legislature's resolution was to prepare the ground for an attack on the CERs.

The resolution would order the Alberta Electric System Operator and the Alberta Utilities Commission to ignore the regulations when they come into force 'to the extent legally permissible'[XXVIII]. The resolution also proposed the setting up a provincial Crown corporation as a way to protect the provincial companies that provide electricity in the province[XXIX].

However, the political use of the sovereignty law became apparent when it was revealed that the federal proposed Clean Electricity Regulations was only in draft form, and that its aim would be to get Canada's electricity national grid to net zero emissions by 2035. Yet, Premier Danielle Smith claimed, without any concrete evidence, that the 2035 deadline would result in the province having blackouts and massively increased electricity costs for Albertans[XXX]. Her government also claimed, again without real evidence, that, even with that far off distant objective, presently, investors are reluctant to invest in new power generation

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especially involving fossil fuels in light of the future because of the proposed regulations even though the federal electricity regulations had yet to be finalized[XXXI]. Predicting such dire consequences in the future, without much real evidence, the Alberta legislature was prepared to act in a blatantly unconstitutional manner in the present.

Part of this Alberta legislature's resolution's goal would be to establish a new Crown corporation that would encourage and commission the building of new private gas fired plants or buy existing ones which would not certainly be in accord with the federal regulations that aimed at reducing and ultimately eliminating generation of electricity by fossil fuels plants[XXXII]. The proposed new Crown corporation would be the promoter of private sector electricity and its own generator of electricity, if necessary, by establishing its own fossil fuel plants. Thes plants, if actually created, would most likely be in defiance of the federal regulations. However, Premier Smith and her government and legislature was still prepared to argue their actions were justified whether in defiance of the national constitution or not, claiming without much substantive evidence that these plants were critical to prevent shortage of electricity in Alberta about a decade into the future[XXXIII].

Premier Smith then admitted that the resolution was also intended to be part of the legal battle that the province was prepared to fight with the federal government over the final version of the CER regulations. Premier Smith suggested that if the federal government were to extend their net zero goal to 2050, instead of 2035, the actions proposed by the anti-federal government resolution by the Alberta legislature would not be needed. Indeed the Premier is reported to have asked 'Why don't we just work together on a 2050 target?'[XXXIV]

Given this almost admission of yet another political fig leaf by the Alberta Premier, the federal Minister of the Environment, Guilbeault reacted by asserting that this threat of potentially unconstitutional actions against what was still draft regulations of the CER was intended to be primarily politically 'symbolic'[XXXV].

Minister Guilbeault claimed that in the ongoing negotiations with the Alberta , the Sovereignty Act was not mentioned. In addition, the federal Energy and Natural Resources Minister, Jonathan Wilkinson had also 'signalled to the Alberta officials that the federal government has already signalled its flexibility on final details of the CER in order to deal with fear of electricity shortages and acknowledged Alberta's concerns about newer gas plants becoming stranded assets according to a report by City News Edmonton'[XXXVI].

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In February of 2024, the federal government stated they were open to considering a series of 10 major changes to its draft clean electricity regulations (CER) that Minister Guilbeault claimed would give more flexibility in how the CER standards are met. An analysis by an Alberta media investigation and survey found that the Alberta public were largely in favour of the regulations, but the energy and power providers continued to be significantly opposed (Black 2024). Minister Steven Guilbeault claimed that this media investigation reflected the public and private sectors feedback in Alberta he's received, and that the CER is intended to help transition Canada to a net-zero electricity grid in 2035. However the Alberta government remained adamant that entire regulations be abandoned. It increasingly started to look that the main agenda for using this first use of a potentially unconstitutional sovereignty law was to leverage the federal government to push back the ultimate fossil fuels net-zero emissions goal to just 15 years.

The opposition leader in the Alberta legislature, Rachel Notley, said that her party would oppose the resolution, claiming it was an illegal stunt, undermined investment certainty in the province, challenged the respect for the rule of law and indeed could breach indigenous treaty rights in the province[XXXVII].

It has led this author to wonder if the use of the "sovereignty" position by the Premier of Alberta was designed to be more of a constant bargaining strategy with the federal government, rather than a first step towards exceptional and potentially unconstitutional autonomy demands in the way that past and present governments in Quebec had used and continue to use against the federal government, with the threat of secessionism in the background. However, the danger is that in Alberta and other western Canadian provinces while the threat of separation from Canada has not gained as prominent a place as in Quebec, there are individuals in Alberta who have more extreme views on the need to make province far more autonomous from the federal government. Some groups with this attitude include one party that does have a secessionist platform could use the sovereignty law and political tactics of Premier Smith and her government to make national unity in Canada more fragile[XXXVIII].

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6. The Alberta façade of using the sovereignty principle for political advantage and leverage catches on next door in Saskatchewan.

In November 2022, the Government of Saskatchewan introduced Bill 88 into the provincial legislative assembly, titled 'The Saskatchewan First Act'[XXXIX]. This legislation was first introduced in the Saskatchewan legislature before the Alberta government had introduced the text of that province's Alberta Sovereignty Act.

Like the Alberta law, the Preamble to Bill 88 attempted to describe the constitutional identity of the province as a precursor of going beyond what the Canadian constitution would permit. It emphasized in section 3 that the province had autonomy and exclusive jurisdiction to natural resources and other areas of exclusive jurisdiction in 'several aspects of Saskatchewan's economy' in the key provisions of the Canadian Constitution Acts, 1867 and 1982[XL]. This assertion was made regardless of whether in fact and law such blanket assertions were correct.

The Preamble then accused the federal government of intrusions into the province's areas of exclusive legislative jurisdiction 'causing economic harm and uncertainty to Saskatchewan residents and enterprises'[XLI].

Bill 88 then proceeds to create in section 7, a tribunal to assess these harms to the province and to amend the provincial constitution that would affirm the provinces exclusive legislative jurisdiction to make the province an equal partner in the Canadian federation.

In furtherance of this goals Part 1 of Bill 88 has two key sections. The first, focusing on the purpose of the Act, declares some general principles regarding provincial autonomy in areas of exclusive jurisdiction. These include the promise that the provincial government through the proposed law would provide certainty regards the process and principles to ensure the inapplicability of federal initiatives that would 'bring uncertainty, disruption and economic harm'[XLII] to the province. These seem familiar echoes from the Alberta Sovereignty Act that potentially permits unconstitutional behaviour whenever it is the legislature or the executive that decides what federal initiatives are too harmful to those in the province.

It is in the second section of Bill 88, that the Saskatchewan law focuses on how the province will use the constitutional principle called interjurisdictional immunity established

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by the Supreme Court of Canada to defend the asserted areas of provincial jurisdiction. Under this principle, in certain (and in recent times increasingly very limited circumstances), a valid federal law can be made inapplicable in the province, to the extent that it impairs the core content of a province's legislative authority and vice versa a valid provincial law can be made inapplicable if it impairs the core content of any law passed under the federal legislative authority.

The second section of Bill 88 then continues the constitutional assertions that the province has exclusive jurisdiction on all matters listed in the provincial areas of power in the Constitution Acts, 1867 and 1982, ignoring the reality that some of the enumerated areas include shared jurisdiction with the federal government. This section of the Bill then makes it clear that the focus of the principle of interjurisdictional immunity 'applies to exclusive provincial legislative jurisdiction to the same extent that it applies to exclusive federal legislative jurisdiction.' To cement this self-described exclusive autonomy of the province from the federal government, the section then declares key areas that fall within the core content of the province's exclusive jurisdiction to which the principle of provincial interjurisdictional immunity will apply. It basically lists all the key areas that are most likely to limit the powers of the federal government. According to the Bill, the list of areas within the exclusive jurisdiction of the province, agriculture, natural resources, energy, including electrical energy, and the area most likely to draw conflict from the federal government, the regulation of environmental standards including the regulation of greenhouse gas and other emissions. The areas listed as the exclusive jurisdiction of the province, according to well established Supreme Court of Canada jurisprudence are subject to some form of shared jurisdiction with the federal government depending on what are the actual or potential impacts of provincial actions on other provinces or impact on areas within federal powers[XLIII].

This second section of Bill 88 concludes by asserting the right of the Saskatchewan government to deem by regulation, the core content of any other prescribed matter in these areas which can therefore be protected by the provincial form of interjurisdictional immunity and thereby take paramountcy to other federal laws and regulations. This dubious use of the principle of interjurisdictional autonomy would dramatically extent the areas of asserted autonomy free of any interference by the federal government.

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The second section of Bill 88 also proposes two amendments to the provincial constitution, namely The Saskatchewan Act, 4-5 Ed VII, c 42, 1905, which is ironically a federal statute that established the province and government of Saskatchewan under the imperial UK Constitution Act, 1871. This part of the Bill seeks to further its provincial sovereignty claims by proposing additions to the provincial constitution affirming exclusive jurisdiction over all matters that fall to the provinces under the Constitution Act, 1867. Again most controversially these claimed areas of exclusive jurisdiction that would be added to the provincial constitution would include areas that involve shared jurisdiction claims by the federal government. The Bill asserts that these amendments would also constitute an amendment to the entire Canadian Constitution established in 1867. This author would strongly assert that no province, whether it is Quebec, Alberta or Saskatchewan, has the ability to unilaterally amend the Canadian constitution just by amending their own provincial constitution. This more novel form of unconstitutional claims to sovereignty is further discussed below.

The third part of Bill 88 also proposed 'The Economic Impact Assessment Tribunal'. Under this section of Bill 88, it would give the provincial executive the ability order economic impact assessments of federal initiatives that could cause economic harm to the province. These include 'a federal law or policy that may have an economic impact on a project, operation, activity, industry, business or resident in Saskatchewan'. The Tribunal can issue reports including the extent of the economic impacts and any unintended consequences of federal initiatives and suggest steps to minimize any negative economic impacts. Part 3 of the Bill also proposes a Crown immunity protection for any actions or proceedings arising out of the Act[XLIV].

As regards which part of Bill 88 would face most constitutional challenge, the first section of Bill 88 seem to be more of a general warning that the government will focus on demanding as much autonomy as is possible under the present division of powers under the Canadian constitution even if it means ignoring the established jurisprudence on shared areas of jurisdiction especially in areas that go to the province's social, economic and political identity.

It is the second section of Bill 88, in two key areas outlined that does potentially trigger future constitutional challenges by the federal government. First, Bill 88 seems to give the provincial legislature, not the courts, the exclusive power to assert what in Canadian constitutional law framework is titled 'interjurisdictional immunity' which aims at protecting

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core areas of provincial areas of jurisdiction. While it is the Supreme Court of Canada that has given provinces the right to assert this principle against federal laws and initiatives, the Court has warned against extending it to novel areas[XLV]. A fundamental norm of how jurisdictional battles are resolved in Canada is that it is the courts, not the federal or provincial governments, to decide on their own what is a protected core area of provincial power that comes under the 'interjurisdictional immunity' principle.

Most controversially, as with the Alberta Sovereignty law, this part of Bill 88 emphasises that in the areas that is claimed to be within the exclusive jurisdiction of the province, such as the environment and regulation of emissions, the interjurisdictional immunity principle can be triggered by the government, rather than by the federal courts. Dealing with Alberta's and other provincial claims to have exclusive jurisdiction over emissions that impact on the environment beyond provincial boundaries, the Supreme Court in several rulings has made it clear that these are areas of shared jurisdiction that makes it unlikely that the principle of jurisdictional immunity will prevail[XLVI].

It could be legitimately questioned whether the purpose of this part of Bill 88 was an attempt to force the Supreme Court to depart from its previous rulings in these key areas that require co-operative federalism in such areas of shared jurisdiction. If that was a key goal, it seems to have failed from the most recent 2023 ruling of the Court in the landmark *Reference Re Impact Assessment Act*[XLVII]. In this case Alberta attempted to extend the concept of interjurisdictional immunity to federal impact assessments on major projects carried on or financed by federal authorities on federal lands that is likely to have adverse environmental impact. In a majority ruling the court dismissed this attempted expansion of the principle in the following key paragraph[XLVIII]:

> In addition, more recently this Court has held that the doctrine of interjurisdictional immunity must be applied with restraint and is generally reserved for situations already covered by precedent (Canadian Western Bank, at paras. 77-78; COPA, at para. 36; Rogers Communications, at para. 63; References re GGPPA, at para. 124). As was found in the Reference re Genetic Non-Discrimination Act, "[i]n keeping with the movement of constitutional law towards a more flexible view of federalism that reflects the political and cultural realities of Canadian society, the fixed 'watertight compartments' approach has long since been overtaken and the doctrine of interjurisdictional immunity has been limited" (para. 22).

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The other potential constitutionally suspect provision of Bill 88 is the assertion that any amendment to the Constitution of the Province can also be an amendment to the national Constitution Act, 1867. If the intent is to add new sections to the provincial constitution, which is derived from an imperial federal statute, then it also requires an amendment to the national constitution. That would require more than provincial actions under Section 43 of Constitution Act 1982 Act. Under this provision of the Canadian constitution, changes that applies to one or more but not all provinces, to be made by proclamation on the authorization of resolutions passed by the Senate, the House of Commons, and the relevant legislature. Given the constitutional problems that are likely to arise from possible assertions of provincial interjurisdiction immunity in areas of shared jurisdiction just by the Saskatchewan legislature, those resolutions seeking to amend the provincial jurisdiction are unlikely to be approved by the Canadian parliament.

It is on the Saskatchewan government attempt to usurp the separation of powers that we can see the similarity with the Alberta Sovereignty Act. At its core, both so called sovereignty laws are an attempt to undermine the fundamental norms of Canadian constitutional democracy including those relating to how disputes over shared jurisdictions are to be resolved.

On March 16, 2023, the Saskatchewan governing party voted to pass the Saskatchewan First Act despite the strong opposition of First Nations and Métis indigenous groups in the province. These indigenous communities claimed that despite the assertion of a provincial identity in the Act, their own culture, traditions and identity were being ignored and potentially violated.

In media reports[XLIX] during the opposition to the Act in the provincial legislature, the Federation of Sovereign Indigenous Nations (FSIN), that represents Saskatchewan's First Nations alleged that the Act infringed on their treaty rights and that the province did not have the legal authority to assert exclusive jurisdiction over natural resources. The FSIN asserted that treaties signed by Saskatchewan First Nations took precedence and pre-dated the creation of the provincial government. The organization asserted they would take legal action, just as the Onion Lake Cree Nation in Alberta promised to do against that province's Sovereignty Act. The Saskatchewan indigenous peoples will most likely also argue Bill 88 would infringe on their inherent and treaty rights to land, water and resources.

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The opposition in the provincial legislature has also voiced strong disagreement with the Act[L]. Just as with the Alberta Sovereignty Act, the Saskatchewan attempt to use the provincial sovereignty principle may be doomed to failure for not only undermining foundational norms of Canadian constitutional order and democracy, but also ignoring the disagreement on who and what constitutes the core of provincial forms of sovereignty within a federal state.

It is suggested that like the Alberta Sovereignty Act, the Saskatchewan First Act has been developed not only against the possible unconstitutional incursions by the federal government in areas listed as provincial jurisdiction but also as a form of bargaining leverage over areas these western provinces know they have shared jurisdiction with the federal government. Implied in this attempt to further limit the legitimate role of the federal government in these shared jurisdiction areas, is the threat of western Canadian alienation if they don't get much more autonomy in these areas. However, if this is the real political agenda of these constitutionally dubious provincial laws, it also provides potential "raw meat" for those that politically thrive on western Canadian citizens alienation. These individuals could then agitate for more extreme actions that undermine unity in Canada, including proposing or threatening secession. This danger could be exacerbated if these constitutionally dubious laws are eventually struck down by the Canadian Supreme Court for undermining the foundations of Canadian democracy and legal order.

7. Conclusion: future harmful actions in Canada and beyond that can flow from such dubious sovereignty laws passed by subnational components of federal states

The analysis of both the Alberta Sovereignty Law and the Saskatchewan First Law above has attempted to prove that these laws seem to be developed to threaten the traditional constitutional order of Canada primarily for gaining or retaining power by provincial politicians by using the sovereignty concept or unique provincial identity similar to how present and former secessionist Quebec governments had done so. However when the actual provisions of the Alberta and Saskatchewan laws are examined, the threat to the Canadian

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constitutional order may not seem as severe as first thought. Many of the most contentious provisions in the Alberta Sovereignty Law don't actually force provincial actors to disobey the national constitution. Likewise, some of the Saskatchewan First Law provisions, such as its use of the interprovincial immunity concept will unlikely to be accepted by the courts given the past rulings of the Canadian Supreme Court.

However, the deleterious consequences of these subnational attempts to imitate the sovereignty concept used by a former secessionist Quebec government in the past, could include the following. First, it may encourage politically more extreme actors in these provinces to promote secessionist agendas as is evidence in Alberta. It may encourage other provincial governments to follow suit with similar sovereignty based laws to create more bargaining and leverage with the federal government. These laws politically encourage disregard of the fundamentals of the Canadian democratic order, the norms of the accepted rule of law and long accepted division of powers jurisprudence, all of which undermine the strength of these concepts that are the foundations of the Canadian national state.

They can also undermine the rights of most disadvantaged populations who may rely on the powers of the federal government as we are witnessing with the claims of the indigenous populations in the two western Canadian provinces.

Finally, as we shall see with one American state, the Alberta Sovereignty Law could encourage similar subnational governments in federal states to follow suit in other countries and result in the rights of the most disadvantaged who rely on federal powers and jurisdiction also being at risk.

Astonishingly to some, these dubious Canadian sovereignty laws are now a catalyst for constitutionally suspect actions that at least one of the states in the US are now using against the US federal government.

On January 19, 2019, the Utah State legislature was asked to pass a law called the 'Utah Constitutional Sovereignty Act'. A Canadian media report (Vanderklippe 2024) gave the following statement from one of the legislators who led on proposing the law:

> "I'll give the credit where the genesis came from: Alberta," said Scott Sandall, the Republican state senator who drafted the bill. "We share some of the common concerns about federal overreach and in that way I think we partner, even across the border," he said.

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Some Utah academics consider the law, if passed, will be largely symbolic and unconstitutional, like the Alberta Sovereignty Act. It seems from these experts that the focus of this Alberta inspired law is on countering federal environmental measures. It also aims at allowing Utah to ignore some of the federal directives and regulations on ozone and other environmental measures that are deemed federal overreach or harmful to Utah and state residents. Utah Gov. Spencer Cox signed into law the Utah Act on Jan. 31, 2024. As with the Alberta and Saskatchewan laws, this US version was voted largely along party lines in the Utah legislature[LI].

As was discussed with the western Canadian sovereignty laws, while the main goals of the proponents of these laws may be to gain or maintain political standing and leverage, they also have dangerous intended and unintended consequences.

In particular, we may be seeing in the US, these constitutionally suspect sovereignty laws or claims by subnational governments in federal states could be used attack the most vulnerable in society. This is most vividly seen in the US with the ongoing legal and political fights between the US federal government and Texas authorities who have sought to override federal jurisdiction in immigration and related areas claiming the State was exercising its sovereignty rights.

The US Supreme Court ruled on January 22, 2024, that the US federal authorities could cut the razor wire deployed by Texas at the border with Mexico in defiance of the Biden or Administration's opposition to this attempt by Texas that claimed such border security and immigration enforcement action was within its sovereignty rights[LII].

The action by Texas authorities was despite a 2012 ruling of the US Supreme Court in Arizona v. US[LIII] that border and immigration enforcement was within the powers of the federal government and that it pre-empted the state's immigration and refugee processing laws.

In a majority 5 to 4 ruling, the Court stated that Texas had to allow federal authorities to conduct operations in the border area in order to take in migrants for processing[LIV].The Court confirmed the federal actions even if they were acting against Texas state laws and actions that attempted to stop the US border patrol access to a part of the border under Texas state control. Such prior state actions by Texas authorities preventing prior federal action had resulted in some of the migrants, including children being downed while the Texas

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authorities had installed floating razor-sharp barriers and had also arrested and jailed thousands of migrants under Texas state joint public safety and military actions.

It is suggested that before both the Alberta Sovereignty Act and the Saskatchewan First Act are ruled unconstitutional, there could be similar vulnerable victims of the ultimately illegal actions of the two western Canadian provincial governments. It is also clear that both sovereignty laws of the two western Canadian provinces will be facing challenges in the Canadian courts on whether they infringe on another form of internal sovereignty, namely those of the indigenous peoples in those provinces. These challenges have been aggravated by the failure to consult with these same communities. Increasingly, the traditional perspectives on division of powers within the Canadian constitution is being challenged by the indigenous peoples who argue that their claims to sovereignty based on treaty and inherent aboriginal self governance must not be regarded as an inferior form of claims to autonomy.

In addition, these constitutionally dubious provincial sovereignty laws could encourage other Canadian provinces, including Quebec, to follow suit with similar refusals to accept the fundamental constitutional norms on the independence of the judiciary and the rule of law. These sovereignty laws could even raise the secessionist threats beyond Quebec to include the western Canadian provinces, thus endangering further the foundations of constitutional democracy and the rule of law in Canada.

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[I] See the scope of the initiatives in the strategy on the government site at https://www.freealbertastrategy.com/the_strategy

[II] See the discussion of the use by Quebec of the concept of sovereignty to claim a unilateral right to secede from Canada that was rejected by the Canadian Supreme Court in Mendes (2019).

[III] See, for example the views in this regard of how Alberta is learning from Quebec nationalism by leading Quebec academics (Béland e Lecours 2023). The authors argue that Quebec has become an exemplary model for Alberta as it seeks greater autonomy from the federal government and also seek to establish it as important to the federation as Quebec. The authors argue that not only political statements by Alberta politicians seem to mimic Quebec in demands for greater autonomy. In addition the use of referendums, for example on equalization, to pressure favourable action from the federal government and ultimately even a potential federal party elected to the federal parliament that could also be examples of a provincial strategy that follows similar Quebec actions. See also Rocher (2023) and Dumont (2005).

[IV] The leading Supreme Court of Canada rulings on this fundamental principle of the rule of law in Canadian federation include *British Columbia v Imperial Tobacco Canada Ltd*, 2005 SCC 49 (CanLII); *Reference re Secession of Quebec*, 1998 CanLII 793 (SCC), [1998] 2 SCR 217 and *Reference re Manitoba Language Rights*, 1992 CanLII 115 (SCC).

[V] The Supreme Court of Canada in *Reference re Securities Act*, 2011 SCC 66 (CanLII) stated that there can be no subordination of one level of government over another in the following words: 'It is a fundamental principle

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of federalism that both federal and provincial powers must be respected, and one power may not be used in a manner that effectively eviscerates another' (at para 7).

[VI] See Mendes (2019) for a detailed discussion on the political events in Quebec leading to the decision of the federal government to seek a reference to the Supreme Court of Canada on Quebec's claim to unilateral declaration of independence and secede from Canada.

[VII] *Reference re Secession of Quebec,* 1998 CanLII 793 (SCC), [1998] 2 SCR 217.

[VIII] See the full text of the legislation, Bill 1, Fourth Session, 30th Legislature, 1 Charles III , Alberta Sovereignty within a United Canada Act, online at https://www.assembly.ab.ca/assembly-business/bills/bill?billinfoid=11984&from=bills

[IX] Ibid.

[X] Ibid

[XI] See the discussion in Heath Justice (2022).

[XII] See the report of the action by Amato (2022).

[XIII] See for example the controversy of the impact of the tar sands production on the health, safety and livelihoods of indigenous peoples living near the tar sands in Huseman and Short (2012).

[XIV] Supra, note VIII.

[XV] Ibid.

[XVI] Supra, note VIII. The fact that this interpretation section comes at the start of the Bill and not given much focus in the public discussion in Alberta, could well have been an intention to act tough politically, but not in constitutional reality.

[XVII] See the overview of this severely criticized override clause by the Library of the Canadian Parliament at the following website: https://lop.parl.ca/sites/PublicWebsite/default/en_CA/ResearchPublications/201817E

[XVIII] See the precise wording of these and related provisions in Bill 1, supra, note VIII.

[XIX] Ibid.

[XX] Ibid.

[XXI] Ibid.

[XXII] Ibid.

[XXIII] See the text of the resolution in the Alberta legislature, online at https://docs.assembly.ab.ca/LADDAR_files/docs/houserecords/gm/legislature_31/session_1/20230530_1200_01_gm.pdf

[XXIV] For a detailed description of the scope of these CAR regulations see the government site online at https://www.gazette.gc.ca/rp-pr/p1/2023/2023-08-19/html/reg1-eng.htmln

[XXV] See Ibid, the government's analysis of the need of the CAR regulations to meet Canada's proposed climate change obligations.

[XXVI] In the *Reference re Impact Assessment Act, 2023 SCC 23*, the Court did give a warning to the federal government that even when it is asserting federal jurisdiction over major projects within the province, it could not overreach into designated projects within areas of provincial jurisdiction, see the analysis of the ruling by Castrilli and Lindgren (2023).

[XXVII] Impact Assessment Act, S.C. 2019, c. 28, s. 1 online at https://laws.justice.gc.ca/eng/acts/i-2.75/index.html

[XXVIII] See *supra*, note XXIII.

[XXIX] Ibid.

[XXX] See the report of these claims by the Smith government in this CBC report: (Bellefontaine 2023).

[XXXI] Ibid.

[XXXII] Ibid.

[XXXIII] Ibid.

[XXXIV] Ibid.

[XXXV] See how one energy sector blog, *The Energy Mix* is asserting that both the Minister and other legal experts asserted that the use of the Sovereignty Act was increasingly being used as "political theatre", online at https://www.theenergymix.com/albertas-sovereignty-act-a-bunch-of-political-theatre-legal-experts-say/ Nov. 30, 2023.

[XXXVI] Ibid.

[XXXVII] As reported in the CBC report, supra note XXX.

[XXXVIII] See discussion of possible secessionist movements in Alberta (Wesley and Young 2022).

[XXXIX] Bill 88 – The Saskatchewan First Act of 2022. An Act to Assert Saskatchewan's Exclusive Legislative Jurisdiction and to Confirm the Autonomy of Saskatchewan.

To download the full text of the Bill see the online site of the provincial legislature at

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https://publications.saskatchewan.ca/#/products/119675
XL See Ibid at the several subsections of section 3 of Bill 88.
XLI Ibid.
XLII Ibid.
XLIII See an overview of the distribution of exclusive and shared legislative powers by the federal and provincial governments in Canada by the Canadian Library of Parliament at https://lop.parl.ca/sites/PublicWebsite/default/en_CA/ResearchPublications/201935E
XLIV Supra, note XXXIX.
XLV See for example the views of constitutional expert:
XLVI See the ruling of the Supreme Court of Canada in *References re Greenhouse Gas Pollution Pricing Act*, [2021] 1 S.C.R. 175. See also Wilkins (2019). Wilkins warns in same article, that it could be the federal government that could claim interjurisdictional immunity (IJU) for areas of shared jurisdiction with the province: 'The Constitution, therefore, I submit, protects matters of sufficient national importance even from conscientious, well-meant provincial attempts to address them. IJI, I have argued, protects these same matters from inadvertent, unplanned effects of valid provincial legislation when the province could not seek overtly to achieve those effects. Its function is to preserve the exclusivity of federal legislative authority over matters whose significance to the country as a whole is sufficient to require exclusivity.' (Wilkins 2019), p. 758.
XLVII *Reference re Impact Assessment Act* 2023 SCC 23.
XLVIII Ibid. at paragraph 359.
XLIX See the report by Hunter (2023).
L Ibid.
LI See the ABC News report on the final passing into law of the law at https://www.abc4.com/news/politics/cox-signs-utah-sovereignty-act-to-fight-back-on-federal-overreach/
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LIV *Dep't. of Homeland Sec. v. Texas*, No. 23A607, 2024 U.S. LEXIS 577, at *1 (U.S. Jan. 22, 2024).

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Mind the Gap Between Federalism and Secession: The Relationship Between Two (In)compatible Concepts

by

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Abstract

Scholars have often either framed federalism as an alternative to secession (Buchanan 1995) or suggested that secession is incompatible with the federal principle (Jellinek 1905). As Jellinek (ibid: 768) put it, 'political suicide is not a legal category.' And yet secession within today's globalised world can be also seen as just 'another form of subsidiarity – a claim about the right level for governance within a complex, multi-layered system that extends from the personal through the local, regional, state, transnational and international.' (Waters 2020:227). Taking the cue from that, the paper provides for a nuanced account of the relationship between the two concepts by developing its argument in three steps. First, it defines the two concepts and highlights that secession may occur at various tiers within a federal system. Second, it reviews how federal constitutional orders deal with secession in the different levels. Third, although it accepts that constitutional orders are markedly more reluctant to recognise a right to external secession, it puts forward an understanding of federalism that may accommodate it.

Keywords

Federalism, internal secession, external secession, withdrawal, comparative constitutional law

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1. Introduction

On 4th March 1861, President Lincoln (1861) in his inaugural speech declared that '[p]erpetuity is implied, if not expressed, in the fundamental law of all national governments.' Just a month before the start of the American civil war, he declared secession as 'legally void' given that 'no government proper ever had a provision in its organic law for its own termination' (ibid). In a similar spirit of constitutional self-preservation, most federal orders adopt 'provisions that prevent the defeat of the basic enterprise' (Sunstein 1991: 633). As Jellinek (1905: 768) put it, 'political suicide is not a legal category.'[I] This is why scholars such as Sunstein (2001) have questioned the prudence of constitutionally enshrining a right to secession. For them, codification would make it more likely to fuel than quell secessionist sentiment.

And yet, since the time of Lincoln's speech, legal developments challenge the idea that secession is a legal taboo. In its *Advisory Opinion on Kosovo*, the International Court of Justice (ICJ) reaffirmed that international law does not ban secessionism.[II] The Supreme Court of Canada provided for a procedural framework that makes Quebec's secession possible if it complies with certain fundamental principles including federalism.[III] Some constitutional orders exhibiting federal characteristics such as Ethiopia provide in black and white for 'an unconditional right to self-determination including the right to secession.'[IV] In 2014, a lawful referendum was organised in Scotland to decide its constitutional future while Northern Ireland is one of the few substate entities that enjoy a constitutionally enshrined right to secession.[V]

Precisely because the actual legal landscape provides for a much more complicated picture of the relationship between federalism and the right to secession than what conventional wisdom suggests, the aim of this article is to revisit this age-old debate. Overall, the article does not question the fact that a number of federal constitutional orders are reluctant to recognise the possibility of consensual external secession. However, it argues that it is possible to understand federalism in a way that allows for the accommodation of secessionist processes that take place at every level of a federal order (substate; state; supranational). The remainder is organised as follows. Part 2 defines the two concepts and points to how secession may apply at every level of a federal order. Part 3 provides for a bird's-eye view of how constitutional orders that exhibit federalism treat secession that takes

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place at the substate; state and; supranational levels. By referring to the concept of territorial integrity, Part 4 explains why federal constitutional orders are reluctant to accept the possibility of external secession and suggests an alternative understanding of federalism that aims to smooth its perceived incompatibilities with secession.

2. A Federal Understanding of Secession

In order to understand the relationship between federalism and secession, it is necessary first to define those polysemous concepts. Starting from the former, we note that clear definitions about the federal principle are difficult to achieve for such 'a chameleon-like concept' (Post 1990: 227). The reason for that might be the fact that federalism can be a normative idea, a political aspiration, and a descriptive category of political institutions, sometimes almost simultaneously.

'To begin with what might seem only a matter of semantics, it is worth recalling that the word "federal" (*Föderativ, federaal*) is derived from a Latin root (*foedus*) which in Roman Law referred to an international treaty, and in wider usage extended to concepts of "covenant", "compact" and "agreement"' (Aroney 2009: 16–17). It comes as no surprise that when modern federalism emerges with the rise of the European states system, it is associated with the political relations between independent/sovereign States (Schütze 2009: 14).

It is the American experiment with federalism, however, which has largely shaped our contemporary understanding of it as a constitutional system of governance. United States Supreme Court Justice Kennedy, has once proudly proclaimed that modern 'federalism was [the American] Nation's own discovery'.[VI] The gradual evolution of the American constitutional order from confederation to federation and from a dual federal model to a more cooperative one has greatly influenced the academic and political debate on federalism (Elazar 1987: 144–46; Schütze 2009: 75–127). This is why 'today "federal" and "federalism" are understood primarily in terms of the American hybrid form of governance as opposed to the older idea of federalism as confederation' (Halberstam 2012: 579).

In his pioneering *Federal Government*, Wheare defines the federal principle as 'the method of dividing powers so that the general and regional governments are each, within a sphere,

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coordinate and independent' (Wheare 1964: 10). In that context, he noted the importance of the existence of a written constitution

> expressly conferring powers on the central and regional governments, a system of direct elections for both levels of government, the power of each level of government to act (or not act) independently of the other, and the existence of an independent high court to serve as the "umpire" of federalism (Choudry and Hume 2011: 357).

This definition which stresses on the one hand the legislative autonomy of the different levels of government in a federal order and on the other the combination of self-rule and shared-rule over the same territory has informed a number of other analyses such as the one provided by Riker. His understanding of federalism echoes the one of Wheare by suggesting the following rule of identification:

> [a] Constitution is federal if (1) two levels of government rule the same land and people, (2) each level has at least one area of action in which it is autonomous, and (3) there is some guarantee (even though merely a statement in the constitution of the autonomy of each government in its own sphere) (Riker 1964: 11).

The influence of Wheare's definition can be also seen in the work of Watts, who elaborated further the aforementioned constitutional model. In his very detailed federal 'checklist', Watts added the formal distribution of legislative and executive authority, the allocation of sufficient revenues to ensure the autonomy of each order of government, the representation of regional views in the central legislature (eg through an upper chamber), a constitutional amendment procedure requiring a substantial degree of regional consent, and an enforcement mechanism that included courts, referendums or a special role for the upper chamber (Watts 1966). More recently, he redefined federalism as a normative term that 'refers to the advocacy of multi-tiered government combining elements of shared rule and regional self rule' (Watts 2008: 8). Despite the elaborate nature of Watts' model of federalism, his more recent definition echoes the one of Elazar who referred to 'shared rule plus self rule' (Elazar 1987: 12).

Overall, despite their differences, in all those classical writings, federalism is associated with polities where:

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(i) shared rule is combined with territorially based self rule (Annett 2010: 109); and
(ii) every level of the government—whether central or sub-state—enjoys a constitutionally guaranteed claim to some degree of organisational and jurisdictional authority (Halberstam 2008: 142).

This rather broad definition encapsulates the different species of federal political systems circumventing the rather sterile debate on the precise category of federal arrangements (Watts 2008) to which different entities belong. In that sense, it equally applies to federal States such as the United States, Germany and Switzerland; regionalised States such as Italy, Spain and the UK and; even supranational organisations such as the EU. Such multi-level constitutional systems—irrespectively of their political and historical origins—may sometimes be faced with secessionist challenges at any tier of legislative autonomy.

Much like in the case of federalism, there are different perceptions in legal and political theory about secession as well.[VII] The strict/narrow perception entails 'the creation of a new independent entity through the separation of part of the territory and population of an existing State without the consent of the latter' (Cohen 2006: 3). It is the parent state's lack of consent that turns such 'separation, if it occurs, into secession' (Thürrer and Burri, 2009) effectively excluding the possibility of a consensual and democratic secession. In that (strict/narrow) sense, secessions rarely occur. 'Since 1945 there has not been a single separation of a constituent part from a State to which the latter has not, sooner or later, given its consent' (ibid). 'In fact, no new State formed since 1945 outside the colonial context has been admitted to the United Nations over the opposition of the predecessor State' (Crawford 2007: 415).

Other authors follow 'a broad notion of secession, including in their analyses all cases of separation of States in which the predecessor State continues to exist in a diminished territorial and demographic form' (Cohen 2006: 2). For them, secession includes 'every action that leads to a part of a State being separated off, regardless of whether or not this happens with the consent of the existing State' (Thürrer and Burri, 2009). By not focusing on the potential opposition of the metropolitan State as a *conditio sine qua non* for secession, this wider definition includes events that have been characterised as consensual and democratic secessions such as Norway's secession from Sweden or more recently Montenegro's independence from the State Union of Serbia and Montenegro. Thus, it is able to encapsulate the political developments in the post-WWII period, during which 142 new

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States managed to become members of the UN General Assembly. Out of those States, almost three quarters owe their birth to secession. This is why authors such as Buchanan (1997: 301) and Griffiths (2017) speak about the 'Age of Secession'.

Having said that, both those conceptions are 'mostly level-specific because they apply only to independent states' (Bauböck 2019: 228). And yet secession may also occur at the sub-state (internal secession) and the supranational levels (withdrawal) as well. In fact, a closer look at how international law treats the right to self-determination which is the basis of the right to secession points to this direction. According to international law, the right to external self-determination (ie. secession and independence) for peoples under colonial domination is undisputed.[VIII] Given that the period of classical colonialism has largely passed, this principle applies to a rather limited number of peoples, such as those of Gibraltar and New Caledonia.[IX] In 1995, however, the ICJ proclaimed that the right to self-determination 'has an *erga omnes* character.'[X] This does not mean, though, that all peoples have the right to external secession and independence. In metropolitan territories such as Flanders, Scotland, Basque Country and Catalonia, 'peoples are expected to achieve self-determination within the framework of their existing state.' (Crawford and Boyle, 2012: para 175) As the Canadian Supreme Court in *Reference re Secession of Quebec* held, outside the colonial context, the right is 'normally fulfilled through internal self-determination—a people's pursuit of its political, economic, social and cultural development within the framework of an existing state.'[XI] At its most extreme, this right to internal self-determination includes a right to internal secession—the possibility to create a new autonomous sub-state unit within the borders of the same metropolitan State. Having said that, the ICJ famously held in its *Advisory Opinion on Kosovo* that there is no prohibition on unilateral declarations of independence in international law,[XII] let alone independence that has been reached via a consensual and democratic process (external secession). At the same time, the people's pursuit to 'freely determine their political status and freely pursue their economic, social and cultural development'[XIII] clearly encompasses the sovereign choice of a nation to withdraw from an international organisation (withdrawal).

This means that secession i.e. the 'formal withdrawal from a central political authority by a member unit' (Wood 1981: 110; Ginsburg and Versteeg 2019: 925) may occur at any tier of a polity that exhibits federal characteristics. For instance, part of a legislative region (e.g., Jura) may be carved out of an existing one (e.g. Berne) and given distinctive substate status

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within a federal or quasi-federal state (internal secession) (Requejo and Nagel 2017: 9). A 'subunit of a state [may also break off], usually to form a new state, but sometimes to join an existing neighbour' (external secession) (Ginsburg 2018: 1). Finally, a State as a whole may withdraw from a supranational organisation such as the European Union. In fact, the UK's 'unilateral decision[] to separate territory and citizenry from the Union,' (Pohjankoski 2018: 849) has been aptly characterised as 'functionally akin to secession'(Vidmar 2019: 371).

So, in a federal legal order, secession i.e. 'the voluntary breakaway of a polity from a territory of which it had previously been a part' (Bauböck 2019: 228) may be experienced at the substate; the state and; the supranational levels. This is why it is important to assess how constitutional orders which exhibit federal characteristics regulate secessionist processes.

3. Secession in federal constitutional orders

A comparative analysis of how federal constitutional orders actually regulate secession points to two directions. First, it is clear that while federal orders are willing to recognise, accommodate and include processes of consensual and democratic secession at the subnational (internal secession) and the supranational (withdrawal) levels, they are markedly more reluctant to do so at the State level (external secession). Having said that, even when it comes to the most controversial form of secession (i.e., regions' right to external secession), a close look at the relevant federal arrangements reveals a picture that is much more nuanced than what conventional wisdom suggests. A number of federal orders do not prohibit it.

3.1 Internal Secession

Internal secession is a procedure available in some federal systems 'where new States are carved out of the existing ones and given member state status' (Requejo and Nagel 2017: 9). And while with regard to external secession, federal constitutional orders tend to be reluctant if not opposing, as we shall see, there is a number of federal constitutions that allow internal secession. In fact, a cursory look at those procedures reveals that most of the constitutions that permit the redrawing of internal borders do so on the condition that the institutions of the affected entity/ies and of the central political authority approve such initiative.

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For instance, Article IV, Section 3 of the US Constitution requires the approval by both legislatures of the affected States and by Congress in order part of an existing State to merge with a neighbouring one. Similarly, Article 3 of the Austrian Constitution requires the passing of 'harmonizing constitutional laws of the Federation (*Bund*) and the *Land*, whose territory experiences change.' In the case of Germany 'revisions of the existing division into Länder shall be effected by a federal law which must be confirmed by referendum.'[XIV] In fact, according to Article 29(3) of the German Basic Law, a referendum on a bill allowing the internal secession of part of a Land would have to be held in the territory of the whole Land. The secession would be approved if 1/4 of the electorate of the Land participates and there are either simple majorities in favour in both the seceding territory and the whole Land or a 2/3 majority for secession in the seceding territory and no 2/3 majority against it in the affected Land.

The most famous example of a process of internal secession is the one related to the creation of the Swiss canton of Jura. After a partly militant campaign of Jurassian separatists, a series of cascading plebiscites were organised. The seven districts that comprised of the *Ancien Jura* were asked to vote whether a new canton was to be created and what should be the delimitation of its borders. Given that the Swiss constitution enumerates the cantons[XV] and specifies their participation rights within the consociational arrangement,[XVI] a federal constitutional amendment was necessary.[XVII] 'This requires a double majority among all enfranchised federal citizens as well as in a majority of cantons' (Bauböck 2019: 241). Moreover, the new cantonal constitution required the consent of the federation.[XVIII]

The aforementioned Swiss procedure is considerably more entrenched than what is required in other constitutional orders that allow for internal secession. In the case of Canada, the self-governing territory of Nunavut was carved out of the Northwest Territories following two local plebiscites that approved the secession and the delineation of the border and an Act of the Canadian Parliament that ratified the decision. In the case of India, Article 3 of the Constitution allows the federal parliament to approve a process of internal secession after consulting the legislature(s) of the affected State(s). The states of Chhattisgarh, Uttaranchal (renamed Uttarakhand), Jharkhand, and Telangana were all established through such procedure.

To sum up, internal secession is not prohibited in a number of federal constitutional orders. Having said that, in all cases, the approval of the realignment of internal boundaries

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requires some form of consent from the central political authority. This ensures that those processes that may often be politically divisive and controversial take place in a more inclusive, democratic and less conflictual manner that does not threaten the stability of the overall federal arrangement.

3.2 External Secession

From an international law point of view, 'no one is very clear as to what [the right to external secession and independence] means, at least outside the colonial context' (Crawford 2001: 10). Indeed, the right to external secession for peoples under colonial domination was enshrined in the UN Charter,[XIX] further crystalised in UN General Assembly Resolutions[XX] and endorsed by the ICJ in a number of Advisory Opinions.[XXI] Outside the colonial context, a right to unilateral secession may be recognised to people 'subject to alien subjugation, domination or exploitation.'[XXII] Still, the status of remedial secession in international law remains unclear. In its *Advisory Opinion on Kosovo*, the ICJ highlighted the different opinions expressed on 'whether international law provides for a right of "remedial secession" and, if so, in what circumstances.'[XXIII]

More importantly for the purposes of the article, it should be noted that Joint Article 1 of the two covenants in the International Bill of Rights provides that '[a]ll peoples have the right of self-determination.'[XXIV] This does not mean, however, that all peoples have the right to external secession and independence. In fact, a state that respects the principles of self-determination in its internal arrangements 'is entitled to maintain its territorial integrity under international law.'[XXV] As the Canadian Supreme Court held, 'international law does not specifically grant component parts of sovereign states the legal right to secede unilaterally from their "parent" state.'[XXVI]

At the same time, from a comparative constitutional law point of view, it is true that the vast majority of Constitutions are generally hostile to external secession by affirming either explicitly or implicitly the primacy of the state's territorial integrity (Monahan et al. 1996: 7-8). Even when they are silent on the matter, they often adopt tools and strategies to prevent secession for 'existential – and not so existential – needs, rather than democratic reasons alone' (Weill 2018: 913). These strategies include the use of 'eternity clauses' and bans on either partition/secession or secessionist political parties (Ibid.). For instance, the indivisibility of the Republics of France and Romania is enshrined in Article 1 of their

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respective constitutions, while Article 2 of the Spanish Constitution speaks of the indissoluble unity of the Spanish nation. Similarly, Article 185 of the Cypriot Constitution prohibits the integral or partial union of the island with another state and separatist independence.

The same applies with regard to several constitutions that exhibit federal characteristics. For instance, the ones of Australia,[XXVII] Brazil[XXVIII] and Comoros[XXIX] explicitly exclude the possibility of secession. In the case of Germany, although the Basic Law is silent on the matter, the Federal Constitutional Court has clarified that the Länder are not *Herren des Grundgesetzes* [Masters of the Constitution]. As such, there is no possibility for them to secede as they would breach the constitutional order.[XXX] In a heavily separatist context, the Constitutional Court of Bosnia and Herzegovina similarly stressed that the constitution 'does not leave room for any "sovereignty" of the Entities or a right to "self-organization" based on the idea of "territorial separation".'[XXXI] So did their South African counterpart which held that the right to self-determination as recognised in the text of the constitution of the 'rainbow nation' 'does not embody any notion of political independence or separateness.'[XXXII] Finally, the Italian Constitutional Court went a step further by proclaiming that the 'unity of the Republic is an aspect of constitutional law that is so essential to be protected even against the power of constitutional amendment.'[XXXIII]

Notwithstanding, external secession should not be understood as an absolute constitutional taboo. In fact, even some unitary States such as Denmark,[XXXIV] Liechtenstein[XXXV] and Uzbekistan[XXXVI] allow for the possibility of a consensual and democratic process of partition. In the past, a number of federal constitutions also allowed for secession. In addition to the socialist constitutions of the Soviet Union and Yugoslavia that famously included a right to secession in black and white,[XXXVII] the Burman constitution of 1947,[XXXVIII] the founding document of the State Union of Serbia and Montenegro[XXXIX] and the transitional constitution of Sudan[XL] all provided for a process of a consensual secession for part of their territory.

Currently, Article 39 of the Ethiopian constitution famously provides for 'an unconditional right to self-determination, including the right to secession' for every nation, nationality and people in Ethiopia. It also sets out the precise procedure and conditions to be met in order such secession to take place.[XLI] Equally, the Constitution of Saint Kitts and Nevis allows for the secession of Nevis Island following a process that is prescribed in a

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detailed manner in Article 113. In the case of the UK territorial constitution, which is characterised by devolution, the Belfast/Good Friday Agreement recognises a right for consensual secession to Northern Ireland in no uncertain terms.[XLII] Such right has also been enshrined in domestic legislation. Schedule 1 of the Northern Ireland Act 1998 describes the circumstances under which a referendum for the reunification of Ireland can and should be called by the UK Secretary of State.

> [T]he Secretary of State is given a discretionary power to order a border poll under Schedule 1 paragraph 1 even where she is not of the view that it is likely that the majority of voters would vote for Northern Ireland to cease to be part of the United Kingdom and to become part of a united Ireland. [XLIII]

However, if it appears to her that a majority would be likely to vote for a united Ireland, then, she is under a duty to call a poll.[XLIV]

Somewhere in between those federal constitutional orders that prohibit secession and those that explicitly recognise such right lie the ones that allow some space for the possibility of a negotiated secession via a constitutional amendment (Kössler 2021: 80). Perhaps the oldest example in this category can be found in the United States. Four years after the end of the civil war, the US Supreme Court held that the 'constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States.'[XLV] Notwithstanding, as Radan (2006: 191) pointed out, it also left the door ajar for the possibility for secession 'through revolution, or through consent of the States.'[XLVI] Following the logic of the court, secession of a state is not unconceivable, if the US constitution is amended accordingly.

Many years later, somehow similarly, the Spanish Constitutional Court on the one hand reaffirmed that the Autonomous Communities do not have a right to unilaterally organise self-determination referendums and on the other distanced itself from the German model of militant democracy that rules out the possibility of secession under any circumstances. Instead, they pointed out that

> Any approach that intends to change the very grounds of the Spanish constitutional order is acceptable in law, as long as it is not prepared or upheld through an activity that infringes democratic principles, fundamental rights or all other constitutional mandates, and its effective achievement follows the procedures foreseen.[XLVII]

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In other words, it highlighted to the relevant constitutional actors that a plebiscite on the constitutional future of Catalonia could be legally organised if they agree on a relevant amendment to the Spanish constitution.

Perhaps the most nuanced and influential view on negotiated secession was put forward by the Canadian Supreme Court in its decision on *Reference re Secession of Quebec*. There, the court clarified that 'the secession of Quebec from Canada cannot be accomplished […] unilaterally, that is to say, without principled negotiations, and be considered a lawful act.'[XLVIII] But it also pointed out that

> the clear repudiation of the existing constitutional order and the clear expression of the desire to pursue secession by the population of a province would give rise to a reciprocal obligation on all parties to Confederation to negotiate constitutional changes to respond to that desire.[XLIX]

In other words, it denied the existence of a unilateral right of secession but accepted that 'a referendum unambiguously demonstrating the desire of a clear majority of Quebeckers to secede from Canada, would give rise to a reciprocal obligation of all parties of the Confederation to negotiate secession' (Mancini 2012: 497). It also underlined that in such negotiations 'the conduct of the parties […] would be governed by the same constitutional principles which give rise to the duty to negotiate: federalism, democracy, constitutionalism and the rule of law, and the protection of minorities'[L] making a clear link between the federal spirit (Burgess 2012) of the Canadian constitutional order and the potential secessionist process of Quebec.

Interestingly, the uncodified UK constitution also allows for managed secession in the case of Scotland. According to section 29 of Scotland Act 1998, the Scottish Parliament has residual powers over the legislative competences that are not explicitly allocated to Westminster. The latter include the constitution of which 'the Union of the Kingdoms of Scotland and England' is part.[LI] This means that '[a]s a matter of UK law, the Scottish Parliament cannot pass a declaration of independence' (Smith and Young 2017). However, referendums are not listed as a reserved matter. Therefore, there was a question to be asked whether Holyrood can lawfully organise a referendum (devolved matter) on Scotland's constitutional future (reserved matter). This question was recently settled by the UK Supreme Court which held that

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> A Bill which makes provision of a referendum on independence –on ending the sovereignty of the Parliament of the United Kingdom over Scotland—has more than a loose or consequential connection with the sovereignty of that Parliament.[LII]

So, an Act of the Scottish Parliament providing for the organisation of an independence referendum would relate directly to the reserved matter of the Constitution and thus it would be deemed *ultra vires*.

Notwithstanding, it would still be possible to lawfully organise an independence plebiscite, if the process that led to the 2014 one is followed. Then, the 'two governments of Scotland' decided to resolve this important constitutional question with a political agreement. The *Edinburgh Agreement*[LIII] underscores the flexible nature of the UK idiosyncratic constitution. According to it, David Cameron and Alex Salmond agreed to amend the text of Scotland Act 1998. In accordance with section 30 of the Act, an Order[LIV] was issued that introduced new section 29A. This new section explicitly conferred the power on Holyrood to organise an independence referendum by no later than 31 December 2014. In other words, Westminster devolved this time-limited competence to Holyrood which was able to organise an independence referendum on 18 September 2014.

Overall, a comparative constitutional law analysis of how constitutional orders that exhibit federalism deal with the issue of secession reveals a much more nuanced picture than what conventional wisdom suggests. It is true that the majority of them reject the right to secession either explicitly or through a judicial interpretation of the overall constitutional settlement. But there is also a number of them that due to historical and political circumstances allow for that possibility either in black and white or through a constitutional amendment.

3.3 Withdrawal

Internal and external secession are procedures that lead to a part of a (constituent) state being separated from that existing (constituent) state. Supranational organisations such as the EU, however, are 'under international law, precluded by [their] very nature from being considered […] State[s].'[LV] This is one of the reasons why some authors have distinguished withdrawal from supranational organisations from the phenomenon of secession (Frantziou

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2022: 70). They understand the former more as a 'habitual way of referring to a decision to leave an international organisation' (Ibid.). However, secession is 'situated at the intersection of constitutional and international law' (Jackson 2016: 316-317) and has historically been defined as a form of withdrawal.[LVI]

More specifically, with regard to the most integrated supranational legal order i.e. the EU, we note the following. It is a '[c]ommunity of unlimited duration, having its own institutions, its own personality, its own legal capacity and . . . real powers stemming from a limitation of sovereignty or a transfer of powers from the [member] States.'[LVII] To the extent that Article 50 of the Treaty of the European Union (TEU) allows a member state's withdrawal from that community of law and the abrupt end to the symbiotic relationship between its domestic legal order and the EU one, it is also a process that 'is functionally akin to secession; it is not a simple severance of contractual obligations' (Vidmar 2019:371) as withdrawal from an international treaty usually is. In other words, 'given the special (constitutional) nature of EU legal order, its highly-institutionalized nature, and the entanglement of domestic law and EU legal regulation, [withdrawal from the EU] can be functionally compared to secession' (Vidmar 2018: 440).

Much like external secession, withdrawal from a supranational organisation like the EU leads to the separation of territory and citizenry (Pohjankoski 2018: 849). It also 'leads to legal problems that resemble those that arise when secession occurs, e.g. regarding the continuation of citizenship rights, succession of treaty obligations, relations with third states, and various financial settlements' (Vidmar 2019:371). Like internal and external secession, such functional secession also denotes the 'formal withdrawal from a central political authority by a member unit' (Wood 1981: 110; Skoutaris 2024: 342).

And yet, the procedural requirements of this functional secession are different from the ones applying to external secession. According to Friel, the Article 50 TEU secession right follows the state primacy or sovereignty model, which provides every constituent unit of a federal order with an unqualified right to secede (Friel 2004: 424-27). As the Court of Justice of the EU noted in *Wightman*, the Article 50 TEU process is characterised by unilateralism as '[t]he decision to withdraw is for [a] Member State alone to take, in accordance with its constitutional requirements, and therefore depends solely on its sovereign choice.'[LVIII] It 'is totally independent of the will of the EU [and] the remaining Member States' (Closa 2017: 193-194). Apart from being unilateral, the Article 50 TEU right is also unconditional in that

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'the exercise of the right to withdrawal is not subjected to any preliminary verification of conditions nor is it even conditional on the conclusion of the agreement foreseen in the provision' (Closa 2017: 195). Article 50(1) TEU allows a Member State 'to withdraw from the Union in accordance with its own constitutional requirements.' Article 50(3) TEU foresees that the withdrawal can take place two years after the member state has notified the EU of its intention to leave if no withdrawal agreement has been achieved by then. This is in marked contrast to the majority of constitutional provisions that regulate secessions. Usually, those provide for conditions with regard to the organisation of a referendum that could potentially lead to secession and/or foresee an *inter partes* agreement as an important step for finalising the process. Still, withdrawal leads to the separation of part of the territory and population as the other two forms of secession.

In sum, the most integrated supranational organisation provides for a unilateral and unconditional right of functional secession. This points again to the fact that states are more generous to provide themselves with the right to functionally secede from such an organisation than to accommodate a process of external secession that would alter their territorial borders.

4. Federalism and Secession: Two (in)compatible concepts?

So far, we have established that the voluntary withdrawal from a central political authority by a member unit may occur at every tier of a federal order. And although, the recognition of the right to external secession remains unpopular in federal constitutional orders, secession is far from a constitutional taboo.

By reference to the international law principle of territorial integrity, this section explains why federal orders recognise the right to external secession while they are more accommodating with regard to secessions that occur at the subnational (internal secession) and the supranational (withdrawal) levels. But it also goes a step further by offering an alternative conception of the relationship between those two concepts. It shows that it is possible to understand them as compatible without undermining the international legal and political order.

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4.1 Federalism and Secession: Two incompatible concepts

Ker-Lindsay (2014) has catalogued a number of reasons why States are reluctant to accept external secession. Those include emotional attachment to defined boundaries, the historical, political and economic significance of the withdrawing territory, a sense of injustice etc. Although all of them are true, they equally apply to internal secession –as the case of Jura highlights– and withdrawal from a supranational organisation as the Brexit experience suggests. And yet federal constitutional orders tend to be way more accommodating towards those other forms of secession that occur in the different tiers of those multi-level constitutional orders than they are with regard to external secession as our comparative analysis clearly shows.

To a certain extent, this discrepancy is due to the fact that States – whether unitary, regionalised or federal – remain the main actors and *loci* of constitutional politics. More so than substate entities which often participate in a hierarchical system that entails the primacy of the legislative and constitutional wills of the central State. In such system, the dominant position of the federal institutions is not undermined by internal secession processes. They remain at the apex of the hierarchy no matter how many new substate entities are created. In that sense, it is almost anodyne for any central State to absorb the tensions and frictions created by processes that involve the delineation of internal boundaries by allowing for the possibility of internal secession. At the end of the day, a process of internal secession does not lead to the loss of territory as external secession does.

Equally, States are *Herren der Verträge in supranational organisations such as the EU. In this capacity, they are able to provide themselves with the right to functional secession, which is often seen as* 'the only undeniable legal limit that member states have at their disposal against competence creep' (Garben 2020: 52) that often occurs within supranational organisations. By allowing themselves with the possibility to withdraw from such an organisation, they protect their sovereign rights as subjects of international law.

At the other end of the spectrum, '[a] paramount consideration in any [external] secession-related discussion is that, irrespective of the nature of secessionists claims, secessions are not prima facie desirable, because they jeopardize world stability' (Mancini 2012: 482). This is largely due to the fact that they are seen as undermining the territorial integrity of the main subjects of international law: the States. In a letter submitted to the Supreme Court of Canada at the request of the Government of Canada, Luzius Wildhaber

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(1998), explained why the territorial integrity of federal states is no less of a guarantee in law than that of unitary States. 'It would be unjust if it were otherwise. Not only to give member units of a federal State a claim or "privilege" to secede, but further to grant them a claim to secede with territorial integrity, would create an obvious inequality between States' (Ibid).

Having said that, in its *Advisory Opinion on Kosovo* in 2010,[LIX] the ICJ confirmed that there was no prohibition on declarations of independence in international law and that the legal obligation to respect territorial integrity is imposed only on states, not on non-state actors. So, although the protection of the territorial integrity of States is a fundamental tenet of the post-WWII international legal order, it does not bind substate entities. As Cassesse (1995: 340) pointed out:

> [I]nternational law does not ban secessionism: the breaking away of a nation or ethnic group is neither authorized nor prohibited by legal rules; it is simply regarded as a fact of life, outside the realm of law, and to which law can attach legal consequences depending on the circumstances of the case.

This international law orthodoxy is also echoed in *Opinion No. 1* of the Badinter Commission, among else, which underlined that 'the existence or disappearance of [a] state is a question of fact.'[LX]

Of course, a unilateral declaration of independence may be in breach of national constitutional law as we already noted. In fact, external secession *de facto* challenges the constitutional delineations of the national territory (Doyle 2018). In that sense, it is often seen as a threat to the territorial integrity of the State. And as such, it is often construed as somehow antithetical to the federal principle (Sunstein 2001).

4.2 Federalism and Secession: Two compatible concepts

The dominance of States in the post-WWII international legal order and the centrality of the principle of territorial integrity has led to 'the development of constitutional provisions that prevent the defeat of the basic enterprise' (Sunstein 1991: 633). An inherent instinct of self-preservation has meant that the majority of federal orders exclude the possibility of external secession. And yet, it is possible to construe an understanding of federalism that is

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compatible with the right to consensual secession if one looks at some of the fundamental tenets of the federal principle.

As mentioned before, the root of the term federalism can be found in the Latin word *foedus* which in Roman Law referred to an international treaty, and extended to concepts of 'covenant', 'compact' and 'agreement'. So, it is possible to conceive a federal order as a compact between the member units, especially in the case of coming-together federations. For instance, in the context of US federalism, proponents of the compact theory such as Calhoun argued that since the states created the federal government via compact, they should have final authority in determining when the federal government oversteps its constitutional limits. 'In Calhoun's view, secession was possible after an escalation of measures that could be triggered by the use of the nullification doctrine' ie. the declaration of federal acts as null and void by the states (Martinico and Skoutaris 2025). Having said that, the compact theory is far from a prevalent interpretation of any major federal constitutional order nowadays. Even in the US, the Supreme Court has largely rejected the idea that the Constitution is a compact among the states.[LXI] In that sense, it is rather difficult to bridge the gap between federalism and secession in federal legal orders other than supranational ones (Fabbrini and Kelemen 2020) by reference to this theory.

Instead, the principle of subsidiarity provides for a much more intellectually coherent avenue for the bridging between those two concepts. Federalism and subsidiarity have been inextricably linked throughout their conceptual history. For instance, Althusius' federal model that is comprised of four different levels –namely families, cities, provinces and the commonwealth— was 'grounded in the idea that the lowest possible level should exercise autonomous powers insofar as it has an interest in this exercise and is most suitable for it' (Palermo and Kössler 2017: 19). Nowadays, it is linked with the idea that public powers should be allocated at the lowest level of government where they can be exercised effectively. It is 'a presumption for local-level decision-making, which allows for the centralization of powers only for particular good reasons' (Jachtenfuchs and Krisch 2016:1). The principle has been recognised among else within the German,[LXII] the Italian[LXIII] and the EU[LXIV] constitutional orders. The extent to which this principle truly governs the functioning of those federal orders is debatable. Still, it is a constitutional guarantee of the autonomy of the lower tiers in a federal system and more importantly a principle that ensures that the exercise of legislative competences take place at a level that is closer to the citizen.

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In the modern globalized world where States participate in a dense network of legal relations, the 'voluntary withdrawal of a political territory from a larger one in which it was previously incorporated' (Bauböck 2019: 227-228) may also be seen 'as a move to change the status or affiliation of a territory within a wider constellation of polities.' (Ibid: 229) Seen that way, secession 'is really just another form of subsidiarity—a claim about the right level for governance within a multilayered system extending from the personal through the local, regional, [state,] and transnational' (Waters 2020: 227). It triggers the repositioning of the relevant subject of law within the wider global constitutional landscape. In the case of internal secession, a newly formed substate entity within a territorially plural state would be able to effectively use the channels of regional participation at the national level. As to external secession, its proponents, such as the mainstream Catalan and Flemish independentist parties, prioritise the 'upgrade' of their region from a subnational authority to a fully functional state within the global legal order, enjoying all relevant rights and obligations. Finally, the withdrawal of a member state from a supranational organisation such as the EU, inescapably leads to the recalibration of its relations with the organisation itself and its remaining member states.

More importantly for the purposes of the article, Jackson (2001: 273–74) has highlighted that 'federalism provisions of constitutions are often peculiarly the product of political compromise in historically situated moments, generally designed as a practical rather than a principled accommodation of competing interests.' In that sense, the codification of the right to consensual and democratic secession is the price that a system has to pay sometimes to hold together member units with divergent aspirations as to their constitutional future. Such 'domestication' of secession is based on 'the perceived advantages of handling secessionist politics and secessionist contests within the rule of law rather than as "political" issues that lie outside of, or are presumed (by the secessionists) to supersede, the law' (Norman 2006: 188-189). It follows the logic of the Canadian Supreme Court in *Reference re Secession of Quebec*, in which the Court constructed a procedural framework, 'a normative due process' (Tancredi 2006: 171) that made the secession of Quebec conditional upon compliance with certain fundamental principles such as democracy, constitutionalism and the rule of law and the protection of minorities.[LXV] Somewhat paradoxically, this approach transforms the potential formation and/or disappearance of a state from a pure fact—a political matter remaining outside the realm of law (Tancredi 2006: 171)—to a smoother transitional process in which

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both sides should respect certain values that secure their peaceful and democratic co-existence. In that way, a proceduralised democratic secession becomes 'an important message of hope' (Martinico 2019) since it recognises the fundamental role of the law in protecting peace and stability in a certain area.

By actually codifying the right to external secession, a federal legal order may create a clear procedural channel where the competing claims about the constitutional future of a member unit may continue to be negotiated in democratic and peaceful means. So, a codified procedure on secession may create a forum of meta-constitutional debate, a debate as to what type of constitutional vision will prevail at the domestic level (Bell 2008: 200). In that way, such a right can 'induce wary actors to experiment with unions with partners with whom they are involved but about whom they harbour some scepticism' and may 'lead to a stronger sense of loyalty that comes from an active, voluntary commitment—a forced renewal of vows of sorts that reinforces commitment' (Elkins 2016: 294).

5. Conclusion

During the last ten years we have witnessed a proliferation of secessionist claims and processes in a number of constitutional orders that exhibit federalism. The 2014 Scottish referendum, the *procés* in Catalonia, the debate on the future of Northern Ireland, the secessionist claims in *Republika Srpska* provide for some examples. Within this context, this article revisits the age-old debate on the relationship between secession and the federal principle. It points to the fact that secession may apply at the different tiers of the federal order; highlights and explains the reluctance of States towards external secession and puts forward an understanding of federalism that may accommodate even external secession.

Larsen (2021: 49) has convincingly explained that as a general rule federal orders are created out of necessity; when their member units 'are incapable of accomplishing separately one or more of their fundamental substantive aims: external security, internal stability, or the wellbeing of their citizens'. This historical reality underlines the pragmatic nature of many federal arrangements. Against this background, constitutional actors in federal orders have to decide whether the prohibition of secession contributes to the stability of the arrangement or leads to an endless, paralysing political and constitutional tug of war.

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[I] In the context of the US, in particular, because the Constitution should not be considered as a suicide pact, Paulsen (2004: 1257) explains that 'its provisions should not be construed to make it one, where an alternative construction is fairly possible.'

[II] *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion, 2010 I.C.J. 403, para. 119 (July 26) [hereinafter *Advisory Opinion on Kosovo*].

[III] *See* Supreme Court of Canada, *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217 [hereinafter *Reference re Secession of Quebec*]

[IV] *See* Constitution of the Federal Democratic Republic of Ethiopia, Art 39.

[V] Northern Ireland Act 1998, s 1.

[VI] US Supreme Court, *US term Limits Inc v Thornton*, 514 U.S. 779, 838 (1995).

[VII] See for example the different perspectives that authors adopt in Cohen (2006).

[VIII] *See Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution*, Advisory Opinion, 1971 I.C.J. 16 (June 21); *Advisory Opinion on Western Sahara*, Advisory Opinion, 1975 I.C.J. 12 (Oct. 16); *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, Advisory Opinion, 2019 I.C.J. 95 (Feb. 25).

[IX] *See* Non-Self-Governing Territories, United Nations, https://www.un.org/dppa/decolonization/en/nsgt#:~:text=Under%20Chapter%20XI%20of%20the,measure%20of%20self%2Dgovernment.

[X] *Case Concerning East Timor (Portugal v. Australia),* Judgment, 1995 I.C.J. 90, para. 29 (June 30).

[XI] *Reference re Secession of Quebec*, para. 126.

[XII] *Advisory Opinion on Kosovo*, para. 119.

[XIII] International Covenant on Civil and Political Rights, art. 1, Dec. 16, 1966, 999 U.N.T.S. 171; International Covenant on Economic, Social and Cultural Rights, art. 1, Dec. 16, 1966, 993 U.N.T.S. 3.

[XIV] German Basic Law, Art 29.

[XV] Federal Constitution of the Swiss Confederation, Art 1.

[XVI] *See* e.g. Federal Constitution of the Swiss Confederation, Art 150.

[XVII] Federal Constitution of the Swiss Confederation, Arts 53 and 140.

[XVIII] Federal Constitution of the Swiss Confederation, Art 51.

[XIX] U.N. Charter Arts 55 and 73.

[XX] G.A. Res. 1514, at 66 (Dec. 14, 1960) and G.A. Res. 1541, at 29 (Dec. 15, 1960).

[XXI] *See* e.g. *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276* (1970), Advisory Opinion, 1971 I.C.J. Rep. 16; *Western Sahara*, Advisory Opinion, 1975 I.C.J. Rep. 12 (Oct. 16); *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, Advisory Opinion, 2019 I.C.J. Rep. 95 (Feb. 25).

[XXII] *See Reference re Secession of Quebec*, para. 133.

[XXIII] *Advisory Opinion on Kosovo*, para. 82.

[XXIV] *Supra* note xii.

[XXV] *See Reference re Secession of Quebec*, para. 154.

[XXVI] *Ibid.*, para. 111.

[XXVII] *See* Commonwealth of Australia Constitution Act, Preamble.

[XXVIII] *See* Constitution of the Federative Republic of Brazil, Art 1.

[XXIX] *See* Constitution of the Union of Comoros, Art 7.

[XXX] Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Dec. 16, 2016, BVerfGE, 2 BvR 349/16 (Ger.).

[XXXI] Constitutional Court of Bosnia and Herzegovina*, Case U 5/98 Partial Decision U 5/98 III* of 1 July 2000, para. 30.

[XXXII] The Constitutional Court of South Africa, *Certification of the Amended Text of the Constitution of The Republic Of South* Africa, 1996 (CCT37/96) [1996] ZACC 24, para. 24.

[XXXIII] Italian Constitutional Court, Judgment 118/2015, of 29 April 2015, para. 7(2).

[XXXIV] *See* The Act on Greenland Self-Government of 21 June 2009, Ch 8, Art 21(1). According to it, '[d]ecision regarding Greenland's independence shall be taken by the people of Greenland.'

[XXXV] *See* Constitution of the Principality of Liechtenstein, Art 4(2). According to it, '[i]ndividual communes have the right to secede from the State. A decision to initiate the secession procedure shall be taken by a

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majority of the citizens residing there who are entitled to vote. Secession shall be regulated by a law or, as the case may be, a treaty. In the latter event, a second ballot shall be held in the commune after the negotations have been completed.'

[XXXVI] *See* The Constitution of the Republic of Uzbekistan, Art 89. According to it, '[t]he Republic of Karakalpakstan shall have the right to secede from the Republic of Uzbekistan on the basis of a nation-wide referendum held by the people of Karakalpakstan.'

[XXXVII] *See* Constitution of the Union of Soviet Socialist Republics (1924), Art 4; Constitution of the Union of Soviet Socialist Republics (1936), Art 17; Constitution of the Union of Soviet Socialist Republics (1977), Art 72; Yugoslav Constitution, Introductory Part. Basic Principles.

[XXXVIII] *See* The Constitution of the Union of Burma, Ch X.

[XXXIX] *See* Preamble of the founding document of the State Union of Serbia and Montenegro.

[XL] The Interim National Constitution of Sudan, Arts 118 and 222.

[XLI] *See* Constitution of the Federal Democratic Republic of Ethiopia, Art 39(4).

[XLII]. The Belfast Agreement: An Agreement Reached at the Multi-Party Talks on Northern Ireland, N. Ir.-U.K., art. 1, Apr. 10, 1998, Cm 3883, provides that the United Kingdom and the Republic of Ireland:

> (i) recognise the legitimacy of whatever choice is freely exercised by a majority of the people of Northern Ireland with regard to its status, whether they prefer to continue to support the Union with Great Britain or a sovereign united Ireland;
> (ii) recognise that it is for the people of the island of Ireland alone, . . . to exercise their right of self-determination on the basis of consent, freely and concurrently given, North and South, to bring about a united Ireland, if that is their wish, accepting that this right must be achieved and exercised with and subject to the agreement and consent of a majority of the people of Northern Ireland; . . .
> (iv) affirm that if, in the future, the people of the island of Ireland exercise their right of self-determination on the basis set out in sections (i) and (ii) above to bring about a united Ireland, it will be a binding obligation on both Governments to introduce and support in their respective Parliaments legislation to give effect to that wish[.]

[XLIII] High Court of Justice in Northern Ireland, *In re Raymond McCord* [2018] NIQB 106, para. 18.

[XLIV] *Ibid,* para. 20. A similar statutory duty for calling a referendum on Irish unification does not exist on the other side of the Irish border. The Irish Constitution, especially the text of the revised Articles 2 and 3, reveals that there is nothing that explicitly states that the Taoiseach or any other institution and/or office holder is obliged by the Constitution, and the duties of their office, to pursue a united Ireland. The procedure for holding a referendum in the Republic of Ireland can be found in Article 46 of the Constitution and in the Referendum Acts. In sum, the proposal must be supported by both houses of the *Oireachtas*, submitted to and approved by the electorate, and signed into law by the President.

[XLV] US Supreme Court, *Texas v White*, 74 (7 Wall) 700 (1869), 725.

[XLVI] *Ibid*., 726.

[XLVII] Constitutional Court of Spain, Judgment n. 42/2014 of 25 March 2014, 12-13 available in English at: https://www.tribunalconstitucional.es/ResolucionesTraducidas/STC%2042-2014E(2)%20%20DECLARACION%20SOBERANISTA%20%20SIN%20ANTECEDENTES.pdf

[XLVIII] *Reference re Secession of Quebec*, para. 104.

[XLIX] *Ibid*., para. 88.

[L] *Ibid*., para. 90.

[LI] *See* Scotland Act 1998, Schedule 5.

[LII] UK Supreme Court, *Reference by the Lord Advocate of devolution issues under paragraph 34 of Schedule 6 to the Scotland Act 1998*, [2022] UKSC 81.

[LIII]<https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/313612/scottish_referendum_agreement.pdf >.

[LIV] *See* The Scotland Act 1998 (Modification of Schedule 5) Order 2013.

[LV] Court of Justice of the EU, *Opinion 2/13, re Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedom*, ECLI:EU:C:2014:2454, para. 156.

[LVI] Letter from John C. Calhoun to General Hamilton on the Subject of State Interposition 14 (1832) ("Secession is a withdrawal from the Union; a separation from partners, and, as far as depends on the member withdrawing, a dissolution of the partnership. It presupposes an association; a Union of several States, or individuals, for a common object. Wherever these exist, Secession may; and where they do not, it cannot.") (emphasis omitted).

[LVII] *See* Court of Justice of the EU, Case 6/64 *Costa v E.N.E.L*, ECLI:EU:C:1964:66, at 593.

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[LVIII] *See* Court of Justice of the EU, Case C-621/18 *Andy Wightman and Others v Secretary of State for Exiting the European Union*, ECLI:EU:C:2018:999, para. 50.
[LIX] *See Advisory Opinion on Kosovo*.
[LX] Arbitration Commission of the Peace Conference on Yugoslavia, *Opinion No. 1,* available at (1992) *European Journal of International Law* 3(1): 178-185.
[LXI] *See* e.g. US Supreme Court, *Martin v. Hunter's Lessee*, 14 U.S. 304 (1816); *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819).
[LXII] German Basic Law, Art 23(1).
[LXIII] Constitution of the Italian Republic, Arts 117, 118, 120.
[LXIV] Art 5(1) TEU.
[LXV] *Reference re Secession of Quebec*, para. 90.

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The Road Less Travelled: Constitutionalising Internal Secession

by

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Abstract

The Ethiopian Constitution uniquely elevates the demand for internal secession to the status of a constitutional right. This right, enshrined in Article 47 of the Constitution, allows the Nations, Nationalities and Peoples (NNPs) of Ethiopia, the term the Constitution uses to refer to ethnic groups, to establish their own states, at any time. The right to internal secession is exclusively granted on the sole basis of ethnicity. This approach inextricably links ethnic rights to territorial claims, overlooking other relevant factors such as population size, geography, and administrative efficiency. Moreover, according to the procedures outlined in Article 47(3), it appears as though the federal and state governments are not empowered to play a decisive role in the internal secession process. This represents a significant departure from procedures outlined in other federal jurisdictions, as they impose limitations on the creation of new constituent units by allowing federal parliaments and/or other concerned constituent units to participate in the process. As demands for internal secession continue to surge in the country, the practical implications of this approach in Ethiopia's volatile political landscape are called into question.

Keywords

Ethiopia, ethnic federalism, territorial claims, internal secession, constitutional design

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1. Introduction

Federations are dynamic entities from their inception and are prone to experiencing shifts in internal boundaries over time. They are based upon territorial divisions that are organised into political states, provinces, or regions known as constituent units (CUs) (Anderson 2014). Consequently, many federations incorporate provisions within their constitutions pertaining to the alteration of subnational boundaries, the division of existing states, and the establishment of new ones. However, the Ethiopian Constitution differs from its counterparts by elevating the demand for the creation of new CUs to the status of a constitutional right. In this regard, the ability of ethnic groups to break away from the states in which they are found (i.e. internal secession), is accorded significant legal status.

Article 47 (2) stipulates that 'Nations, Nationalities and Peoples within the States enumerated in sub-Article 1 of this article have the *right to establish, at any time, their own states*.' The Nations, Nationalities and Peoples (NNPs) in this context refer to the various ethnic groups that inhabit Ethiopia.[1] Accordingly, a further distinguishing factor of the Ethiopian Constitution is that the right to internal secession is exclusively granted to ethnic groups and is not accessible based on alternative criteria such as territorial, economic, or administrative claims. Furthermore, according to the procedures outlined in Article 47(3), it appears as though the Federal government and State councils are not empowered to play a decisive role in the internal secession process. According to Fessha and Ayele (2021), this represents a significant departure from procedures outlined in other federal jurisdictions, as they impose limitations on the creation of new constituent units by allowing federal parliaments and/or other concerned constituent units to participate in the process. The recent influx of demands for internal secession in Ethiopia, most notably from the southern region, has underscored the challenges inherent in enshrining internal secession as a constitutional right and the procedures involved in its realisation.

This paper aims to critically analyse the nature and status of the right to internal secession in the Ethiopian Constitution. It is structured into three interrelated parts: Part two discusses the status of the right to internal secession in the Ethiopian Constitution and the criterion upon which it is based. Part three examines procedural aspects, namely how the process is initiated, the involved actors, and the degree of consensus (if any) required from affected

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states and citizens in surrounding areas. These procedures are also discussed in light of recent state developments in the southern region, serving as a case study to assess the disjunction between rhetorical assertions and practical implementation before concluding with brief remarks.

1.1 The Road to Ethiopian Federalism

Ethiopia's administrative landscape has witnessed some significant transformations from the late 19th to early 20th century. This period in history was characterised by shifts in regional structures, marked by phases of highly centralised authority, which were notably influenced by imperial rule and later by the Dergue military regime (Deressa 2024: 8). The process of decentralisation began when the Ethiopian People's Revolutionary Democratic Front (EPRDF) assumed power in 1991.[II] Having identified the 'nationality question' as the fundamental issue in Ethiopia, the EPRDF developed an ideology with the promise of resolving this issue. As a result, the Constitution of 1995 established a system of ethnic federalism primarily founded on the principle of self-determination, which expressly encompasses the right of every ethnic community to both external and internal self-determination (Fessha and Ayele 2021).

Yet, regardless of the expansive protection that the right to self-determination enjoys, there appears to be an apparent mismatch between the conceptual starting point of the Constitution, which conceives every ethnic group as the original negotiator and founding member of the federation that is entitled to a state of its own, and the initial nine-states organisation of the federation (Belay and Belay 2019: 101-102). Originally only five *kilils* (states) – Afar, Amhara, Oromia, Tigray, Somali, were established as 'core nationality regions,' in the sense that they are dominated overwhelmingly by a single group on whose names the states are designated and run by their languages (Bihonegn 2015: 49).[III] The remaining four – Harari, Benishagul-Gumuz, SNNPRS (Southern Nations, Nationalities and People's Regional State) and Gambella were heterogeneous and comprised of different groups with none of them making up a majority (Bihonegn 2015: 49). The unique ethnic composition of the country means that smaller ethnic groups inhabit areas where other ethnic groups dominate in number. This creates immense difficulty when trying to draw "clean borders" that do not result in the perpetual creation of "fresh minorities" (Belay and Belay 2019: 101-102). Thus, the same problem the Constitution was ostensibly created to

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resolve at a national level has been replicated on a subnational level throughout the country. The Constitution attempts to reconcile this apparent conflict by giving each ethnic group the right to create their own state This will be the focus of the subsequent discussion.

2. Constitutional Framework

2.1 Ethnicity and the Right to Internal Secession

As previously highlighted, Article 47(2) affords the ethnic groups of Ethiopia 'the right to establish, at any time, their own states' (Belay and Belay 2019: 101-102). Here we see the ability of ethnic groups to break away from the state and form their own "mother states" as a clear depiction that internal secession forms part of the right to self-determination. Whereas a constitution that allows for the creation of new subnational units is not particularly unheard of, the Ethiopian Constitution is exceptional in that it elevates the demand for the creation of a new subnational unit to the status of a constitutional right (Fessha and Ayele 2021). A further distinguishing factor is that it requires no justification from those seeking their own state, as the claimants are not required to demonstrate a legitimate condition that warrants internal secession, considering that the right exists independently (Fessha and Ayele 2021). Strikingly, Article 47(2) establishes ethnicity as the sole criterion for state creation. If these provisions were to be taken at face value, it would appear that every ethnic group regardless of size, geographic location, economic considerations, administrative efficiency, or logistical reasons, would be entitled to have their own state. Hence, it may be argued that, due to the manner in which Article 47 was drafted, ethnic rights are now inextricably linked to territorial claims (Dessalegn and Afesha 2019: 87).

Despite efforts to re-draw the internal borders along ethnic lines, the states of Ethiopia, often viewed as homogeneous, actually display a considerable degree of heterogeneity. When the charter of the transitional government and subsequently the Constitution bestowed territory to select ethnic groups (known as the titular groups), these groups began to perceive their states as property that fell within their exclusive domain. It could be argued that this sense of ownership is a natural consequence of the substantive powers granted to state governments under the Constitution;[IV] which often has the effect of alienating the non-titular

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minority groups living in that region (Carvosso 2020: 681). Thus, faced with a sense of powerlessness, it is not surprising why internal minorities would opt to secede and form their own "mother-sate" in which they have access to the federal purse and a sense of greater autonomy to regulate their own affairs. Moreover, the question remains whether the ever-increasing demands for recognition and self-determination can be reconciled with the threats of territorial land and ethnic fragmentations.

2.2. The subjects of the right to internal secession: Determining Ethnic Identity

According to the Constitution, if territorial autonomy through internal secession is the door that needs to be opened to enjoy the above-mentioned privileges, ethnicity is the only key that can unlock it. This makes the question of who qualifies as an NNP (i.e. ethnic group) and how a group attains recognition a pertinent one. Fortunately, the Siltie's pursuit of recognition as a distinct nationality has resolved procedurally, if not politically, these essential constitutional questions (Smith 2013: 120).

In the literature, the designation "Eastern Gurage" originates from linguists who distinguish between one category of Ethiopian Semitic language-speakers referred to collectively as "Gurage" and their Cushitic-speaking counterparts (Woldeselassie 2017: 2). These linguists have categorised Gurage speakers into three primary groups: Northern Gurage, Western Gurage, and Eastern Gurage. However, until recently no inter-group organisation or identity formation has been observed by the Eastern Gurage speakers. This changed between 1991-2001 after a successful campaign that led to the official state recognition of the Eastern-Gurage-speaking population as one of the many distinct "nationality" groups within the Ethiopian federal state system (Woldeselassie 2017: 2). While historically, there appeared to be no official ethnonym for the Eastern Gurage speakers, the name Siltie was adopted from one major clan of people called Silti,[V] to represent the rest of the Eastern-Gurage-speaking population (Woldeselassie 2017: 3). Their pursuit of recognition commenced in the early nineties, during which, despite not speaking the same language, the "Siltie" group were regarded as Gurage (Deressa 2024). Considering that language was the primary criteria utilised by the transitional government to identify distinct ethnic groups, the rationale for their earlier designation as Gurage remains somewhat unclear.[VI]A few years later, Siltie political parties began to form, most notably the Siltie

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Peoples Democratic Unity Party (SPDUP), to pursue legal and constitutional recognition of the Siltie group (Smith 2007: 580).

Up until this point, it was unclear how exactly communities ought to be recognised as distinct ethnic groups. Remarkably, the position of the ruling party at the time seemed to contradict their initial messaging on the sacrosanctity of ethnic recognition. At first, they were particularly reluctant to acknowledge the Siltie as a separate ethnic identity. According to Smith (2007: 580), the initial stance of the federal government was that the Siltie were considered part of the Gurage ethnic group and that they were 'essentially the same community, differing only in language, and that over time they would assimilate into the Gurage identity'. Subsequently, the Siltie made a petition for recognition to the council of the Southern Nations Nationalities and Peoples Regional State (SNNPRS). Although this type of matter falls within the jurisdiction of state governments, the matter was referred to the House of Federation (HoF), the second chamber of the federal parliament. In 1997, after a meeting was organised in the town of Butajira with representatives from various parts of the Siltie community, a resolution was passed that rejected the distinctiveness claim of the Siltie and the matter was considered closed by the ruling party (Markakis 1998).[VII] However, that was not the end of the matter. The issue was brought before the HoF for the second time and it was sent to the Council of Constitutional Inquiry (the Council), the expert body that advises the HoF. The Council identified two constitutional issues that needed to be resolved in this case: (1) 'According to the FDRE Constitution, who has the power to decide about the identity of a given group of people?' and (2) 'What procedure should be followed to do that?' (Smith 2007: 581).

Regarding the first question, the Council claimed that identity issues relating to the rights of NNPs and self-determination were within the mandate of the HoF to decide (Dessalegn and Van der Beken 2020: 132). Subsequently, this interpretation was confirmed by Proclamation No. 251/2001[VIII] and is also reflected in the more recent amendment, Proclamation No. 1261/2021.[IX] As outlined in articles 4(3) and 24(1) of the latter, the HoF decides on issues relating to the rights of NNPs to self-determination, including the right to secession (See for example, Deressaa. 2024:12).

Concerning the procedure that has to be followed to determine ethnic identity, it was established that the recognition of an ethnic group would be determined in line with the criteria outlined in Article 39(5). According to Article 39(5), a 'Nation, Nationality or People

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for the purpose of this Constitution, is a group of people who have or share a large measure of a common culture or similar customs, mutual intelligibility of language, belief in a common or related identities, a common psychological make-up, and who inhabit an identifiable, predominantly contiguous territory'. In the Siltie case, it was established that communities claiming a distinct identity are required to prove that they meet these criteria. Consequently, the HoF determined that claimants are first required to submit a petition in writing showing that they meet the above-mentioned criteria (Dessalegn and Van der Beken 2020: 133). The role of the state council is to check whether the requirements set under Article 39(5) have been complied with. Once they prove that there is sufficient case, the state Council is expected to prepare a referendum and the concerned community proceeds to decide on the final fate of the identity question through direct participation in the ballot (Smith 2007: 582). Accordingly, the Hof came to the decision that the Siltie had presented a compelling argument for their recognition as a distinct "nationality", warranting, at the very least, the opportunity for a referendum on the issue. In 2001, such a referendum took place, posing the question 'Are the Siltie Gurage or not?' (See also Smith 2007: 582). The outcome was resoundingly affirmative, with over 99% of the vote in favour of the Siltie's separation from the Gurage.

What the Siltie judgment failed to adequately address is whether the requirements of Article 39(5) needed to be fulfilled cumulatively. In 2008, while deliberating on another petition, the Council of Nationalities (CoN) in the SNNPRS –mandated with the power of settling identity determination issues at the *state level*– ruled that a claimant community does not need to fulfil all the five criteria cumulatively (Dessalegn and Afesha 2019: 70). However, the CoN has subsequently backtracked on this stance, and the prevailing interpretation is that these are cumulative standards essential for analysing and determining identity claims (Dessalegn and Afesha 2019: 70). This interpretation could prove to be problematic since different communities who identify as distinct ethnic groups might not be able to meet all the requirements outlined in Article 39(5). For instance, language was a key criterion when recognising distinct ethnic groups and partitioning the country accordingly, during the transitional period. However, not all ethnic groups have a "mother tongue" and vice versa (Hudson 2012). Moreover, in the years since the Siltie decision, various procedural inconsistencies and irregularities have emerged in addressing requests for recognition. Beyond the Siltie instance, which reached a resolution through a referendum, other cases

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presented to the HoF have been handled through decisions made by the HoF directly, referred back to regional state councils, or are currently awaiting judgment by the HoF. According to Kedir (2021: 23), this suggests that the HoF lacks a standardised and predictable approach when determining ethnic identity.

Article 47 clearly states that the right to internal secession is inherent to all ethnic groups within Ethiopia. However, as the preceding discussion has elucidated, accessing this "right" poses considerable challenges for many ethnic groups due to various hurdles, such as ethnic recognition, which must be overcome before initiating the internal secession process. Consequently, an underlying constitutional assumption emerges: certain ethnic groups are deemed inherently deserving of recognition and associated benefits, while others must substantiate their presence (Kedir 2021: 23). The obvious quagmire that this creates is that there is a right in the Constitution that is an intrinsic entitlement, vested in *all* the NNP's of Ethiopia but is not accessible to all ethnic groups on an equal basis.

3. Consensus in the Self-Determination Process

The essence of good political institutions is that they make political idiocy more difficult (but not impossible) to achieve.

Hammel (1993: 40)

It is a fact universally acknowledged that political power tends to be inherently fragile, and even the most elegantly crafted constitutions are only as good as the humans who choose to abide by the rules set out in them. However, this does not negate the value that constitutional engineers have to offer when it comes to resolving the various socio-political issues prevalent in divided societies. So while it is important to recognise the limitations of what the design of political institutions can achieve, it is also important to use the available tools of constitutional design to, as Hammel best put it, make political idiocy harder to achieve (Anderson and Vaughn 2021).

As previously discussed, the Ethiopian Constitution differs from its counterparts in that it appears to have elevated the *demand* for the creation of new constituent units to the status of a constitutional right (Fessha and Ayele 2021). This right is exclusively afforded to ethnic groups and is not available based on alternative criteria such as territorial claims. Moreover,

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it appears that the federal government and state governments have no decisive role in the process. This is a key departure from other constitutions, which often place limitations on the creation of new constituent units by allowing federal parliaments and/or other concerned constituent units to have a say in the process (Fessha and Ayele 2021). The central question remains: does the process for internal secession, as outlined by the Constitution, make the aspiration of establishing one's own state an achievable reality or a mere pipe dream? The following discussion contends that these constitutional provisions display weaknesses and gaps since they affect the achievement of the constitutional objectives, involve serious risks for the rights of (persons belonging to) other ethnic groups, and exacerbate ethnic conflict while undermining social cohesion (Van der Beken 2021).

3.1. Initiating the Process

Article 47 (3)(a) provides that the right of any Nation, Nationality or People to form its own state is exercisable under the following procedures:[X]

> When the demand for statehood has been approved by a two-thirds majority of the members of the Council of the Nation, Nationality or People concerned, and the demand is presented in writing to the State Council.

This procedure tends to resemble the one for secession in Article 39(4)(a) which stipulates that the procedure to exercise the right to self-determination, including secession, of every NNP, shall be triggered 'when a demand for secession has been approved by a two-thirds majority of the members of the Legislative Council of the Nation, Nationality or People concerned'.[XI] This petition can only be entertained if a two-thirds majority of the members of the council of the NNP approve. This is obviously a reference to the local government council.

As previously noted, state governments wield significant substantive powers and are tasked with managing their states and drafting their state constitutions. As a result, uniformity of local government, in terms of structure and type, cannot be guaranteed. However, a general survey of local government in the country would reveal that a multi-layered local government is established across the country (Ayele and Fessha 2012: 97). These include, but are not limited to, the establishment of zones, woredas (districts)[XII], and Kebeles (wards)

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(Article 52(1)).[XIII] State governments have also created ethnic-based local governments, known as *liyu* (special) woredas and nationality zones, through which internal minorities are expected to exercise autonomy, a response to the practical challenges impossibility of providing each major ethnic group with a designated "mother state"(See for example Ayele 2014: 96). Nationality zones are established to serve as institutions of self-governance for intra-state ethnic minority communities spanning two or more districts, while a liyu woreda is established to govern a community inhabiting a single district (Chigwata et al 2021: 194). Each nationality zone, liyu woreda, woreda and city should have a representative council composed of elected representatives and an executive appointed by the local council (Chigwata et al 2021: 194). Nationality zones and liyu woredas exhibit a departure from conventional local governance frameworks within Ethiopia as their establishment is predicated upon the imperative of territorial accommodation for ethnic groups, thus reflecting the nation's ethno-federalist structure.

The question is whether every local government council can initiate internal secession. Given that the right to internal secession is reserved for ethnic communities, it is submitted that it is not every local government council that can initiate internal secession but the council of ethnically based local government. It is only a petition that is approved by a two-thirds majority of the members of the council of the special woreda or the nationality zone of NNP that can be entertained by the state council.

3.2. The Role of the Federal and State Governments

Upon receipt of the written claim for internal secession from the council of the concerned NNP, the relevant state council is required to initiate a referendum, as outlined in Article 47(3)(b):[XIV]

> When the Council that received the demand has organized a referendum within one year to be held in the Nation, Nationality or People that made the demand.

The State Council does not seem to have the discretion to refuse the application. Instead, it is obligated to arrange a referendum within a year of receiving such an application. Nevertheless, the Constitution does not specify any consequences for failing to organise the referendum within the specified timeframe (Belay and Belay 2019: 105). Article 25(2)-(4) of Proclamation 1261/2021[XV] attempts to fill in the gaps by creating a right to appeal to the

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House of Federation that can be exercised by a party claiming that its demand for state formation has not been executed within the time specified or alleges to have dissatisfaction with the decision. Such a complaint has to be presented to the House in writing by the Council of the NNP that claimed for the formation of the State. The House is then expected to provide a final decision within two years of receiving the complaint.[XVI] The aforementioned provisions suggest a tendency towards relaxing the stringent requirements outlined in the Constitution. By introducing an appeals process to the House of Federation, the proclamation not only anticipates the possibility of the referendum exceeding the one-year timeframe but also grants the House a two-year window to deliberate on the appeal. Nonetheless, it remains unclear whether the HoF, as an organ of the federal government, possesses the discretion to reject such an application. Should this question be affirmed, it implies a more pronounced role for the federal government in the process of new state formation than initially envisioned by the Constitution.

Recently, this issue was raised in the context of the Sidama quest for statehood. Political activists in the Sidama community, who had been agitating for their own state for a very long time, took advantage of the internal crisis the ruling party was facing and Prime Minister Abiy Ahmed's subsequent ascent to power in 2018 to initiate the process of internal secession (Tronvoll et al 2020: 11).[XVII] According to the International Crisis Group (2019), key members of this movement were the Sidama youth known as the *Ejjeetto* ("hero", in the Sidama language), who were instrumental in influencing the political elites in the capital city of Hawassa and elsewhere in the Sidama zone. Many other ethnic groups living in the vicinity were targeted in the turmoil as, according to Davidson (2018), the Sidama intended to manifest 'ownership' of the city. In the aftermath, interviews with non-Sidama observers revealed that those who orchestrated the chaos during the violent protests claimed that the 'land belongs to them' and all other clans should be 'kicked out'. The protests amplified the interests of both government and opposition politicians, ultimately leading to the Sidama Nationality Zone Council endorsing the demand for a separate regional state on 18 July 2018 (Davidson 2018; Tronvoll et al 2020: 11).[XVIII]

As per constitutional procedures, the Sidama Zone Council's request for statehood was submitted to the SNNPRS state Council for further processing. According to Article 47(3), the State Council would then be responsible for organising a referendum. This would mean forwarding instructions to the National Election Board of Ethiopia (NEBE), to carry out a

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referendum within one year. Ultimately, the SNNPRS Council submitted a letter on 20 November to NEBE instructing them to facilitate a referendum on the Sidama request (Tronvoll et al 2020:11). After receiving said instructions, the NEBE, who at the time was engaged in institutional, legal, and structural reforms, and did not have the capacity to address the Sidama referendum, hesitated on whether or not to start preparing for the referendum.[XIX] Their prolonged silence on the matter intensified speculations on whether or not there were ulterior motives for their non-reaction to the Council's demand.[XX] The delay prompted activists to mobilise a group of Sidama lawyers, who argued that the undue delay in holding the referendum justified a unilateral declaration of statehood (Verjee 2019). The perceived resistance and obstructionism from federal authorities and institutions played a role in fostering unity across Sidama society. Consequently, the notion of a unilateral declaration of statehood garnered widespread support (Tronvoll et al 2020: 13).

In response, Prime Minister Abiy addressed parliament on 1 July, acknowledging the constitutionality of Southern Nations' statehood demands but emphasising that they must be addressed through the appropriate procedure once the new board of the NEBE is fully operational. (Tronvoll et al 2020: 13). He cautioned that failure to follow the correct procedure for declaring statehood could lead to federal intervention, and a federal official revealed that the Abiy administration was receptive to the idea of Sidama statehood but preferred to address it within the framework of a constitutional reform process. However, according to the International Crisis Group (2019), concerns among government officials regarding their ability to manage the situation were palpable and the government's senior ranks were worried they would not be able to handle the opening of the "Pandora's box". Two days prior to 18 July 2019 (one year to the day after the request had been submitted), the NEBE announced that it needed an additional five months to prepare for a referendum, to be conducted on 13 November 2019. This prompted accusations against the state government of SNNPRS;[XXI] of collusion with the federal government, leading to unrest among the Ejjeetto, who debated between demanding a unilateral declaration or advocating for a delayed referendum, ultimately agreeing to postpone the declaration plan and hold discussions on 18 July 2019 in Hawassa city instead (Tronvoll et al 2020: 13).

Considering the incredible violence and inter/intra-ethnic conflict that had been witnessed in the quest for Sidama's statehood. The NEBE initially demanded that the SNNPRS develop legal protection for non-Sidama living in Hawassa; the demand was

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nevertheless rejected, as the SNNPRS Council stated that the Constitution and the laws of the land regulate such issues and that there was no need for special legislation pertaining only to Hawassa City (Tronvoll et al 2020: 14). Subsequently, on 18 October, the SNNPRS Council approved the legal framework for a transition with 168 voting in favour, 55 against, and 23 abstentions. But finally, after much deliberation, on 15 October 2019, NEBE decided to postpone the referendum for one week, pushing it back to 20 November.[XXII] The organisation blamed the SNNRPS for being late in developing the legal and regulatory framework of a possible Sidama transition process to regional statehood.[XXIII] On 20 November 2019, an overwhelming 98.5 per cent of the votes tallied were cast in favour of statehood (Misikir 2021).

According to Belay and Belay (2019: 106), it is evident that the roles of the national and state governments underwent their first test in the context of the Sidama quest for statehood when a referendum was not organised within the constitutionally specified one-year period. Many proponents of Sidama statehood argued that the failure to conduct the referendum within the designated timeframe entitled them to unilaterally declare statehood (Belay and Belay 2019: 106). While this threat was not realised, the violence that erupted in the state amid the controversy has brought the problematic nature of the constitutionally provided procedure to the forefront. Although it grants ethnic communities the right to request internal secession, it doesn't explicitly oblige Federal or Regional State governments to comply (Fessha 2019). According to Fessha (2019), the absence of this obligation leaves room for interpretation, potentially suggesting the possibility of negotiation. Subordinate legislation such as Article 25(2), (3), and (4) of Proclamation No. 1261/2021 offers some clarification on the process to be followed should the State Council fail to organise a referendum within a year. However, it does not address the core issue of whether the State Council has the discretion to reject these applications for substantive reasons. Nor does it confirm whether the House of Federation, effectively acting as an appellant division in these instances, possesses the authority to do so.

The wording of Proclamation Article 25(2) and (4) seems to be purposely drafted to be ambiguous:

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> 2. Any party claiming that the question of state formation has not been executed within the time specified in sub-article 1(b) of this Article or alleges to have dissatisfaction with the decision, may appeal to the House;
>
> …
>
> 4. The House shall make a final decision within two years on issues presented to it in such a procedure;

The verbiage used in the sentence 'alleges dissatisfaction with the decision' denotes that the state Council does have the discretion to reject said application. However, there is no indication whether this rejection may be purely based on procedural grounds or not. The wording in these subsections creates ambiguity, potentially suggesting that both the state and federal governments could deny statehood applications based on undisclosed criteria. This appears to be an attempt by the federal government to establish greater control over the process, akin to a claw-back provision. Arguably, seeking more control in the decision-making process is neither inherently problematic nor procedurally unsound.[XXIV] The issue here lies in the Ethiopian Constitution, which explicitly grants all NNPs the right of internal secession without specifying a decisive role for federal and state governments (Belay and Belay 2019: 106). Consequently, as this ambiguity persists, the federal government's efforts to empower itself in retrospect, through regulations such as the ones mentioned above, run the risk of encroaching upon constitutionally enshrined rights vested in the NNPs of Ethiopia.

3.3. The Use of Referendums

According to Anderson (2014: 12), federations such as Iraq, Switzerland, Germany, and Nigeria, have procedures for creating new CUs that involve referendums (and in some cases a right of initiative). Nonetheless, the thresholds for approval vary greatly as do the rules regarding the procedure for initiating a referendum (Anderson 2014: 12). Typically these referendums require a specified majority vote and, in some instances, there may be an additional requirement for the approval of any affected constituent units or by some number of all CUs, as well as the national legislature. The Ethiopian Constitution not only fails to specify a decisive role for Federal or state governments in the procedures outlined in Article 47(3). It also fails to consider the role of other ethnic minorities living in the state which would be affected by the outcome of said process. Instead, Article 47(3)(c) merely stipulates

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that the right of NNPs to form their own state is exercisable if, amongst other things, '[T]he demand for statehood is supported by a majority vote in the referendum'.[XXV]

The Ethiopian approach stands in sharp contrast to the position adopted in federations such as, for example, Germany. The complicated referendum process, as provided in the Basic Law,[XXVI] begins with a federal law which must be approved by a majority vote in a referendum in both the area of the new Land and the remaining areas of the affected Land or *Länder*. Alternatively, it must achieve a two-thirds majority in the territory of the proposed new Land while not being rejected by more than two-thirds of voters in the affected Land (Anderson 2014: 13). Another example is the case of Switzerland, which requires a far higher threshold. In Article 53(1)-(4) it is stipulated that any change in the number of Cantons requires the consent of both of the Cantons concerned together with the consent of a majority of voters and Cantons in a national referendum (Anderson 2014: 13). If the majority of the population and the cantons, and if the federal power agreed, the proposal of the people would be implemented.[XXVII]

The above examples demonstrate a desire to mitigate the potential adverse outcomes of creating new states, such as excessive politically motivated demands for statehood and inter- and intra-state conflicts, while also providing citizens with an opportunity to express their consent regarding proposals for new states. However, the Ethiopian Constitution appears to overlook this aspect, creating a virtual breeding ground for politically driven demands for internal secession. In this environment, politicians and activists are unrestricted by any reservations about offending other ethnic groups, thus disincentivising them from adjusting their rhetoric and tactics. If the Constitution had included a provision requiring the consent of the majority of citizens in the neighbouring or affected states, or a majority vote in a national referendum, groups like the *Ejjeetto* and other activists advocating for their own state, as discussed below, might not have resorted so readily to violence against non-Sidama residents or employed harsh rhetoric implying the expulsion of these residents from "their land" in order to gain favour with other ethnic groups in Ethiopia.

3.3.1. Voter Eligibility

The Constitution is rather vague and does not stipulate 'who' is eligible to participate in the referendum procedure. Unsurprisingly, this was the most controversial issue discussed in the voter registration process in the case of Sidama's quest for their own state. The issue

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is key and hinges on whether eligibility is based on the ethnicity or residency principle. Some argue that the Constitution tacitly endorses the ethnicity principle based on the Constitutional phrase that the referendum shall be held 'in the Nation, Nationality or People that made the demand,' and thereby grants the ethnic group claiming a new state a monopoly right on the referendum (Afesha and Barrett 2024: 10). Others claim that the residency principle can be advocated for when the statehood claim is made.[XXVIII] It is reported in Tronvoll et al (2020: 15) that the NEBE initially wanted to implement a residence clause under which a minimum residency of five years in Sidama would be a requirement to be eligible to vote. Sidama activists pushed back against this, interpreting it as an attempt to diminish the influence of Sidama voters in Hawassa City.[XXIX] Ultimately, the NEBE declared that any individual above the age of 18 residing in the Sidama Zone for six months prior to registration would be eligible to vote.[XXX] This could be interpreted to mean that non-Sidama residents in the Zone were also eligible to participate in the process.

However, the political context during the registration process was perceived as having intimidated non-Sidama residents living in Hawassa and its environs.[XXXI] The large-scale violence and killings during the summers of 2018-2019 resulted in several members of the Wolayta ethnic group being murdered by the Ejjeetto activists, which appeared to have scared many non-Sidamas away from participating in the referendum process.[XXXII] According to Tronvoll et al (2020: 18), it appears plausible to suggest that the majority of non-Sidamas opted not to register, potentially influenced by a politically intimidating and non-conducive environment. This scenario highlights the risks associated with formulating a process for establishing new states, as outlined in the Constitution, which solely relies on the ethnic group initiating the demand. This approach undoubtedly empowers malicious actors to employ any means necessary, including inciting chaos, violence and intimidation to attain their desired goals.

3.3.2. Reframing Self-Determination: Exploring Collaborative Statehood Demands

Less than a year after Sidama Zone succeeded in creating their own state via referendum in 2019, a new multi-ethnic region began to emerge. Between November 2018 and April 2019, a series of events unfolded whereby at least three zonal units unanimously endorsed the idea of independence from the SNNPRS. These endorsements were made at their respective zonal councils, following which formal requests were submitted to the assembly

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of the SNNPRS. On the 30th of September 2020, five zone-level administrations and one district in the region, namely Kaffa, Sheka, Bench-Sheko, Dawuro and West Omo Zones, and Konta Special district put aside their individual requests for statehood and voted unanimously for a referendum on creating a joint South West State.[XXXIII] This petition was endorsed by the HoF, which then requested that NEBE arrange a plebiscite. In September 2021, a referendum was held on the same day as the second round of national elections, which, according to the NEBE, attracted 93.8 per cent of the 1.3 million people registered to vote. An overwhelming majority, around 1.2 million people, voted in support of creating the State of South West Region (SWEP) (Tsegaye 2023).

The emergence of the state of the SWEP region is particularly notable because the Constitution seemingly envisions the right to self-determination for a specific NNP. This interpretation suggests that NNPs integrated within existing states only have the option to form their own state if they secede by following the procedures outlined in Article 47(3). However, the creation of the new SWEP state in 2021 involved more than ten NNPs. In this case, the ethnic groups residing in five zones and one special woreda, who initially sought separate statehood, abandoned their original claims in favour of establishing an ethnically clustered state. The successful establishment of statehood by the SWEP introduces a new dimension to the statehood process and has sparked numerous contentious issues.

The SWEP statehood quest not only challenges conventional interpretations of self-determination but also prompts critical reflections on the Constitution's conceptualisation of ethnic homeland as the primary mechanism for achieving self-determination. By choosing collaboration over exclusion, the SWEP's formation underscores the potential for a more inclusive and cooperative approach to statehood, wherein NNPs exercise their right to self-determination through association rather than the unilateral pursuit of an exclusive ethnic homeland. In essence, the SWEP's emergence presents a compelling case study that reaffirms the notion that self-determination can be realised through diverse and collaborative arrangements, wherein ethnic groups express their will at the ballot box in a manner that fosters unity and cooperation, rather than fragmentation and division.

The SWEP referendum raises questions about the "majority vote" required in the constitutional referendum procedure when it is ethnic clusters claiming statehood. For instance, should the outcome of the referendum be decided based on the combined majority or should each distinct majority have the right to decide separately? The NEBE used a simple

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majority vote system to decide the outcome of the SWEP referendum. This is despite the differences in ethnic population sizes amongst the clustered ethnic communities. Table 1 illustrates that even if only the members of the Kafa and Bench-Sheko communities endorsed separate statehood, the referendum outcome would still favour state formation based on a majority vote.

Table 1. Ethnic make-up of SWEP arranged by size of population: Source Statistical Report of the 2007 Population and Housing Census.

No	Name of the zone	Population size	Percent
1	Kafa	874,716	33.9%
2	Bench-Sheko	652,531	25.2%
3	Dawro	489,577	19%
4	West Omo	272,943	10.6%
5	Sheka zone	199,314	7.7%
6	Konta Special District	90,846	3.5%
Total Population		2,579, 927	100%

The significance of this issue was brought to the forefront in 2023 with the creation of the South Ethiopia State, when six zones and five special woredas, in the SNNPRS held a referendum on statehood (Tadesse 2023).[xxxiv] The NEBE declared the approved results of the referendum of all zones and special woredas except Wolayta, who had long been advocating for their own state. Despite the Wolayta groups' objection, on April 28, 2023, the Southern Ethiopia State was created. This was followed by the Central Ethiopia State, which was formed with what remained of the SNNPRS.[xxxv] Similar to the Wolayta, the Gurage nationality group also objected to joining the new clustering system in the new Central Ethiopian State and aimed to establish their own separate statehood. However, unlike the Sidama nation, their demands were ultimately suppressed and reversed.

This prompts a critical examination of the rights accorded to minority ethnic groups, particularly those who may have dissented against the establishment of a new state, and the representation of their preferences in this process. Considering that the Constitution is ambiguous on how ethnically clustered claims for statehood should be handled, including the matter of voting rights and territorial proximity, it becomes evident that the simple majority vote system enshrined in Article 47(3) fails to adequately ensure the protection of minority ethnic rights. Arguably, according to Beken (2021: 956), 'the requirement of an

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ordinary majority vote in the referendum significantly reduces the chances for effective minority participation.' Thus, within the ambit of safeguarding minority interests, this framework is demonstrably deficient (Afesha and Barrett 2024: 8). Likewise, if a two-thirds majority requirement had been in place instead of a simple majority for the referendum, or if a majority vote was required from every affected minority group, it would have ensured a more robust representation of the wishes of minority groups residing in the various regions.

4. Conclusion

As the preceding discussion elucidates, the Ethiopian Federal system faces complex challenges in striking a balance between ethnic autonomy and national unity. The ambiguity surrounding the federal government's role in the creation of new states and its subsequent efforts to empower itself through sub-ordinate legislation risks infringing upon the constitutionally enshrined rights vested in the NNPs of Ethiopia. Additionally, lessons from other jurisdictions underscore the importance of consensus in the self-determination process to ensure the legitimacy and stability of internal secession movements, particularly in cases that involve ethnic clusters seeking statehood. Furthermore, the case study of recent statehood developments in the southern region reveals a substantial disconnect between the initial rhetorical assertions of the federal government and the practical implementation of constitutionally enshrined rights. This raises concerns about the exacerbation of societal grievances, ethnic tension, and violence both within and between ethnic groups. Moving forward, it is essential to critically assess the potential consequences of relying exclusively on ethnicity as the basis for the right to internal secession, emphasising the need for inclusive and transparent processes that promotes unity while respecting the diverse identities within the Ethiopian federation. Hence, highlighting the need for clear constitutional amendments to address these pivotal issues.

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[I] Article 39(5): A 'Nation, Nationality or People' for the purpose of this Constitution, is a group of people who have or share a large measure of a common culture or similar customs, mutual intelligibility of language, belief in a common or related identities, a common psychological make-up, and who inhabit an identifiable,

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predominantly contiguous territory. Many other articles or sub-articles of the Constitution are substantially either specifications or elaborations of Article 39, or contextualization's of ethnicity within the state structure. See Constitution's 'Preamble'; Art.2; Art.3.2; Art.5; Art.8.1; Art.34.6; Art.35 Art.40.3; Art.41.9; Art.46.1-2; Art.47.2-9; Art.61.1; Art.88.1-2; Art.89.4-6; Art.91.1; Art.94.

[II] In May 1991, the EPRDF overthrew the former dictatorial government, the Derg (military committee), ending almost a decade of devastating civil war. The EPRDF was a coalition of ethnically-based armed groups, which the Tigrayan People's Liberation Front (TPLF) formed during the war.

[III] Kilils are the Ethiopian equivalent for US states and Swiss cantons. In 2019, Sidama became the first new state created since the inception of the 1995 Constitution, following a referendum that garnered a 98% vote in favour of internal secession. However, as of yet, no constitutional amendments have been made to include it and/or other subsequent new states in the list of states enumerated in Article 47(1).

[IV] Article 52 (1) & (2) grant vast power to states including but not limited to: (b) enacting the state constitution, (c) to formulate and execute economic, social and development policies, strategies and plans of the State; (d) to administer land and other natural resources in accordance with Federal laws.

[V] In the literature, variant versions of this term exist, including 'Siltie', 'Silte' 'Silt'e' and 'Selti' However, it is important to differentiate between Siltie and Silti. The term Siltie refers to the post-1991 formation of collective identity that constitutes the various clan and territorial groups historically known in the literature as the Eastern Gurage. Nonetheless, the term Silti refers to one of the clans or dialect groups of the Eastern Gurage.

[VI] Some authors have suggested that this was due to the close proximity of the two different groups and their shared hardships and subjugation under the reign of Emperor Menelik, which united the Siltie with their Gurage neighbours. Despite this, there are clear indications early in the transitional period that the Siltie pushed for the recognition of their own language.

[VII] Nevertheless, the ruling party did acknowledge that the Siltie people, at the very least, had a distinct language and it was this recognition that facilitated the legal process undertaken by the SPDUP.

[VIII] Consolidation of the House of the Federation and Definition of its Powers and Responsibilities Proclamation No. 251/2001, Federal Negarit Gazeta, Year 7, No. 41.

[IX] A Proclamation to amend the Proclamation Defining the Powers and Functions of the HoF of the Federal Democratic republic of Ethiopia No. 1261/2021,Federal Negarit Gazeta, Year 28, No 4.

[X] Constitution of the Federal Democratic Republic of Ethiopia, 1995.

[XI] However, there exists a slight difference in the wording of the two provisions. Notably, Article 39(4)(a) refers to the 'Legislative Council' of the NNP, while Article 47(3)(a) only refers to '"the Council" of the Nation, Nationality or People concerned.' This prompts consideration regarding whether this distinction implies a substantive difference in meaning. Essentially, does Article 39(4)(a) refine the term 'Council' by introducing the qualifier 'Legislative'?

[XII] A woreda, is a territorial area equivalent to a district with approximately 100,000 residents. Typically established in rural areas on wall-to-wall basis, with the aim of fostering public participation and delivery of basic services.

[XIII] All powers not given expressly to the Federal Government alone, or concurrently to the Federal Government and the States are reserved to the States.

[XIV] Constitution of the Federal Democratic Republic of Ethiopia, 1995.

[XV] See Article 19(3) of Proclamation No. 251/2001 which preceded this.

[XVI] See Article 25 (2), (3) and (4) of A Proclamation to amend the Proclamation Defining the Powers and Functions of the HoF of the Federal Democratic republic of Ethiopia No. 1261/2021.

[XVII] Since the inception of the SNNPRS, there have been numerous initiatives launched by ethnic groups to form new ethnic administrative units, from the level of local government such as woreda's all the way up to the regional state level. The SNNPRS has endorsed many of these claims up to a zonal level, however, up until 2019 it has repeatedly 'rejected' demands of internal secession to form new states. In 2006, then-Prime Minister Meles Zenawi persuaded Sidama leaders to suspend their pursuit of a regional state after the Sidama zonal council voted for a referendum on statehood. After that, the Sidama's campaign largely lay dormant until 2018.

[XVIII] Following this, eleven additional claims for regional statehood were endorsed by various zonal councils in SNNPRS during 2018. According to deputy president Getahun. Sidama statehood would likely fuel agitation by the Dawro, Gamo, Gofa, Gurage, Hadiya, Kafficho, Kambatta, Wolayta and other groups for their own states).

[XIX] 'Ethiopia Holds Referendum to Determine Statehood for Sidama Zone' in *International Foundation for Electoral Systems*, 15 January 2020, available at <https://www.ifes.org/news/ethiopia-holds-referendum-determine-statehood-sidama-zone> (last accessed 2 May 2024).

[XX] 'Ethiopia Holds Referendum to Determine Statehood for Sidama Zone' in *International Foundation for Electoral*

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Systems, 15 January 2020, available at <https://www.ifes.org/news/ethiopia-holds-referendum-determine-statehood-sidama-zone> (last accessed 2 May 2024).
XXI As EPRDF's views on governance and statehood shifted, from the time of armed struggle to actually administering and running the country, so did their understanding on how to organise the ethnic heterogeneous southern part of the country. Originally sixteen different ethnic parties were established to administer the five states in the south at various administrative levels. As these parties were replicates of each other and initiated by EPRDF in order to obtain politico-administrative control of the southern people, it was decided to merge them into one unified multi-ethnic front in 1993, called Southern Ethiopian Peoples' Democratic Front (later renamed to 'movement' as in SEPDM).
XXII 'Ethiopia Holds Referendum to Determine Statehood for Sidama Zone' in *International Foundation for Electoral Systems*, 15 January 2020, available at <https://www.ifes.org/news/ethiopia-holds-referendum-determine-statehood-sidama-zone> (last accessed 2 May 2024).
XXIII See: 'Ethiopia postpones autonomy referendum for ethnic Sidama: Fana news agency' in *Reuters*, 15 October 2019, available at<https://www.reuters.com/article/us-ethiopia-politics/ethiopia-postpones-autonomy-referendum-for-ethnic- sidama-fana-news-agency-idUSKBN1WU2LJ> (last accessed 6 April 2024).
XXIV It is worth noting that many federations involve both the federal government and subnational councils in decision-making processes to varying degrees.
XXV Article 47 (3) (c) Constitution of the Federal Democratic Republic of Ethiopia, 1995.
XXVI Article 29, para. 2-8 in Basic Law for the Federal Republic of Germany, 1949.
XXVII Federal Constitution of the Swiss Confederation of 18 April 1999.
XXVIII For instance, the Gurage Zone embraces several different ethnicities, although the name of the Zone privileges one ethnic group. The Gurage Zone Comprises of representatives from three distinct ethnic groups, which approved the new state formation claim from the Gurage Zone. Meaning that the 3 ethnic groups voted in the statehood exercise in the zonal council.
XXIX There has been a high rate of urbanisation from rural Sidama to the city over the last years.
XXX 'Elections in Ethiopia: 2019 Sidama Referendum' in *International Foundation for Electoral Systems*, 19 November 2019, available at < https://www.ifes.org/tools-resources/faqs/elections-ethiopia-2019-sidama-referendum> (last accessed 20 April 2024).
XXXI See: 'Ethiopia referendum: Dozens killed in Sidama clashes' in *BBC*, 22 July 2019, available at <https://www.bbc.com/news/world-africa-49070762 > (last accessed 6 April 2024).
XXXII See: 'Ethiopia referendum: Dozens killed in Sidama clashes' in *BBC*, 22 July 2019, available at <https://www.bbc.com/news/world-africa-49070762 > (last accessed 6 April 2024).
XXXIII 'New multi-ethnic regional state emerging in South west' in *Borkena*, 10 October 2020, available at < https://borkena.com/2020/10/10/ethiopia-new-multi-ethnic-regional-state-emerging-in-south-west/> (last accessed 28 April 2024).
XXXIV The Southern Ethiopia Region constitutes Wolayta, Gamo, Gofa, South Omo, Gedeo and Konso zones– and special woredas – Derashe, Amaro, Burji, Basketo and Ale.
XXXV The Central Ethiopia Region constitutes Gurage, Siltie, Kambata Tambaro, Halaba, Hadia zones and Yem special district.

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New Caledonia: a Promising Attempt to Constitutionalize a Sovereignty Conflict Going Wrong

by

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Abstract

New Caledonia is a French autonomous territory in the South Pacific whose constitutional status is designed to be transitional. It derives from the 1998 Nouméa Agreement, based on the 1988 Matignon-Oudinot Agreements. These Agreements ended violence between loyalist and indigenous groups and delayed a promised independence referendum by 30 years, in return for territorial and non-territorial autonomy. Indeed, the Nouméa Agreement provided the New Caledonian divided society with a power-sharing system that up to 2021 worked well. It recognizes the 'Kanak people' and 'shared sovereignty'. It also entrenches procedural rules for a series of referendums that, if the restricted electorate had voted in favour, would have guaranteed full sovereignty to New Caledonia. In early 2024, two years after the inconclusive third and last independence referendum, tensions escalated and in May 2024, following deadly riots over a voting reform proposal, the French Government declared a 12-day state of emergency. There is no consensus on New Caledonia's final constitutional status. Instead, dialogue between the parties has eroded and a true 'Indigenous-settlers' reconciliation is far from being reached. Combining historical background with recent legal and political analysis, this paper offers insight into the intricate history – and problematic present – of New Caledonia.

Keywords

New Caledonia, sovereignty, self-determination, independence referendum, decolonization, power-sharing

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1. On the constitutional recognition of Overseas France …

Overseas France (119,394 km^2) includes Guadeloupe, French Guiana, Martinique, Réunion, Mayotte, Saint Barthélemy, Saint-Martin, Saint-Pierre-and-Miquelon, Wallis and Futuna, French Polynesia, French Southern and Antarctic Lands, and New Caledonia. All 12 French overseas territories – inhabited by an estimated 2,2 million people – have different political statuses and relations to Paris, the European Union, and their respective world regions.

In constitutional terms, Overseas France is classified into Overseas Departments (*départements d'outre-mer*, DOM) and Overseas Territories (*territoires d'outre-mer*, TOM), according to the Articles 73 and 74 of the 1958 French Constitution (FrConst). With the 2003 constitutional revision,[1] DOM and TOM changed their names and have become Overseas Departments and Regions (*départements et régions d'outre-mer*, DROM), and Overseas Collectivities (*collectivités d'outre-mer*, COM). In essence, DROM are governed by the principle of legislative identity, meaning that national legislation automatically applies. Yet this allows for some degree of legislative differentiation. Indeed, Article 73 of the 1946 Constitution of the Fourth Republic already provided the French Parliament the ability to differentiate or adapt legislation in the DOM on an exceptional basis. This arrangement was maintained under the 1958 Constitution of the Fifth Republic. The 2003 constitutional revision went a step further. It gave the DROM themselves a limited power to derogate from national legislative provisions, although subject to parliamentary supervision and oversight.

COM instead are granted more extensive autonomy because of their peculiar organization (*organisation particulière des collectivités*, Article 74 FrConst). They are only subject to the laws specifically extended to their respective territory in accordance with the principle of specialty of legislation (*spécialité législative*). This means that laws passed in metropolitan France must include a special reference rendering (parts of) them applicable in the respective COM (i.e. *Saint Barthélemy, Saint-Martin, Saint-Pierre-et-Miquelon, la Polynésie française* and *les îles Wallis et Futuna*).

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2. … and the *sui generis* collectivity New Caledonia

New Caledonia (*Nouvelle-Calédonie*) belongs to Melanesia and is home to 271,400 people (ISEE 2020). It is located at 16,822 km from metropolitan France, almost 2,000 km east of Sydney, Australia. It has an area of 18,575 km^2 and its Economic Exclusive Zone – strategically and economically relevant for France – covers 1,4 million km^2 (French Government 2024). From 1946 to 1998, New Caledonia was vested with the specific status of TOM, as defined by the different French Constitutions and in spite of multiple reforms of its local administrative government regime (1957 Defferre Law; 1963 Jacquinot Law; 1969 Billotte Law; 1976 Stirn Statute; 1979 Dijoud Law; 1984 Lemoine Law; 1985 Pisani Plan; 1985 Fabius Plan; 1986 Pons I Statute; 1988 Pons II Statute); (in brief, see annex in Fisher 2013; in detail, see Minvielle and Pascual 2021). In other words, New Caledonia experienced a 'waltz of the statutes' (Jacquemart 1989: 64), or 'institutional yo-yo' (Agniel 1997: 41)[II], progressively outlining the main features of New Caledonia's political system. This gradual statutory evolution, in accordance with the logic of transition from colonization to decolonization,[III] led to the establishment of a unique self-governing entity within the French Republic. Its political autonomy made many French authors echo the question posed by Thierry Michalon (1982): is the French Republic a federation that ignores itself?

The Nouméa Agreement of 5 May 1998 (or Nouméa Accord;[IV] Nouméa is New Caledonia's capital) makes New Caledonia an exception in Overseas France insofar as it enshrines its different and unique legal framework within the FrConst (Chauchat 2011). The unorthodox nature of the Nouméa Agreement was such that back then Socialist Prime Minister Michel Rocard told the signatories the very day the Agreement was signed to 'anticipate pleasurably the perplexity of public law professors faced with the innovative and unusual nature of the constitutional instrument [they had] just invented'.[V] As a response to decades of political troubles and bitter civil conflicts between movements of the Indigenous Kanak[VI] population and those of French settlers, France revised its Constitution to allow for a change in the territorial status of New Caledonia, over the question of New Caledonia's self-determination (i.e. the transition from colonization to decolonization, with the possibility of attaining full sovereignty).

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The constitutional revision was implemented by constitutional law no. 98-610 of 20 July 1998.[VII] This revision provided for a referendum on the Nouméa Agreement and New Caledonia, from 1998 onward, has been vested with a constitutional status – Title XIII Transitional Provisions Pertaining to New Caledonia of the FrConst – different from the status of other overseas territories that are governed by the Title XII On Territorial Communities and Articles 72 and 74 of the FrConst. After the approval of the Nouméa Agreement in the referendum of 8 November 1998,[VIII] a series of implementing laws further defined the constitutional status of New Caledonia. All this steadily contributed to what has been termed the development of a 'Constitution outside the Constitution' (Young 2008; Ginsburg et al. 2009), 'a mini Constitution within the main Constitution' (Havard 2021: 226), or a form of New Caledonian Constitution artificially and temporarily inserted into the FrConst (Chauchat 2007: 2244), which destabilizes and impacts the entire French public law (Gohin 2008: 291). Such a development coupled with academic interpretations explains three issues. First, the reluctance of metropolitan France in the exercise of gradual transfer of powers (for a critical review on the Nouméa Agreement as a time-taking post-colonial tactic see Berman 1998). Second, the absence or underestimation of other elements such as public participatory constitution-building which could tame sovereignty conflicts (Palermo 2019) as well as the conduct of a series of independence referendums that does not correspond to what has been termed 'deliberative peace referendums' (Levy et al. 2021).[IX] Third, the position of French courts that have gradually restricted the scope and substance of legislative powers (Blanc 2015: A63-A67).

Among the implementing laws of the Nouméa Agreement, most importantly, the Organic Law no. 99-209 of 19 March 1999[X] was passed to define the procedures and time schedule of the transfer of major responsibilities from French authorities to New Caledonian authorities. At term, this process could lead to full independence with the handover of the sovereign powers France holds, meaning that New Caledonia would gain full sovereignty. Article 3.3 of the Nouméa Agreement provides that 'justice, public order, defense and currency (together with credit and exchange rates), and foreign affairs […] shall remain within the competence of the French Republic until the new political structure resulting from the votes put to the populations concerned, provided for in [Article] 5'.

With the Nouméa Agreement, the constitutional status of New Caledonia is grounded in the principles of shared sovereignty and of irreversibility of transferred powers.[XI] The

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principle of shared sovereignty means that executive and legislative powers are jointly shared between metropolitan France and New Caledonia, so not simply decentralized. This comes in the form of enumerated powers and thus follows a federal logic (Chauchat and Cogliati-Bantz 2008). The legislative powers have been distributed between the Parliament (Congress) of New Caledonia and the French Parliament on the basis of a double enumeration of legislative powers, an arrangement that has given New Caledonia control over many fields (Suksi 2021). A specific category of legislation – *lois du pays* (in detail David 2009; 2024) – enables New Caledonia to enact laws independent of any authorization, an anathema to the French tradition (Diémert 2005; Custos 2007). Indeed, the concept of 'shared sovereignty', closer to anagogy than legalism, carries a mystical force which irreversibly reduces the power of the French government in New Caledonia (Gravelat 2021: 242) and, if so, it is discussed through the prism of the federalizing logic by disaggregation (Beaud 1999).

The irreversibility principle means that any transfer of powers is permanent. Indeed, point 5 in the Preamble of the Nouméa Agreement, in line with the aim of emancipating New Caledonia, provides that 'the transferred powers cannot be reclaimed by the French government, and this shall reflect the principle of irreversibility governing these arrangements.' If the transfer of powers is defined as irreversible, the Nouméa Agreement which defines the transfer as irreversible, is not itself irreversible, in spite of its constitutional nature.[XII] In essence, the *pouvoir constituant* remains unshared between New Caledonian and French authorities as French constitutional law is not irreversible (Gohin 2008: 293).

The transfer of powers follows a gradual approach. It vests New Caledonian authorities with the power to co-define details. Paragraph 3 of the Nouméa Agreement Preamble establishes that employment regulation, trade, natural resources, and primary education are to be transferred immediately, among others. Policing, civil defense, civil law, commercial law, land ownership, real property rights, local government, and others are, instead, to be transferred at later stages. This gradual approach is typical for *interim* constitutional reforms that aim at guaranteeing a continuing open and inclusive process of constitution-building in conflict-affected societies, or war-torn nations, insofar as it gives time to find procedural support for reconciliation and set up *interim* bodies. In the case of New Caledonia, the Nouméa Agreement set up a body called the 'Committee of Signatories' (CoS). Initially, the CoS was tasked with 'assisting in the drafting of the texts required to implement the Agreement' and then with 'monitoring the implementation of the Agreement'. As partner

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and guarantor of the Agreement, the French Government heads the CoS, which meets annually in Paris, with the Minister of Overseas Territories or Prime Minister as chair. Originally a solemn consultation between the Agreement's historic signatories,[XIII] the CoS meetings have, over time, mutated into a decision-making body combining the ideas and efforts of the French Government and all the representative political forces and institutional presidents. The meetings provide a time and a place for discussion on how each party involved views the implementation of the Nouméa Agreement, and for taking decisions on both key guidelines and intransigent disagreements.

This specific and comparatively unique constitutional status has not only guaranteed New Caledonia a certain level of autonomy compatible with international standards in the field of transition processes from colonization to decolonization, but has also protected the integration of New Caledonia into the constitutional system of the French Republic (Blanc 2015: A41), without however granting New Caledonia self-organisation of constitutional nature in *strictu sensu* of federal theory. For many scholars, the territorial arrangements of New Caledonia represent an increasingly 'contractual' conception in French public law, referring to its adaptability when confronted with indisputable cultural diversities (Le Pourhiet 2002). Indeed, from the viewpoint of minority rights, populations of New Caledonia (but also those of other COM and in part of DROM) *in concreto* appear to be treated as minorities and, on a case-by-case basis, enjoy special rights (Palayret 2004), although not officially recognised as minorities by France. While there is evidence for this (for an overview see IACL-AIDC Blog 2020), France in general holds on to its 'stereotypical perception of homogeneity' (David 2020). Waves of unstable equilibriums between Indigenous and settler communities remain high on the agenda in many overseas territories.

For New Caledonia, as of early 2024, expert observers warn that 'work is needed now to ensure history does not repeat itself' (Fisher 2024a). Indeed, local academics compare the situation to the 1980s, when violence with bloodshed and a referendum boycott similar to the one in 2021 forced France to negotiate with pro-independence parties (Louis-José Barbançon 2024; he is of the opinion that there is still time to relaunch a dialogue, under certain conditions, not least because seeking consensus is a central tenet of Oceanic cultural Kanak tradition).[XIV] Others define the situation as a 'fallback to colonialism' (Kowasch et al. 2022), or give evidence of the fact that it is 'a form of [steady] re-colonization [within decolonization]' (Leblic 2022). Along the same lines, Chauchat (2019) while analyzing the

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first independence referendum held on 4 November 2018 argues that 30 years of dialogue about decolonization have not succeeded in reaching agreement on a consensual future. Instead of 'internal decolonization', a crossed interethnic majority in Congress and a halt to French efforts to strengthen the anti-independence demographic and electoral majority are needed. After the events in early May 2024, namely the deadly riots over the voting reform proposal[XV] to expand the electoral body and the subsequent declaration of a 12-day state of emergency by decree in the Council of Ministers (i.e. signed by the President of the French Republic) on 15 May,[XVI] New Caledonia is far from having an interethnic dialogue in Congress, and France is seeking to reestablish negotiations to secure the end of violence and ultimately also the end of the transitional constitutional status of New Caledonia (see further in parts 5 and 6).

3. On the (post-)colonial and current political demography

European influence in New Caledonia started in 1774 when British captain Cook sighted its coast. Twenty years later, the French also reached New Caledonia under captain D'Entrecasteaux. On 24 September 1853, the island became a penal colony under French administration and a destination for missionaries and settlers. The French colonial power resorted to the violent repression of the Kanak tribal and linguistically variegated cultures, and the Kanak pre-colonial intertribal rivalry.

With no negotiating power, the Kanak became marginalized socially, economically, and geographically. In 1887, le *code de l'indigénat* (the Native Law;[XVII] Merle and Muckle 2022) was passed, while establishing parallel civil jurisdictions for French citizens. It confined Kanak people to reservations, unable to leave without permission from the colonial authorities. Colonial land grabs resulted in Kanak reservations being reduced to barely ten per cent of the land area of *Grande Terre*, New Caledonia's main island; customary chiefs who refused to act as functionaries of the colonial regime were removed and replaced by compliant administrative chiefs whose duties included imposing taxes and providing unpaid Kanak labour for public works and settler farms. The establishment of reserves and the displacement of the population exacerbated the Kanak claims to the land for two reasons.

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First, land clearing undermined one of the key principles of Indigenous populations, namely the identification of their identity and cultural heritage with their land of origin. From 1998 onward, the Kanak identity is grounded in a dual system of social organization (ordinary codified law and customary law[XVIII]) that defines land as a common natural resource and is structured by a specific link to land. This link is defined by means of three types of land: private land, public land, and customary land (Fisher 2014: 5). Second, land claims in New Caledonia are closely linked to the management of resources, particularly nickel (discovered in 1874), with New Caledonia at present possessing about 25 per cent of the world's nickel reserves.

By the turn of the 20th century, the Kanak population had fallen to less than 30,000, pre-colonial estimates having ranged from 50,000 to well over 100,000. New Caledonia, like Algeria, was conceived as early as the 1860s as a welcoming place for French population, with the policy of settlement that was reaffirmed several times, in the 1950s for agricultural development and in the 1970s for the nickel boom. The policy of settlement succeeded to turn the Kanak population in a numerical minority.[XIX] Describing the impact of colonialism, the Customary Senate, an advisory body established with the 1998 Nouméa Agreement,[XX] wrote in the Charter of the Kanak People (2014: 4)[XXI] '… the violence of colonization resulted in the disappearance of clans and chiefdoms, and the displacement of all or part of the populations of tribes and entire regions. The trauma of this violence has permanently marked the customary structures and the people who inhabit them'.

As of the 2019 census, 111,860 persons declared themselves as belonging to the Kanak community, out of a total number of 271,400 inhabitants of New Caledonia. This number represented the first increase in Kanak percentage since the 1980s, growing from 39.1 per cent in 2014 to 41.2 per cent in 2019 (ISEE 2020). Next to Kanak, European-origin groups are divided into *Caldoches* (early French descendants), *Métros* (French immigrants and temporary workers), *Calédoniens* (ethnic French from recently settled families), and *Pieds Noirs* (Northern African French). The sizes of these groups have often changed and they overall account for almost a quarter of the total population. The third main demographic group is the Wallisian and Futunian community, which represents 8.3 per cent of the population. The remaining includes several other ethnicities, such as Indonesians, Vietnamese, Chinese, Filipinos, Indians, West Indians, Arabs, Berbers, and others. However, censuses usually

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overlook the growing percentage of *métissage mélanésien* (Anderson and Anderson 2017: 127-128).

The 1980s were particularly significant for the Kanak (internal) self-determination struggle that is heavily interlinked with land issues and economic development. Large-scale land redistribution, initiated with the 1978 Dijoud Plan, was redesigned with the Matignon-Oudinot Agreements in 1988, and finally formalized with the 1998 Nouméa Agreement. Most importantly, the 1988 Matignon-Oudinot Agreements ended the violent period since 1984 that saw pro-independence parties opposed to anti-independence ones (i.e. loyalists in favor of keeping New Caledonia in the French Republic).[XXII] The period 1984-1988 is euphemistically known as 'the Events' (*les Événements*), reaching its climax on 5 May 1988 with the tragedy at the Ouvéa cave which resulted in the death of 21 people (Fisher 2024b: 230; Havard 2021: 224; Kowasch et al. 2022: 12). It has its roots in the Kanak Awakening of 1969-1976, the convergence of powerful structural forces, such as the recolonization of the territory by France in the 1960s, accompanied by massive immigration during a nickel mining boom, and the return to home of radicalized Kanak and Caledonian students from France, who, in 1975, called for a referendum on self-determination (Chappell 2013). In 1983, a first negotiation between independentists and loyalists took place in Nainville-les-Roches, without success. On 13 September 1987, a first independence referendum was organized by the conservative French Government (98.3 per cent voted in favor of remaining in the French Republic). Independentists, however, boycotted it because it allowed residents of only 3 years to vote.

With the 1988 Matignon-Oudinot Agreements, it was agreed that the 'interested populations' in the future of the territory of New Caledonia would be the only ones entitled to vote in the elections of New Caledonian institutions – three Provincial Assemblies (South Province, North Province and Loyalty Islands) and, drawn from them, the Congress – as well as in the referendum of self-determination to be held within 10 years, subsequently postponed until 2014 and 2018 following the 1998 Nouméa Agreement (that ultimately extended the residence requirement to a minimum of 20 years). This meant that only those residents present in New Caledonia at the time of approving the Matignon-Oudinot Agreements (i.e. 6 November 1988) would be able to vote. Support for the Matignon-Oudinot Agreements was fragile, evident in the assassination of Jean-Marie Tjibaou, the Kanak leader and signatory of the Agreement, on 4 May 1989, by a radical independentist,

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just one year after the signing of the Agreement. Tensions remained high until both sides in the early 1990s agreed to take up the idea of a 'negotiated independence' (Fisher 2013: 69). The reasons why both parties agreed to defer the independence referendum were different. The pro-independence parties wanted to develop more capacity and expertise needed to manage an independent Kanaky (the Kanak name for New Caledonia). The anti-independence parties hoped for further 'economic rebalancing' (Blaise 2017) of the marginalized Kanak population, so that more Kanak would become convinced of the benefits of remaining in the French Republic. The North Province and the Loyalty Islands, where most Kanaks live, are characterized by lower rates of wealth and less developed infrastructure compared to the South Province in which Nouméa, the capital, is located. These inequalities must be considered when analyzing the Kanak cycles of rebellion and civil unrest, and the wider pro-independence movement (Gorohouna and Ris 2017; see also Pantz 2024).

In 1998, under the Socialist French Government of Lionel Jospin, the Nouméa Agreement extended the date of the referendum to 2018, to be held in the final term of the Nouméa Agreement that also established the New Caledonian Congress.[XXIII] The Congress is composed of 54 members and, drawn from the Provincial Assemblies, they are to be elected every five years for the duration of the Agreement by a frozen electorate confined essentially to those with 10-years residence to 1998. The Nouméa Agreement furthermore established a multi-party Government composed of 5 to 11 members (the number is fixed by an act of the Congress) that gets elected by the Congress through proportional representation and whose decision-making procedure requires simple majority of its members, with the President having the casting vote in the event of a tie.

The 1988 and 1998 Agreements brought stability and they, until 2021, have worked well (Fisher 2024b: 232), evident in the passing of more than 200 *loi du pays* (with over a third relating to New Caledonia's tax regime; Havard 2021: 229). Politically, in the first four elections from 1999 to 2019, the anti-independence parties retained the majority in the Congress. In May 2019, in the elections to the Provincial Assemblies that took place half a year after the first independence referendum on 4 November 2018, the strength of the anti-independence parties declined to 25 seats (from a maximum of 36 seats in 2004, and from 29 seats in the 2014 elections), while the pro-independence parties increased their seats from 25 seats in 2014 to 26. For the first time, they won more seats than the anti-independence

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parties. Most importantly, a new Wallisian-based party won the remaining three seats and became the kingmaker when voting for the Government. As of May 2024, both the Congress and the Government are headed by a leader of the independentists group.[XXIV] This is a *novum* under the yet in force but technically expired Nouméa Agreement.[XXV]

4. On the citizenship of New Caledonia

The 1998 Nouméa Agreement, signed on 5 May 1998 by the Kanak independence movement *Front de Libération Nationale Kanak et Socialiste* (FLNKS) and the conservative settler party *Rassemblement pour la Calédonie dans la République* (RPCR),[XXVI] defined a 'citizenship of New Caledonia', not a New Caledonian citizenship (*sic!*). The citizenship of New Caledonia is the most significant and yet polarizing aspect of the Agreement (Robertson 2024: 259), and a current bone of contention in view of the deferred elections of the three Provincial Assemblies and the Congress[XXVII] from May 2024 to, at the latest, 15 December 2024 (Decloitre 2024; see further in part 6). The distinction between those having a citizenship of New Caledonia and those not possessing one, i.e. the infringement of the right to vote and the principle of equality enshrined in the FrConst, is considered legitimate and legal, in international law[XXVIII] and in national law,[XXIX] because it is intrinsic to the decolonization process. In other words, the citizenship of New Caledonia is a provisional and evolving instrument designed to serve for the duration of the Nouméa Agreement. Its aim is to create a New Caledonian community across ethnic and community lines, i.e. a 'community of common destiny'[XXX] (Cornut 2021: 256; on the often-repeated mantra of 'common destiny' see critically Guiart 2024).

In essence, the citizenship of New Caledonia translates in three issues. First, the right to vote for the Provincial Assemblies and the Congress, and the right to vote for the deferred independence referendum. Second, provisions promoting local employment in the private and public sectors (i.e. mandatory duration of residence per profession category, with a maximum duration required for a profession category being 10 years; Robertson 2024: 267-268). Third, identity politics, including the (dis-)agreements over the adoption of symbols that represent New Caledonia, and the very name of the country. New Caledonia has adopted

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a new anthem, banknote designs, and a motto. However, it so far failed in adopting one flag and a country name that is in the spirit of 'common destiny'. Two flags are co-official, the French tricolour and the flag of the FLNKS (since 2011). On the name, instead, New Caledonia is the only official one.[XXXI]

Regarding the right to vote (Robertson 2024: 265-267), the Nouméa Agreement established 'restrictions on the electoral body for elections of the country's institutions and for final consultation [referendum on self-determination]' (Preamble to the Agreement). The question of how such restrictions should look like in detail, i.e. the criterion of length of residence, was heavily debated. None of the parties favored a 10-year-long continuous residence in New Caledonia. The independentists wanted a *frozen electoral body*, meaning that only those present in New Caledonia before the approval of the Agreement *and* able to justify a 10-year-long residence would be entitled to take part in provincial elections and the independence referendum(s). The non-independentists favored a *sliding electoral body*, meaning that all those who could justify a continuous 10-year-long residence would be entitled to take part in provincial elections and the independence referendum(s). Most importantly, the date of residence was not meant to be the date of arrival to New Caledonia, but the date on which the person enrolled on the general electoral list at the local municipality. In addition, those who did not have the minimum residence period were placed on an auxiliary roll. This created major political division. It finally resulted in the Constitutional Act 2007-237 of 23 February 2007 that establishes a frozen electoral body, meaning that any person who arrived in New Caledonia after 8 November 1998 – the approval of the Nouméa Agreement – would be excluded from voting in elections for the three Provincial Assemblies, the Congress, and the final consultation, or until the Agreement is in force. Some exceptions were made (for details see Chauchat and Cogliati-Bantz 2008; Robertson 2018). In 2016 and 2017, with the independence referendum to be held within 2018, the issue of the special electoral list for the independence referendum dominated the CoS meetings (Robertson 2024: 267).

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5. On the three independence referendums 2018, 2020, 2021

On 4 November 2018, the first independence referendum was held (Fisher 2024b: 234-235). The 1998 Nouméa Agreement provides for up to three rounds of voting in the event of a 'No' vote outcome in the first independence referendum. In Article 5, it specifies that if independence is rejected in the first referendum, there is an option for another referendum so long as the poll is requested by at least a third of the members of the Congress, to be held in the second year following the first poll. Shall independence be rejected in the second referendum too, then there is also an option for a third one, to be requested by the same vote in Congress and with the same timeframe. In case of a third 'No' vote, the parties would need to meet and consider the situation together. To this end, the political system of New Caledonia set up by the 1998 Nouméa Agreement would remain in force.

Article 5 also clarifies that the result of the poll applies comprehensively to New Caledonia as a whole, meaning that it is not possible for one part of New Caledonia to alone achieve full sovereignty, or alone retain links with the French Republic. Regarding the timeframe, the same Article provides for the first independence referendum to be held any time after the provincial elections in 2014 ('the date of the poll will be set by the Congress in the course of the fourth term, by a qualified majority of three-fifths of its members'). If the Congress had agreed immediately to initiate the first referendum, the series of referendums would have concluded by the end of 2018, before the elections of the Provincial Assemblies of May 2019. However, the pro-independence and anti-independence parties could not agree on the question to be put on the ballot until the very last moment. Finally, the referendum on 4 November 2018 marked the beginning of the potentially four-year self-determination process that is, like the *sui generis* collectivity New Caledonia itself, unique. The restricted electorate was for the first time out of three asked to return a 'No' or 'Yes' vote on the question 'Do you want New Caledonia to attain full sovereignty and become independent?'. The option of turning New Caledonia into an associated state with the French Republic - discussed at UN level and by the Kanak independentists - was never considered.

The turnout for the 2018 referendum was a historic high of 81.01 per cent in comparison with elections to the European and French Parliaments, and the New Caledonian Congress.[XXXII] Out of 174,165 registered voters in the special electoral roll,[XXXIII] 78,734 voted

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'No' (equaling 56.67 per cent) and 60,199 voted 'Yes' (equaling 43.33 per cent), with 141,099 voters and 138,933 valid votes cast. The clear majority opposing full sovereignty suggests a setback for New Caledonia's independence coalition FLNKS. However, the size of the 'Yes' vote has disappointed loyalists of the French Republic and opened the way for the second referendum in 2020 (Maclellan 2019). The result is consistent with the trend in provincial elections as described above. For both sides, the real shock in the results was the clear ethnic division in the vote; essentially all pro-independence voters were Kanak (Pantz 2018; Fisher 2019).

When looking at the spread of the 'Yes/No' vote across New Caledonia in the second independence referendum on 4 October 2020, the South Province located southwest on New Caledonia's main island, with its capital Nouméa, to a large extent voted 'No' (70.86 per cent), while the rest of New Caledonia, the less populated North Province located on the main island and the Islands of Loyalty that form the third Province of New Caledonia's second tier of government, to a large extent voted 'Yes' (respectively 78.34 and 84.27 per cent). Again, this distribution of the votes aligns with the distribution of the Kanak, even though it cannot be assumed that all Kanak are pro-independentists and all non-Kanak are loyalists. However, the 2020 vote deepened division between the sides and heightened loyalist concerns (Léoni 2020).

The number of registered voters in the second independence referendum was higher (180,799 instead of 174,165) because of changes in demography, i.e. persons being of voting age on that date. However, the increased numbers of voters in the second independence referendum do not suggest a big enough cohort to really shift the results.

The margin in the results of the second independence referendum was narrower than the one in the first independence referendum. Out of 180,799 registered voters in the special electoral roll, 81,503 said 'No' to getting full independence from France (equaling 53.26 per cent) and 71,533 answered 'Yes' when asked 'Do you want New Caledonia to accede to full sovereignty and become independent?' (equaling 46.74 per cent), with 154,918 voters and 153,036 valid votes cast; just 9,970 votes separated the two sides as opposed to 18,000 in 2018. The turnout in the 2020 independence referendum (85.69 per cent) was even higher than the one in the first independence referendum held in 2018 (81.01 per cent).

The 2020 independence referendum was re-scheduled from 6 September because of the coronavirus pandemic.[XXXIV] This caused major discontent within the pro-independent camp.

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They claimed that the imposition of the Coronavirus policy to New Caledonia by metropolitan France was in breach with New Caledonia's autonomy that grants the archipelago the competence in the fields of social protection, public health and hygiene, and sanitary control to its borders (New Caledonia up to early September 2021 only had very few infection cases, and no mortalities, not least because it applied severe policies regarding incomers and quarantine measures).

On 12 December 2021, the third independence referendum took place, with pro-independence leaders calling for 'non-participation'. With a voter turnout of just 43.87 percent (80,881 voters and 78,467 valid votes), the official results to the question 'Do you want New Caledonia to accede to full sovereignty and become independent?' were 3.50 percent (2,747) in favor and 96.50 percent (75,720) opposed. This differs drastically from the first two referendums in terms of both turnout and results, and effectively nullified the political effect of the third vote (Kowasch et al. 2022).

Preparations for the third independence referendum were undertaken in a deeply divided climate. Three issues are noteworthy. First, pro-independence parties dominated both the Congress and the Government, a *novum* under the Nouméa Agreement. With pro-independence parties holding well over one-third of the seats, the Congress on 8 April 2021 supported the call for the third referendum, with all anti-independence parties abstaining. Second, the presence of the coronavirus: by October 2021, mortalities – most in Kanak areas – exceeded 200 (of a population of 270,400). Thus, independence leaders on 4 October 2021 requested a postponement of the vote due to the many mortalities and the Kanak mourning traditions of up to 12 months (the request was supported by the larger Indigenous population community; Fisher 2024b: 243; and in an open letter in the French newsletter "*Le Monde*" signed by 64 worldwide academics; Trépied et al. 2021). Third, nickel management was of political contest, once again (on nickel as a political tool see Gorohouna 2021; Kowasch and Merlin 2024). In this divided climate, France continued to make considerable efforts in encouraging dialogue between the two sides. However, it changed its strategy in comparison to the 2018 and 2020 independence referendums. The third referendum was not held with France being impartial (Fisher 2024b: 237-242). President Emmanuel Macron replaced officials responsible for the New Caledonia portfolio and turned the French Government from an impartial guarantor of the Nouméa Agreement into a player who, in absence of an agreement between the New Caledonian parties and despite the room for manoeuvre in

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setting the date (Beaud 2021), on 3 June 2021 unilaterally fixed the 12 December 2021 as the date of the third independence referendum, to secure the end of the Nouméa Agreement and to make sure that the series of independence referendums comes to an end before the French presidential and parliamentary elections in April and June 2022. By doing so, it 'betrayed commitments of more than 30 years to a peaceful and inclusive decolonization' (Gagné 2024: 225). On 23 June 2021, the Congress endorsed the referendum date, with pro-independence parties abstaining or opposing. Their position was not to hold any referendum between September 2021 and August 2022, instead advocating to postpone it to October 2022 so as to separate politics in New Caledonia from politics in metropolitan France, at the one hand, and respect mourning traditions of the Kanak at the other (Brengarth 2022).

Separatists argued early on that the two campaign cycles should not overlap. Interestingly, in early concurrence, French Prime Minister Édouard Philippe also went so far as to state 'We have ruled out that this third consultation could be organized between the middle of September 2021 and the end of August 2022.' He went on to reason it by saying 'It seemed to us collectively that it was preferable to clearly distinguish between national electoral deadlines and those specific to the future of New Caledonia.'[XXXV] And back in 1988, the then French Prime Minister Michel Rocard after the Matignon Agreement also had argued along the same lines: 'I do not know where each of us, we are in 3, 5 or 10 years, but we should make a solemn commitment. New Caledonia never should again become an issue of French politics' (cited in Kowasch et al. 2022: 13).

The independence coalition FLNKS called into question the legitimacy of the 2021 referendum. On 3 June 2022,[XXXVI] the highest administrative court in Paris rejected the claim brought by the Kanak Customary Senate to nullify the 2021 results. The court said the Customary Senate's declaration of a year of mourning 'was not of a nature to affect, in itself, the sincerity of the ballot' because coronavirus had calmed by the time the campaign period had begun. The pro-independence parties turned to the United Nations too. On 12 December 2022, the General Assembly 'calls upon the administrating Power, in cooperation with the territorial Government and appropriate bodies of the United Nations system, to develop political education programmes for the Territory in order to foster awareness among the people of their right to self-determination in conformity with the legitimate political status options, […]' (United Nations General Assembly 2022: 4) – thus criticizing in diplomatic terms the position of France in favour of the 'No' vote (Chauchat 2023: 2).

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6. On a 'relational' model to be built anew

As this paper has shown, reflecting on Overseas France requires us not only to transcend disciplinary boundaries, but to think globally and regionally too. On the one hand, French-administered territories outside Europe are located across many and very diverse geographic regions. On the other hand, despite or due to their constitutional ties to metropolitan France (and the European Union), they were and are still subject to conflictual dynamics in 'relational constitutionalism' – within their geographic region and beyond.

Zooming in to New Caledonia, in the first half of 2024, three issues are at stake, and contested. First, the limit of the voter eligibility in view of the 2024 elections of the three Provincial Assemblies and the Congress. The electoral body for New Caledonia's election of the three Provincial Assemblies and the Congress is defined in Article 77 of the FrConst and Article 188 of the Organic Law of 19 March 1999. This electorate has been frozen at 1998 since the constitutional reform of 23 February 2007. As a result, in 2023, around 20 per cent of citizens (42,596 voters) were registered on New Caledonia's general electoral roll but not on the special electoral roll for the three Provincial Assemblies and the Congress.[XXXVII] In order to remedy this situation, a draft constitutional law[XXXVIII] presented by the French Government modifies the electorate for the elections of the three Provincial Assemblies and the Congress by opening it up to voters that are registered on the general electoral roll of New Caledonia, who were born in New Caledonia or who have been domiciled in New Caledonia for 10 years. This change will make nearly 25,000 people eligible to vote, including 12,000 Indigenous (a + 14.5 per cent in voter eligibility; Maclellan 2024). This constitutional amendment, i.e. the sliding electorate, contains a mechanism for being suspended, if a political and institutional agreement is reached between the New Caledonian parties before the date of the next provincial elections (set for 15 December 2024 at the latest). The conclusion of such an agreement, in the spirit of the 'common destiny', remains the French Government's objective.[XXXIX] Earlier, in late 2023, French President Emmanuel Macron had asked the highest administrative French court to consider whether the electoral rules could be changed by simple legislation. On 7 December 2023, the court unequivocally stated that alterations to the Nouméa Agreement in a period of 'seeking consensus' about the final constitutional status of New Caledonia can only be made by constitutional amendment (i.e.

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by involving both parliamentary houses). Politically, the sliding electorate would swing 2 or 3 seats at each election to the loyalist parties and thus prevent the FLNKS from retaining a majority in the Congress. This is the reason why the voting reform has led to massive riots in early May 2024. They involved supporters and opponents of independence, and they led to casualties. The '*Cellule de Coordination des Actions de Terrain*' (CCAT), a collective entity created at the end of 2023 to mobilize against the reform of the electoral body, was behind the massive blockades that have paralyzed especially the area of the capital Nouméa. The deadly riots have necessitated the declaration of a state of emergency and the dispatch of numerous police forces from metropolitan France to deal with the growing number of acts of vandalism, violence, and looting. On 27 May 2024, French President Emmanuel Macron decided to lift the state of emergency, in a move meant to allow political dialogue following the unrest. Earlier, during his visit to Nouméa on 23 May 2024, he asserted that New Caledonia is not the 'Wild West', so the Republic must regain authority on all fronts and provide security for everyone,[XL] in view of reestablishing a dialogue between all parties.[XLI]

The second contested issue is the right to self-determination (Chauchat 2024). The FLNKS has proposed a final transitional phase during the next term of office, i.e. five years, with a non-binary referendum to be held in which the question posed relates to an associated statehood between New Caledonia and France. This is not admissible for the French Government that instead has proposed to introduce a period extending over one or two generations (20 to 40 years) and wants any future self-determination referendum to be initiated by a two-third majority in Congress. Debates on the question of who is to decide now are in full swing, and complex. The 'matrix pact' (Beaud 2021), i.e. the Agreements that set the course of New Caledonia's self-determination, resulted in the 'No' to independence expressed three times in the ballot box. For some, it is thus for the French people as a whole to decide, also because metropolitan France has never consented to delegating its sovereign power beyond the 2021 vote (Descheemaeker 2023). However, according to the Nouméa Agreement, in the event of a triple 'No', the political partners will meet to examine the situation thus created, to resume negotiations. Hence, would any political decision on the future of New Caledonia belong solely to the New Caledonian parties, with the French Government acting as a Third-Party mediator? And who would be the negotiating signatories in such a case? How is the composition of the CoS and its working mode redefined over time? Questions that were not addressed back in time when the Agreements were negotiated

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and transformed into a 'constitutional political pact' (Beaud 2021) to overcome unconstitutionality obstacles regarding certain provisions such as the frozen electorate or the granting of legislative powers to a territorial entity other than the State.

One issue is clear. Trust between the parties has been at an all-time low since May 2024 at the latest. With trust at short supply at all levels of government, and metropolitan France facing a major political crisis after the 2024 elections for the European Parliament of 9 June, the possibility of promptly addressing the third open issue (Fisher 2024b: 245), that is the transfer of further powers as per Nouméa Agreement (i.e. the remaining Article 27 powers of tertiary education, broadcast media and provincial and municipal administration) and the joint handling of some issues such as nickel management, control of immigration, future of land management, economic inequalities, and social isolation of young Kanak, are delicate and dim.

After the visits of President Emanuel Macron to New Caledonia in July 2023[XLII] and May 2024, the prospect of a 'common destiny' – although extolled in the Nouméa Agreement – has never been so remote in recent years. New Caledonia's society is deeply polarized, local politics is in a stalemate, and Kanak representatives are absent in key negotiations over the final constitutional status of New Caledonia (Fisher 2024b: 244). It is time to remind all parties of what Jean-Marie Tjibaou once said: 'Sovereignty means the right to choose one's partners. For a small country like ours, independence means working out interdependency' (cited in Baker 2019).

Post-Nouméa is yet to be built. So is the Indigenous strategy in the South Pacific. The two cannot but go together in a world region that is enmeshed in global networks, sovereignty conflicts, and multilateral relations (Heathcote 2021). And if New Caledonia's final *sui generis* constitutional status truly wants to stand up to the reality check, one must admit that the means used, i.e. the constitutionalized political referendum(s) pact, at last is contradictory to the end initially pursued (Beaud 2021). New paths must therefore emerge to advance and fine grain the scholarly fields of deliberative peace referendums (Levy et al. 2021) and the (still evolving) comparative law of secession (Delledonne and Martinico 2019).

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[I] In accordance with Article 1 of the FrConst resulting from the amendment of 28 March 2003, France 'shall be organized in a decentralized basis.' This reform does not apply to the *sui generis* collectivity of New Caledonia.

[II] Guy Agniel, New Caledonia's first Professor of Law, used the image of a yo-yo to depict New Caledonia's relations with the French Government. New Caledonia is the body of the yo-yo, moving towards and away from the finger of the player – the French Government – which controls the yo-yo's movement up or down the string. The historian Isabelle Merle (1995) has clearly shown that when the French took control of New Caledonia in 1853 they had no precise political plan for the archipelago, and ever since the French Government has only proposed plans and statutes for New Caledonia in response to the successive crises the territory has experienced. On the role of the French Government controlling the yo-yo, see Gravelat 2021.

[III] New Caledonia was on the United Nations List of Non-Self-Governing Territories from 1946 to 1947, following the transmission of information on New Caledonia and Dependencies by France under Article 73e of the Charter of the United Nations. Calls for greater autonomy were treated within French President De Gaulle's larger post-war policy of forming a French 'community of dependencies' with some autonomy. France, therefore, refused to allow its overseas territories to be considered as Non-Self-Governing Territories in the newly formed United Nations. With this promise, in the 1958 referendum, 98 per cent of New Caledonians who voted (77 per cent of the then 35,163 registered voters) chose to stay with France (*Journal Officiel de la République Française 1958, Proclamation des résultats des votes émis par le peuple français à l'occasion de sa consultation par voie de référendum le 28 septembre 1958, 5 octobre*). The level of autonomy however appeared inadequate to satisfy the political desires of New Caledonian authorities and political forces, including the Kanak independence movement. In 1986, the General Assembly re-inscribed New Caledonia, by considering that 'New Caledonia is a Non-Self-Governing Territory within the meaning of the Charter'. See General Assembly resolution 66 (I) of 14 December 1946 and 41/41 of 2 December 1986. See Regnault 2013.

[IV] *Accord sur la Nouvelle-Calédonie*, signed on 5 May 1998 in Nouméa; JORF, 27 May 1998, 8039–8044.

[V] *Déclaration de M. Rocard, le 5 mai 1998*: 'Je savoure à l'avance la perplexité des professeurs de droit public devant la nouveauté et l'étrangeté de l'objet constitutionnel que vous venez d'inventer ensemble […] ', cited in Lemaire (2012: 824).

[VI] Kanak is derived from the term *Canaque*. It was introduced by Polynesian sailors and had a pejorative meaning in the local context. In the early 1970s, the native peoples of New Caledonia changed the spelling to Kanak, marking the birth of a Black Power type of consciousness. Kanak population is made up of more than 300 tribes speaking more than 30 languages including dialect variations. On Kanak languages, see Leblic 2024.

[VII] *Loi Constitutionelle n. 98-610 du 20 julliet 1998* JO 21 July 1998, 1143; subsequently revised by *Loi Constitutonelle n. 2007-237 du 23 février 2007* JO 24 February 2007, 3354.

[VIII] On 8 November 1998, New Caledonian voters approved this Agreement in a referendum by 71.86 per cent (equaling 55,400 'Yes' votes against 21,697 'No' votes). The turnout was 74.23 per cent and, out of 106,698 registered voters, 79,202 cast a vote and 77,097 of the votes cast were valid.

[IX] The authors rightly stress that 'referendums are never just about the act of voting. They are also about contests of ideas and norms in the broader society. In that sense, the DPR [Deliberative Peace Referendum] is a distinct approach not just to peace referendums, but to peacemaking more broadly.' (Levy et al. 2021: 221). In short, a DPR aims 'to institutionalize a kind of deliberation centred around public values in order to reframe the issues germane to a conflict and to expose and encourage agreement among ordinary people. The DPR may also help to secure a lasting constitutional settlement by relying on what we coined "deliberative popular legitimation".' (Levy et al. 2021: 214).

[X] *Loi Organique n. 99-209 du mars 1999* JO 21 March 1999, 4197.

[XI] Under the Nouméa Agreement, France agreed to give up part of its sovereign powers: 'The sharing of powers between the French government and New Caledonia shall signify shared sovereignty. It shall be gradual. Some powers shall be transferred on implementation of the new structure. Others shall be transferred according to a set timetable, which can be adjusted by the Congress, in accordance with the principle of self-organization. The transferred powers cannot be reclaimed by the French Government, and this shall reflect the principle of irreversibility governing these arrangements'.

[XII] In 1999, the French Constitutional Council ruled that the Nouméa Agreement has constitutional nature. *Conseil Constitutionnel, decision n. 99-4409 DC, 15 mars 1999*, on New Caledonia. On the legal debate on the meaning and scope of the 1998 Nouméa Agreement see Beaud 2021.

[XIII] The French Government, the Kanak independence movement *Front de Libération Nationale Kanak et Socialiste*

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(FLNKS) and the conservative settler party *Rassemblement Pour la Calédonie dans la République* (RPCR).

XIV '[…] As long as the presence of a Kanak people alongside a French people persists in New Caledonia, we will *de facto* be in a colonial situation. The Matignon and then Nouméa Agreements have paved the way for a Caledonian people in the Kanak house. It is necessary to give time and opportunity for the communities that make up this country to create an "us" with the Kanak people. We are both close and very distant, but one certainty should impose itself on all: the opening of a *sliding* electoral body could only constitute an additional obstacle to the emergence of a Caledonian people. It is not impossible because the independence movement has put forward a new concept that is both promising and future-oriented. To maintain New Caledonia within France opposed to a Kanaky outside France, the perspective of a future state not within France but with France is now formulated. To forbid oneself from embarking on this path, to dismiss it with disdain with a flick of the hand, is to forbid oneself hope. If France wants to hold its head high in the Pacific, there is still time. If we want to perpetuate the lineage illustrated in our motto 'land of speech, land of sharing' which is grounded in 'two colors, one people', continues with Nainville-les-Roches and culminates with the handshake between Jean-Marie Tjibaou and Jacques Lafleur, there is still time. If we want a Caledonian people - and the Caledonian people without the Kanak does not exist - to live in peace and prosper on their homeland, the land of their fathers, there is still time.'

XV *Projet de loi constitutionnelle n° 298, voté par les deux assemblées du Parlement en termes identiques, portant modification du corps électoral pour les élections au congrès et aux assemblées de province de la Nouvelle-Calédonie.* See <https://www.senat.fr/dossier-legislatif/pjl23-291.html>(accessed 10 June 2024).

XVI *Décret n° 2024-436 du 15 mai 2024 portant application de la loi n° 55-385 du 3 avril 1955* : <https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000049537533> (accessed 10 June 2024).

XVII The *code de l'indigénat* – in force until 1946 – was passed by decree on 18 July 1887, and extended by the decrees of 12 March 1897, 23 March 1907, and 27 May 1917. The Melanesians were assigned to live on reserves, except if hired for work. The decisions of 14 September 1920 and 20 September 1934 regulated movement at night.

XVIII On Kanak customary law, see Cornut (2021).

XIX Mass immigration of French citizens was welcomed to avoid the danger of nationalist claims of Indigenous populations, as explicitly stated in a letter of the French Prime Minister Pierre Messmer to his Secretary of State for DOM-TOM on 19 July 1972. Letter quoted here: <https://rebellyon.info/Kanaky-une-lettre-oubliee-de-Pierre-4142> (accessed 30 April 2024). While it is difficult to give evidence whether immigration occurred as a direct result of the policy of the French Government, a clear nexus has emerged between Kanak populations and non-Kanak populations and New Caledonia's political demography. In essence, New Caledonia is divided on both ethnic and political lines.

XX The Customary Senate is composed of 16 members from eight traditional customary areas and holds consultative powers on all laws and deliberations regarding Kanak identity. In case of divergence between the text adopted by the Customary Senate and the deliberation of the Congress, the Congress is empowered to take the final decision on the matter.

XXI In April 2014, a significant number of New Caledonia's Kanak customary authorities adopted the 'Charter of the Kanak People on the Common Foundation of Fundamental Values and Principles of the Kanak Civilisation'. It is the product of a year-long consultation process led by the Customary Senate. The Charter's overall objective is to institute 'cooperative and balanced legal pluralism' (Preamble, 11) in an internally decolonised New Caledonia (Dickins Morrison 2016). See <https://www.senat-coutumier.nc/>(accessed 30 April 2024). On legal pluralism that marks a departure from republican principles enshrined in French constitutional law see Daly 2015.

XXII The handshake between Jean-Marie Tjibaou, the pro-independence leader, and Jacques Lefleur, the loyalist movement leader, became the symbol for reconciliation.

XXIII Its role and powers are defined by Part III, Chapter I of Organic Act no. 99-209 of 19 March 1999.

XXIV Roch Wamytan, president of the Kanak and Socialist National Liberation Front (*Front de Libération Nationale Kanak et Socialiste*, FLNKS, founded in 1984) heads the Congress since 24 May 2019. The FLNKS was formed from several independence parties. Today, the two dominant parties of the "umbrella party" FLNKS are the Caledonian Union (UC) and the Kanak Liberation Party (PALIKA). Louis Mapou, a member of PALIKA, heads the Government since 8 July 2021.

XXV Point five of the Nouméa Agreement's policy document, 'Evolution of New Caledonia's Political Organisation', reads: 'For such time as the polls have not been in favour of the new political organization proposed, the political organization set up by the 1998 Agreement will remain in force, at its latest stage of evolution, without there being any possibility of reversal, such 'irreversibility' being constitutionally guaranteed.'

XXVI The RPCR was formed in 1977 under the leadership of Jacques Lafleur, signatory to the 1988 and 1998

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Agreements. It remained the dominant anti-independence political party until soon after signing the 1998 Nouméa Agreement.

[XXVII] *Loi Organique no. 2024-343 du 15 avril 2024* JORF n°0089 du 16 avril 2024. Article 1 reads: 'Notwithstanding the first paragraph of article 187 of Organic Law no. 99-209 of 19 March 1999 relating to New Caledonia, the next elections for members of the Congress and the Provincial Assemblies shall take place no later than 15 December 2024. The special electoral list and the annexed table mentioned in article 189 of the same Organic Law shall be updated no later than ten days before the date of the poll. The current mandates of the members of the Congress and the Provincial Assemblies end on the day of the first meeting of the newly elected Assemblies.'

[XXVIII] See United Nations Human Rights Committee, Views under article 5, paragraph of the Optional Protocol to the International Covenant on Civil and Political Rights, Communication no. 932/2000 of 26 July 2022; ECHR, 11 January 2005, *Mr. Py v. France*, Ref. no. 6289/01.

[XXIX] Title XIII Transitional Provisions Pertaining to New Caledonia of the FrConst.

[XXX] Preamble of the Nouméa Agreement: 'During this period, signs will be given of the gradual recognition of a citizenship of New Caledonia, which must express the chosen common destiny and be able, after the end of the period, to become a nationality, should it be so decided.'

[XXXI] It dates back to James Cook who named it in 1774. The main island of New Caledonia reminded Cook of the mountainous scenery of his native Scotland. Kanaky or Kanaky-New Caledonia is also in use, with the former being the name invoked by Jean-Marie Tjibaou in the early 1980s (Robertson 2018: 244-255).

[XXXII] If not otherwise specified, all data is from <https://www.elections-nc.fr/> (accessed 30 April 2024).

[XXXIII] *La liste électorale spéciale pour la consultation sur l'accession de la Nouvelle-Calédonie à la pleine souveraineté*

[XXXIV] Earlier, in June 2019, the newly elected Congress duly called for a second referendum with the necessary one-third support.

[XXXV] *Déclaration de M. Édouard Philippe, Premier ministre, sur l'organisation de l'avenir de la Nouvelle-Calédonie, à Paris le 10 octobre 2019*. See <https://www.vie-publique.fr/discours/271226-edouard-philippe-10102019-nouvelle-caledonie-accord-de-noumea> (accessed 30 April 2024).

[XXXVI] *Conseil d'État*, 2022, no. 459711

[XXXVII] New Caledonia has three electoral lists. All French nationals can register on the General Electoral List (LEG) to vote for the French presidency, National Assembly in Paris and municipal councils. French citizens with continuous residence from 1994 to 2014 in New Caledonia can vote in referendums on self-determination (LESC). But only those New Caledonian citizens resident before 8 November 1998 can register on the special electoral list for the three Provincial Assemblies and the Congress.

[XXXVIII] See endnote xv.

[XXXIX] So the yet official statement as stated here: <https://www.vie-publique.fr/loi/292831-nouvelle-caledonie-projet-de-loi-corps-electoral-et-loi-du-15-avril-2024> (accessed 10 June 2024).

[XL] See here <https://www.youtube.com/watch?v=N3ARm9Ug0OA> (accessed 10 June 2024).

[XLI] *Déclaration du Président Emmanuel Macron depuis la Nouvelle-Calédonie* : <https://www.youtube.com/watch?v=yy1nDs4AGgY>(accessed 10 June 2024).

[XLII] To many observers, his assertion 'New Caledonia is French because it has chosen to remain French' was inaccurate given the 'non-participation' of the Kanak to the third referendum (Kowasch et al. 2022).

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Book Review

Federalism and Decentralization in the Contemporary Middle East and North Africa

Aslı Ü. Bâli and Omar M. Dajani (eds.), Cambridge, Cambridge University Press, 2023. ISBN 978-1-108-83123-9

by

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Abstract

This work critically analyses the *Federalism and Decentralization in the Contemporary Middle East and North Africa,* edited by Aslı Ü. Bâli and Omar M. Dajani, Cambridge University Press, 2023. This book makes a groundbreaking and compelling contribution to the law and politics of decentralization in the Middle Eastern and North African (MENA) states.

Keywords

Federalism, Middle East, North Africa, Decentralization, Comparative Law

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1. Federalism Beyond the Usual Suspects

The literature on comparative federalism rarely goes beyond the "usual suspects" (Hirschl 2013) and just analyses a few constitutional systems that generally belong to western cultures. In this review, I will take a critical and detailed look at a recent book that goes beyond the common ideas found in the literature. In doing so, I will first present the structure of the book and then raise some questions that come from reading it.

Federalism and Decentralization in the Contemporary Middle East and North Africa, edited by Aslı Ü. Bâli and Omar M. Dajani, Cambridge University Press, 2023, makes a groundbreaking and compelling contribution to the law and politics of decentralization in the Middle Eastern and North African (MENA) states and is engaging and provocative. The chapters of this edited volume are written by various scholars and experts who illuminate the hits and misses of federalism and decentralization, weaving an argument through case studies in the twelve selected countries, all of which have experimented with federalism and decentralization and whose experiences have been missing from the literature. The editors of the volume, Aslı Ü. Bâli and Omar M. Dajani, shine a light on whether it is feasible for federalism and decentralization to tame the region's conflicts and governance challenges that stem from overly centralized authority. The volume explores the following issues: the decentralization objectives of different states, how interests have evolved, the pursuit of decentralization by different institutions and processes, the forms decentralization has taken and the gridlocks it has encountered, and the decentralization trajectory within the MENA region. The volume illustrates this in eighteen chapters which are clustered into five sections.

2. Theoretical and Comparative Context

Chapter 1 is the introduction to the book and explains the rationale behind the project. In Chapter 2, "Decentralization to Manage Identity Conflicts", Philip G. Roeder views decentralization as a way of keeping a state intact against threats of secession, enhancing democracy, securing peace, and fostering an enabling environment for economic growth and equity. The author points out the lack of a single appropriate institutional solution for all MENA states, illustrating that each state needs to identify and take into account its unique

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characterization to situate itself within the decentralization dynamics. The author emphasizes the importance of designing institutions that can accommodate both common-state identity and separate community identities. However, he quickly points out how efforts to foster the development of common-state identity and separate community identities often pull in different directions.

Will Kymlicka's Chapter 3, "Devolution and the Promotion (or Evasion) of Minority Rights", underscores the importance of creating room to allow minority groups to express their reasons for advancing claims to autonomy and of viewing minority aspirations for self-government as normal within contemporary politics, thus expunging minority autonomy from the "taboo" category. The author points out that decentralization can be a double-edged sword: when decentralization is tethered to efforts of "nation-building" through "nation-destroying", it will disempower communities, but it empowers communities when it recognizes and appreciates the nations within.

In Chapter 4, "Constitutional Design Options for Territorial Cleavages in the Middle East", Tom Ginsburg argues that no nation-state is homogenous and that constitutions must therefore accommodate internal diversity. The author illustrates how federalism, rights to secession, decentralization, special autonomy, differentiating rights, redistribution, and representation from the centre could act as constitutional designs to accommodate internal diversity within the MENA region. The author affirms that to consolidate decentralization in the MENA region, there has to be a deliberate effort to ensure full fiscal autonomy within the decentralized local units.

Chapter 5, "How Decentralization Efforts Have Recentralized Authority in the Arab Region" by Mona Harb and Sami Atallah, assesses decentralization policies and initiatives in five countries – Jordan, Lebanon, Morocco, Tunisia, and Yemen. Within these case studies, the authors highlight how the colonial characterization of shifting the accountability of local actors from local communities to the central government has continued to undermine effective decentralization. The authors illuminate how the MENA region is encumbered by donor funding which comes with conditions for decentralization. The different operating environments between the donors and the local communities precipitate deficiencies in the proper situating and implementation of decentralization, and therefore fail to benefit the intended communities.

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3. Decentralization and Governance Reform

In Chapter 6, "Decentralization, Ideology, and Law in the Islamic Republic of Iran", Kian Tajbakhsh illustrates how the Islamic Republic of Iran (IRI) decentralized the state to establish an elected local government system within its cities and villages. The author of the chapter endeavours to explore the dynamics of political decentralization within a regime that is authoritarian and non-democratic. Notably, the establishment of elected local governments within the country was not accompanied by increased democratization. In a similar vein, the author explains how decentralization, as an avenue to allow the sharing of power between the central government and the subnational units, was seen as a vehicle to weaken and constrain the despotic power of the state. However, it allowed the state to maintain a tight grip on the subnational units by decentralizing its internal administrative architecture. The central state has constantly controlled participation in local and national politics through the disqualification of candidates.

Ali Al-Mawlawi's Chapter 7, "Salvaging State Legitimacy in Iraq through Decentralization", sketches the contours of the argument by highlighting two of the objectives of the Iraqi constitution that was ratified in the 2005 referendum. The first of these was to create a path through which reconciliation could take place, and the second was to preclude the re-emergence of authoritarianism. The author illuminates two drivers of territorial decentralization: "coming together" and "holding together". Since Iraq is a society with deep-seated societal divisions, the main impetus was "coming together". The author emphasizes the need to improve service delivery within local government and to encourage local authorities to take full charge of their sub-units to enhance decentralization.

In Chapter 8, "Decentralization Reforms in Post-Revolution Tunisia: The Struggle between Political and Bureaucratic Elites", Intissar Kherigi first elaborates on the Tunisian uprising, which culminated in the adoption of a new constitution providing for decentralization. Decentralization within the new constitution was viewed as a panacea to undo decades of regional inequality and prevent the return of authoritarianism. The author shines a light on how the political parties, both in government and in opposition, were highly fragmented, with weak local structures within the devolved sub-units, and therefore lacked the impetus to advocate for decentralization. The author points out how the dominance of

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technical experts, who hammer home specific details of decentralization without the participation of those who are affected or are part of the implementation, could stall the process.

4. Decentralization and Self-Determination

In Chapter 9, "Autonomy beyond the State", Joost Jongerden outlines the discussion by first highlighting the two different conceptualizations of self-determination of the Kurdish community: an independent state, and strengthened self-organization. In the same continuum, the author illuminates how the drafting of the Iraq constitution in 2005 paid special attention to the design of institutional solutions that would facilitate different groups achieving self-determination while maintaining the territorial borders of the country, although this draft constitution was rejected. The authors define democratic autonomy as the principle of self-constitution; in this characterization, people's direct engagement and collaboration with one another are allowed to flourish. This catalyses the strengthening of local administrative capacities, which could be termed democratic confederalism.

Peter Bartu and Aidan MacEachern, in Chapter 10 "The Devil Is in the Details: Iraqi Kurdistan's Evolving Autonomy", ground their argument on how Iraq's decentralization has encountered challenges with Kurdish regional autonomy, especially in the areas of governance and natural resources. The authors elucidate the reasons that have hindered the realization of Kurdish autonomy: Kurdish disunity, central government dominance, and the implications of Kurdish self-government for the Kurdish minority populations in Iran and Turkey. A result of the coup of 15 July 1958 was a push for reforms, and this led to the introduction of a temporary constitution that provided for equality between the Arabs and the Kurds, devolution, and reinforced budgetary provisions. However, as the authors illustrate, the failure of the reforms after two years led to a revolt by the Kurds. The authors contend that the invasion of Iraq in 2003 and the drafting of the 2005 constitution curtailed the central government's power, balancing it with that of the sub-units.

In Chapter 11, "Turkish Kurdistan: Decentralization Reimagined", Aslı Ü. Bâli examines the Kurdish proposal for confederalism but no interference with territorial boundaries. The author illustrates how the sustained push for the resolution of the Kurdish question has

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precipitated the government's accommodation of deliberations on decentralization within the central state. The author points out how the government's position on the Kurdish question has metamorphosed from a denial of the existence of the Kurds to advocacy for a political solution. Aslı Ü. Bâli points out how the Turkish Constitutional Court (TCC) has played a key role in closing down pro-Kurdish political parties formed since 1990, thereby limiting their political participation. Having taken into account the inherent risk that armed insurgence will not bring forth the desired outcome, the Kurdish leadership, led by Öcalan, changed its strategy to that of advancing decentralization instead of secession to facilitate a political solution within the borders of Turkey.

Sari Bashi's Chapter 12, "Control, Responsibility, and the Israeli–Palestinian Decentralization Debacle", examines the delegation of authority within the framework of the belligerent military occupation by Israel of the Palestinian territory (the Gaza Strip, the West Bank, and East Jerusalem). The author illustrates how Israel transferred responsibility to Palestinian authorities without ceding them the requisite authority, thus creating accountability gaps. The author points out the special status, as "protected persons" under the international rules on belligerent occupation, of Palestinians in the occupied territories. Their status requires the Israeli authorities to strike a balance between using violence for control and exercising their duty of care for residents within the occupied territory. The author points to the need for donor countries to focus not only on strengthening local government so that it can provide services to people effectively, but also on ending the occupation.

In Chapter 13, "Stuck Together: Can a Two-State Confederation End the Israeli–Palestinian Conflict?", Omar M. Dajani and Dahlia Scheindlin point to the concession made within the international community to divide Israel and Palestine into two states as an avenue for stemming persistent conflicts. However, the two-state solution (2SS) has evoked mixed reactions among the Jews and the Palestinians. The authors illuminate several alternatives to the 2SS: maintaining Israeli government control over Israeli–Palestinian territory, the annexing by Israel of part or all of the West Bank, and creating one democratic state across all of Israel–Palestine. Finally, others have put their weight behind the 2SS as being still the best alternative. The authors contend that if the current one-state system is to pave the way to a two-state government, there has to be a great shift of tectonic plates. This approach

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would tilt the playing field in favour of the Palestinians, filling the implementation path with landmines.

In Chapter 14, "Dans ses Frontières Authentiques? Morocco's Advanced Regionalization and the Question of Western Sahara", Omar Yousef Shehabi illuminates the French bureaucratic legacy inherited by Morocco, which establishes dichotomies between local leaders owing their allegiance to the central government and locally elected officials answerable to communities within the local administrative units. The author shines a light on how the Consultative Committee on Regionalization (CCR) received several proposals, from political parties and others, for the assimilation of asymmetrical autonomy, given the cultural diversity and pluralism of Morocco. However, the 2011 constitutional order in Morocco promotes national unity and territorial integrity, therefore denying a Sahrawi national identity. Omar Yousef Shehabi underscores the role of international actors in advancing constitutional reforms, promoting regionalization, and creating a platform to define the Sahrawi as a linguistic-cultural minority.

5. Decentralization, Conflict, and State Fragmentation

The book changes gear in Chapter 15, "Devolution and Federalism in Collapsed States: Constitutional Process and Design" by George R. M. Anderson and Sujit Choudhry. These authors discuss state collapse and its implications for constitution-making and design in Lebanon, Libya, Somalia, and Yemen. The authors characterize a collapsed state as a state with a non-functional government. From the case studies, the authors demonstrate the difficulty of the constitution-making process, especially if there are deep divisions amongst different ethnic and religious factions within a state. The authors advance devolution or federalism as a constitutional design option for such collapsed states, but they are quick to point out the challenge of further disintegration in this approach. Further, they elaborate on the ingredients of a sustainable peace: agreements on governance arrangements, a constitution-making process, transitional security arrangements, and guiding principles for reconstruction.

Karim Mezran and Elissa Miller, in Chapter 16, "The Promise – and Limits – of Stabilization through Local Governance in Libya", describe how elusive the realization of

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good governance and stability has been in Libya despite efforts by numerous players. The authors, further, point to the conflicting roles played by foreign actors, as both spoilers and advocates of peace, and show how this has perpetuated rifts amongst the different factions. The authors demonstrate how the power struggle after 2014 created localized and fragmented authority, cementing reliance on local sub-units. Despite this development, the transfer of power and responsibility from the centre to the regions remained ad hoc and underdeveloped, and a dysfunctional central state further compounded the problem.

If we shift our attention to Chapter 17, "Decentralization in State Disintegration: An Examination of Governance Experiments in Syria", we see how Samer Araabi and Leila Hilal underpin their discussion by tracing the footsteps of administrative decentralization and governance from its inception in Syria. The authors highlight how decentralization became a signpost for Bashar al-Assad's reforms. They illustrate how the government was left fragmented, with different non-state actors and paramilitary groups assuming control in different parts of Syria when Gulf-backed opposition forces took up arms against Bashar al-Assad's regime following mass protests in the streets.

In Chapter 18, "Decentralization in Yemen: The Case of the Federalist Draft Constitution of 2015", Benoît Challand illuminates the fact that, for a long time, Yemen has agitated for decentralization and the creation of a strong society that would be in a position to formulate and push for the implementation of reforms by the central authority. However, turning these proposals into legal provisions has been slow because of insufficient resources and other barriers. The author contends that regional grievances with calls for dignity and social justice paved the way for the mass protests in Yemen in 2011 that culminated in the resignation of President Salih. As a consequence, an inclusive National Dialogue Conference (NDC) was formed, which called for the establishment of a federal state and other institutions. However, Benoît Challand emphasizes the lack of clarity in reallocating financial, administrative, and human resource functions within the decentralized units.

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6. Recommendations and Conclusion

Although the authors of the volume underline authoritarianism as one of the drivers for federalism and decentralization, federalism and decentralization can still function within an authoritarian environment. Nigeria's federalism has operated under both civilian and military rule, and in Ethiopia federalism has functioned under a one-party system which has had little regard for liberal democracy (Gebeye 2021: 48-150). Additionally, across the different chapters, the volume articulates some key ingredients of a working decentralized system, but the consolidation of these important pointers would be extremely useful to readers. In this continuum the following significant components would be packaged together: the importance of shifting functions or responsibility together with authority and defining and specifying shared functions between the different levels; an explanation of how a decentralized unit can manage competing interests, especially when there are heterogeneous communities within its borders; the design of an asymmetric relationship that does not further exacerbate differences within the sub-units; decisions on unicameral or bicameral parliaments and what legislative power each will possess; the number of decentralized units that should be created and whether this has a correlation with the costs of managing the units and representation; balancing the transfer of functions and authority with the building of local capacities (p.114); the separation of taxation regimes between decentralized units and the central authority to avoid duplication; what formula should be used to inform any sharing of revenue to the sub-units; how conflicts between the sub-regions and the central government should be handled (p. 141); what should inform the election of local representatives or their appointment, and what this means for decentralization; and what role decentralized units play in creating legislation that affects them. These are important ingredients that need to be assembled for ease of reference and possible application.

The use of twelve countries characterized by the existence of minority groups and experiences of federalism and decentralization makes them perfect cases for a comparative study. Chapters 3 and 4 underline the importance of removing minority autonomy from the "taboo" category and creating constitutional designs for decentralization which fit perfectly not only within the MENA region but even beyond. Additionally, although the Kurdish community traverses Iran (Eastern Kurdistan), Syria (Western Kurdistan), Turkey (Northern

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Kurdistan), and Iraq (Southern Kurdistan), (Radpey 2022) the authors of Chapters 9 and 11 converge on the creation of autonomy without interfering with territorial borders as they discuss the decentralization question among the Kurdish communities in Iraq and Turkey. In sum, this book is a prized resource for constitutional designers, policymakers, scholars, students of decentralization and federalism, and any other person or institution interested in a deeply researched and excellently put-together volume on the subject.

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CENTRO STUDI SUL FEDERALISMO
PERSPECTIVES ON FEDERALISM

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Federalism and Decentralization in the Contemporary Middle East and North Africa. A Rejoinder

by

Aslı Ü. Bâli[*] and Omar M. Dajani[**]

Perspectives on Federalism, Vol. 16, issue 1, 2024

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Abstract

The purpose of this short essay is to offer a rejoinder to the comments offered by Nickson Oira in his review of our book *Federalism and Decentralization in the Contemporary Middle East and North Africa*

Keywords

Federalism, Decentralization, Middle East, North Africa

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The literature We were delighted to read Oira's positive review of our volume. We found particularly gratifying his opening observation that the book moves beyond the comparative federalism literature's prevailing focus on Western cases, since one of our primary goals was to bring attention to the understudied experience with federalism and decentralization in the Middle East and North Africa and, more generally, in the global South. But while we are grateful for the attention Oira gave the volume, we feel obliged to respond to a couple of his critical reflections and to make a few additions to his summary of the book.

First, Oira suggests the volume might have been improved had we done more to crystallize the experience described in the cases we cover into generalized lessons that might be applied elsewhere. But, as we explained in our conclusion, our decision not to fashion prescriptions from the MENA region's experience was intentional. In light of the short track record of federalism and decentralization in most of the countries we surveyed, we felt it was too early to derive generalized recommendations from it. That view is fortified by the strikingly inconclusive character of data about the merits of decentralization even in thoroughly studied contexts (Smoke 2015).

That said, we did undertake, in our synthetic conclusion, to highlight the common history that informs attitudes across the MENA region toward federalism and decentralization – a history shared to some extent by other regions still struggling to overcome their colonial past. We also undertook to distill the MENA region's experience by developing a new typology of the motivations driving decentralization, moving beyond Alfred Stepan's often-cited distinction between "coming together" and "holding together" federations. As we point out, decentralization has been pursued 'as both a bulwark against authoritarianism and as a strategy for consolidating it; as vehicle for the emancipation of long-oppressed identity groups and as a dangerous diversion from meaningful self-determination; as a platform for managing governance in circumstances of state collapse and as a framework for reconstituting the state following conflict' (Bâli & Dajani 2023). In relation to each of these types, we highlight some of the distinctive patterns our cases reveal. As we explain, variables such as which institutions are leading decentralization, the degree to which the process is inclusive, and the pacing of decentralizing reforms have been particularly significant. Even so, we resisted the temptation to offer the kind of 'facile institutional recommendations' (Erk 2014: 539) that too often guide policy in this realm.

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Second, while we agree with Oira that 'federalism and decentralization can still function within an authoritarian environment,' our cases sound a note of caution. The experience in Iran, Iraq, Jordan, Morocco, Syria, and Tunisia suggests that decentralizing initiatives should not be assumed to promote democratization or otherwise to counter authoritarian rule. In fact, one pattern we observed in many of the countries in the region is that the combination of deconcentration and symbolic political decentralization (for example, in the form of elections for local councils that have no meaningful authority) can serve to consolidate an authoritarian government's control over a country's periphery rather than challenging it. This track record should alert foreign donors to the danger of reflexively supporting decentralizing initiatives in the hope that they will enhance democratic governance.

Finally, while Oira's review offers readers a valuable summary of our book, it may be useful to highlight some of the distinctive contributions it makes to the literature. First, as the collective product of scholars and policy analysts with deep (and mostly insider) knowledge of the countries they are writing about and perspectives shaped by a variety of disciplines (including law, politics, sociology, and urban planning), it offers a textured portrait of the law and politics of decentralization during a period of sweeping transition in the MENA region. Our cases analyze the actors and power dynamics driving institutional reform efforts, highlighting obstacles (from an entrenched central government bureaucracy in Tunisia to counterproductive donor policies in Syria to intergovernmental competition in Iraq) that have received little attention elsewhere. They also bring to the surface numerous parallels between disparate experiences (e.g., between the Oslo process in Israel-Palestine and advanced regionalization in Morocco-Western Sahara; and between de facto governance in Libya, Syria, and Yemen) that can inform comparative analysis in the future. Second, it reveals a paradox in the region's attitudes toward the idea of decentralized government: while 'decentralization' has been widely embraced as a cure-all for challenges to governance, any mention of federalism tends to provoke suspicion and even consternation. In addition to explaining this paradox through reference to the region's history, we point to the irony it presents, for while federalism is politically incendiary, we believe it has greater potential as a framework for managing diversity in the region than other forms of decentralization do as a means toward governance reform. Finally, following a decade during which the uprisings, counter-revolutions, and other conflicts in the region have produced cynicism about its prospects for political change, the book recounts experiments with decentralized

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government, including 'democratic confederalism' in Rojava, that offer fresh solutions to the challenges presented by the nation-state.

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New Trends in Comparative Federalism. A Special Issue.

Final Remarks

by

Giuseppe Martinico[*] and Matteo Monti[**]

Perspectives on Federalism, Vol. 16, issue 1, 2024

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Abstract

In this special issue, we have gathered experts from different legal systems, and critical voices who have explored new trends in comparative federalism from an original and fresh perspective.

Keywords

New trends, federalism, federalizing process, asymmetry, new actors

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In this special issue, we have gathered experts from different legal systems, and critical voices who have explored new trends in comparative federalism from an original and fresh perspective.

Reflecting on the contributions included in the first section, it is possible to stress the never-ending tension between asymmetrical and symmetrical drives, which, in India, assumes the characteristic of a contraction of asymmetrical autonomy on a religious basis. Harihar Bhattacharyya's article highlights the conflict around Article 370 in the Indian federal system, which has assumed the role of a very important case study for testing the coexistence of asymmetry and symmetry in the light of Modi's new Hindu nationalism.

Marjan Kos's article offers a reading that relates asymmetric federalism and EU differentiation, going beyond the classic rigid division of categories. The article also addresses the convergences between these two categories and builds a bridge between comparative and EU law scholarship. Moreover, it provides important keys for an analysis of the European integration process.

In his essay, Matteo Monti discusses why comparative federalism's traditional categories of asymmetry cannot fully describe the asymmetrical demands of ethno-regionalist parties in so-called 'regional states'. He introduces the concept of spearheaded asymmetry, which holds together demands for maximum self-government and the differentiation of regions inhabited by linguistic minorities or nationalities, in order to explore the claims of ethno-regionalist parties in Spain and Italy. Through this concept, it is easier to understand some of the dynamics that can be generated in those federalising processes defined as 'regional states'.

Finally, Alice Valdesalici provides a new conceptualisation of fiscal federalism and proposes the adoption of a fuzzy logic approach to understand how fiscal decentralisation systems and the actual powers in this field of sub-national units are evolving. Her analysis offers a method for studying fiscal decentralisation outside traditional patterns to give a better understanding of many of the asymmetrical demands concerning fiscal autonomy as they arise in various jurisdictions.

Several insights and new trends also emerge from the second section, entitled *New Actors in Federal Dynamics*. In particular, Allan Tatham's article offers an analysis of a new phenomenon: regional integration in Africa through judicial dialogue. The deployment, by the courts of regional economic communities, of the legal toolbox of the EU Court of Justice, either implicitly or explicitly, is a shining example of the new integrative dynamics in

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the African continent. Tatham's article thus offers a very compelling analysis for understanding the future evolution of African regional processes and the role that these new actors – the courts – can play.

Erika Arban's essay addresses the growing role of so-called *units* in federalism. Her essay proposes new ways of approaching the subject of federalism and its established legal categories. The author, starting from local needs and the challenges of the twenty-first century, highlights how new actors, particularly cities, are emerging, and how it is essential to extend our analysis beyond the rigid structures of classical federalism studies.

Taking the same perspective of challenging the classical categories of federalism studies is the essay by Giuseppe Martinico. This author emphasises that Hay's work is still very useful today for understanding developments in the process of supranational integration and argues that, above all, Hay was among the very first to define the concept of supranationalism in legal terms.

The last section – *Secession in Context: Experiments and Innovations* – analyses new trends in the field of constitutionalised secession and secessionist claims. Errol Mendes' essay deals with the new proto-secessionist challenges in the Canadian legal system, underlining how some western provinces have recently employed the 'provincial sovereignty' weapon to claim new powers, and showing how this element represents a new challenge for the first legal system to have recognised a lawful secession. In the article, Mendes reveals a more concealed 'secessionist' tendency: a claim to sovereignty that recalls Calhoun's theses on the Compact Theory.

Nikos Skoutaris proposes a reinterpretation of secession in the context of federalism, challenging some traditional readings whose aim is to marginalise the secessionist phenomenon and normalising this phenomenon in a 'pragmatic' vision of federalism. This is a stimulating reinterpretation that allows many secessionist experiences to be read from a different perspective.

Partly in continuity with Skoutaris' theses, Yonatan Fessha and Nejat Hussein give an account of the problems related to the constitutionalisation of a mechanism for internal secession in the Ethiopian system. The analysis of these developments is of great interest to those who see the constitutionalisation of secession as an instrument for accommodating ethnic conflicts.

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Elisabeth Alber deals with the complexity of the New Caledonian case and shows how difficult it is to find – in a conflict resolution situation – a balance between secessionist referendums, autonomy powers and the 'issue' of what should be an electoral body in an ethnically divided country. These two last articles contextualise some of the challenges related to the constitutionalisation of internal or external secession, providing essential data from which to develop further considerations on the constitutionalisation of secession.

The dialogue between Nickson Oira, Aslı Ü. Bâli and Omar M. Dajani provides an opportunity to explore various federalising processes in a wide geographical area that, except for the Kurdish issue, is not often the focus of in-depth analysis. This is a dialogue that both gives an account of the book's innovative traits and highlights the reasons why its editors embarked on this analysis.

In conclusion, we hope to have contributed to the debate on comparative federalism, the multifaceted dynamics of which present a new terrain for analysis.

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