Studies in Territorial and
Cultural Diversity Governance

The Principle of Equality in Diverse States

Reconciling Autonomy with Equal Rights and Opportunities

Edited by Eva Maria Belser, Thea Bächler,
Sandra Egli and Lawrence Zünd

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Preface

The Principle of Equality in Diverse States – Reconciling Autonomy with Equal Rights and Opportunities is the fruit of an initiative launched by the International Association of Centers for Federal Studies (IACFS) in collaboration with the Institute of Federalism of Fribourg (IFF). This contribution to the BRILL-series *Studies in Territorial and Cultural Diversity Governance* brought together scholars from different disciplines from both established federal states as well as newly federalising, regionalising or decentralising states from around the world. These researchers all gathered around the following complex question: How can states which are characterised by internal diversity and which guarantee autonomy to their regions or communities deal with this diversity while at the same time respecting and protecting the principle of equality throughout the country? In short: How can diversity and equality coexist?

The objective of this volume is to address the various challenges diverse states face when accommodating diversity while simultaneously guaranteeing equality, and thus to generate new insights into the intricacies of power-sharing. Each contributor investigated the difficulties and the opportunities of combining subnational autonomy with both national and international commitments to equality and explored pathways for the reconciliation of the two clashing principles, whether implicitly or explicitly, and whether hypothetically or concretely. The book offers researchers, as well as policy makers and practitioners a wealth of new knowledge, both about the multifaceted relationships between federalism, decentralisation and other forms of dealing with diversity, and about the respect and implementation of the principle of equality.

We are convinced that this volume constitutes a useful contribution to the BRILL-series *Studies in Territorial and Cultural Diversity Governance*, and a unique contribution to the scientific discourse on federalism, decentralisation, conflict resolution and on the implementation of the principle of equality in diverse states. With its comparative and interdisciplinary approach, this book investigates the effects and interactions between power-sharing and equality from legal, political, economic, social and cultural perspectives, addressing the challenges and solutions from a number of established federal or newly federalising, regionalising or decentralising states. It also aims to build bridges between scholars working on equality and human rights and those firmly anchored in federal studies. We thus hope to open up new avenues for research.

We would like to thank all the actors and institutions who have contributed to bringing this initiative to its successful end. First and foremost, we would like to warmly thank the authors for embarking on this fascinating journey and for enduring the long process of compiling their contributions into a unified and coherent book. We also wish to thank Dr. Rekha Oleschak-Pillai, Milena Kundert, Liliya Tseytlina, Lara Viviroli and Sylvia Goetze, who helped us to read, review, edit, proofread and format the chapters of this book. We are finally most grateful to the editors of the BRILL-series *Studies in Territorial and Cultural Diversity Governance* and to Bea Timmer for her great assistance and unwavering support.

Eva Maria Belser, Thea Bächler, Sandra Egli and Lawrence Zünd

Figures and Tables

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Abbreviations

A.D.	*Anno Domini* (*in the year of the Lord*)
AaVv	Various authors
AMBA	Metropolitan Area of Buenos Aires
ANP	*Agência Nacional do Petróleo, Gás Natural e Biocombustíveis* (*National Agency for Petroleum, Natural Gas and Biofuels*)
APC	All Party Conference
APRC	All Party Representative Committee
ARC	Australian Research Council
Art.	Article
B.C.	Before Christ
BBl	*Bundesblatt* (*Federal Gazette*)
B-C Pact	Bandaranaike-Chelvanayakam Pact
BEA	Bureau of Economic Analysis, US Department of Commerce
BGE	*Entscheidungen des Schweizerischen Bundesgerichts* (*Sentences of the Swiss Federal Supreme Court*)
BiH	Bosnia and Herzegovina
Blaw	Bachelor of Law
B-VG	*Österreichisches Bundes-Verfassungsgesetz* (*Austrian Federal Constitutional Act*)
CABA	Autonomous City of Buenos Aires
CAT	Commitee Against Torture
CBN	Coverage of Basic Needs Index
CC	Constitutional Court
CCI	Council of Constitutional Inquiry
CCPR	Covenant on Civil and Political Rights
CDF	Constituency Development Funds
CDR	Cash Deposit Ratio
CEDAW	Committee on the Elimination of Discrimination against Women
CERD	Committee on the Elimination of Racial Discrimination
CESCR	Committee on Economic, Social and Cultural Rights
cf.	*confer* (*compare with*)
CGLU	World Organization of United Cities and Local Governments
ch.	chapter
CHF	Swiss Franc
Cmd	Command Papers
CNEL	*Consiglio nazionale dell'economia e del lavoro* (*The National Council for Economics and Labour*)

CoE	Council of Europe
Col	Collection
CONAB	*Companhia Nacional de Abastecimento* (*National Supply Company*)
consid.	*considérant* (*consideration*)
Const.	Constitution
CRC	Commitee on the Rights of the Child
CT	Connecticut
D.L.	*Decreto Legge* (*Law Decree*)
d.P.C.m.	Prime Ministerial Decree
DBG	*Bundesgesetz über die direkte Bundessteuer* (*Federal Law on Direct Federal Taxes*)
D-C Pact	Dudley-Chelvanayakam Pact
Dig.	Digesta (Digest)
Diss.	Dissertation
DM	Health Ministry Decree
DPA	Dayton Peace Agreement
Dr.	Doctor
E.	*Erwägung* (*Consideration*)
E.C.D.	European Commission for Democracy
e.g.	*exempli gratia* (*for example*)
ECHR	European Court of Human Rights
ECtHR	European Convention for the Protection fo Human Rights and Fundamental Freedoms
ed. / eds.	editor(s)
EEZ	Exclusive Economic Zone
EIPA	European Institute of Public Administration
EPRLF	Ealam People's Revolutionary Liberation Front
eq.	equation
et al.	*et alii* (*and others*)
et seq.	*et sequens* (*and the following*)
etc.	*et cetera* (*and other similar things*)
ETOM	Eelath Thamilar Otrumai Munnani (Tamil Separist Party)
EU	European Union
EUBI	European Bank for Investments
EuConst	European Constitutional Law Review
EUDEBA	*Editorial universitaria de Buenos Aires* (*University Press of Buenos Aires*)
EURAC	European Academy of Bozen
EZFF	*Europäisches Zentrum für Föderalismus-Forschung Tübingen* (*The European Center for Research on Federalism*)
f.	*folgend* (*and the following item*)

FBiH	Federation of Bosnia and Herzegovina
FDR	*Fondo de Desarrollo Regional* (*Regional Development Fund*)
FedCst	Federal Constitution
FiLaG	*Bundesgesetz über den Finanz- und Lastenausgleich* (*Federal Law on the Equalisation of Finances and Burdens*)
FiLaV	*Verordnung über den Finanz- und Lastenausgleich* (*Federal Regulation on the Equalisation of Finances and Burdens*)
fn.	footnote
FP	Federal Party
FRC	Fiscal Revenue Commission
FS	*Festschrift* (*Commemorative Publication*)
F-VG	*Österreichisches Finanz-Verfassungsgesetz* (*Austrian Fiscal Constitutional Act*)
FWO	*Fonds Wetenschappelijk Onderzoek* (*Fundamental Research Foundation Flanders*)
GDP	Gross Domestic Product
H.R.	High Representative
Haw.	Hawaii
HDI	Human Development Index
HDZ	Croatian Democratic Union of Bosnia and Herzegovina
HoP	House of Peoples
How.	Benjamin Chew Howard
i.e.	*id est* (*that is*)
IACL	International Association of Constitutional Law
IBGE	*Instituto Brasileiro de Geografia e Estatística* (*Brazilian Institute of Geography and Statistics*)
ibid.	*ibidem* (*in that very place*)
ICCPR	International Covenant on Civil and Political Rights
ICE	Research Unit for Institutional Change and European Integration
IDPI	Institute of Social and Political Research
IFF	*Institut für Föderalismus* (*Institute of Federalism*)
ILO	International Labour Organisation
IMF	International Monetary Fund
INDEC	National Institute of Statistics and Censuses
IPEA	*Instituto de Pesquisa Econômica Applicada* (*Institute of Applied Economic Research*)
ISEE	*Indicatore della Situazione Economica Equivalente* (*Index for evaluating the economic situation*)
ISGA	Interim Self-Governing Authority

ISSIRFA	*Istituto di Studi sui Sistemi Regionali Federali e sulle Autonomie* (*Institute for Studies on Federal Regional Systems and their Autonomies*)
ISTAT	*Istituto Nazionale di Statistica* (*National Statistics Institute*)
ItCC	Italian Constitutional Court
IZA	Institute of Labor Economics
JSC	Joint Standing Committee
JVP	*Janatha Vimukthi Peramuna* (*People's Liberation Front*)
KG	*Kommanditgesellschaft* (*Limited partnership*)
L.D.	Volume
LGBT	Lesbian, Gay, Bisexual, and Transgender
LL.M	*Legum Magister/Magistra* (*Master of Laws*)
LLRC	Lessons Learnt and Reconciliation Commission
LN	*Lega Nord* (*Northern League*)
LSSP	Lanka Sama Samaja Party
LT	*Legge tributaria della Repubblica e Cantone Ticino* (*Ticino Tax Law*)
Ltd.	Limited company
LTTE	Liberation Tigers of Tamil Eelam
LUMSA	*Libera Università degli Studi Maria Ss. Assunta di Roma* (*Free University Maria ss. Assunta of Rome*)
Mass.	Massachussets
Md	Maryland
MFM	Macroeconomics and Fiscal Management
Mlaw	Master of Law
MMag	*Doppelmagister* (*Double master's degree*)
MP	Member of Parliament
Mr.	Mister
NATO	North Atlantic Treaty Organization
NBER	The National Bureau of Economic Research
NEA	North East Region
NEB	National Electoral Board
NFA	*Nationaler Finanzausgleich* (*New Financial Equalisation*)
no. / nos.	number(s)
NOA	North West Region
NRGI	Natural Resource Governance Institute
NRNR	Non renewable natural resources
OECD	Organisation for Economic Co-operation and Development
OHR	Office of High Representative
OLS	Ordinary Least Squares
OSCE	Organization for Security and Co-operation in Europe
p.	page

PA	People's Alliance
para.	paragraph
PhD	*Philosophiæ doctor* (*Doctor of Philosophy*)
PPP	Purchasing Power Parity
pr.	*principium* (*beginning*)
Prof.	Professor
QoG	Quality of Government
RAI	Regional Authority Index
ref.	reference
Rivista AIC	*Rivista Associazione Italiana die Costitutionalisti* (*Journal of the Italian Association of Constitutionalists*)
ROC	Rest of Canada
RS	*Republika Srpska* (*Republic of Srpska*)
SCHR	Swiss Centre of Expertise in Human Rights
SDA	Bosniak Party of Democratic Action
SIG	Solomon Islands Government
SKMR	*Schweizerische Kompetenzzentrum für Menschenrechte* (*Swiss Centre of Expertise in Human Rights SCHR*)
SLB	State Language Board
SLFP	Sri Lanka Freedom Party
SNG	Subnational governments
SNNPR	Southern Nations, Nationalities and Peoples
Sri LR	Sri Lanka Law Reports
STV	Single Transferable Vote
subpara	subparagraph
TC	Tamil Congress
THA	Tobago House of Assembly
TIG	Tobago Island Government
TNA	Tamil Nationalist Alliance
TSE	*Tribunal Superior Eleitoral* (*Supreme Electoral Court*)
TTG	Trinidad and Tobago Government
TUF	Tamil United Front
TULF	Tamil United Liberation Front
U.N. doc	United Nations documents
UBC	University of British Columbia
UK	United Kingdom
UN HRC	United Nations Human Rights Committee
UN	United Nations
UNDP	United Nations Development Programme
UNDRIP	United Nations Declaration on the Rights of Indigenous Peoples

UNESCO	United Nations Educational, Scientific and Cultural Organization
UNFGG	United National Front for Good Governance
Univ.	University
UNO	United Nations Organisation
UNP	United National Party
UPFA	United People's Freedom Front
UPR	Universal Periodic Review
UQAM	Université du Quebec à Montreal
US	United States of America
USA	United States of America
v. / vs.	versus
VAT	Value Added Tax
Venice Commission	European Commission For Democracy Through Law
VfSlg	*Sammlung der Erkenntnisse und wichtigsten Beschlüsse des Verfassungsgerichtshofs* (*Compendium of judgments and most important decisions of the Constitutional Court*)
VNI	Vital National Interest
WWII	World War II
ZBl	*Schweizerisches Zentralblatt für Staats- und Verwaltungsrecht* (*Swiss Official Gazette for Constitutional and Administrative Law*)

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Introduction

Eva Maria Belser and Lawrence Zünd

While unitary states find it easy – at least in theory – to pledge equal rights to all geographic entities and all citizens of the country, the principle of equality raises several complex issues in states which guarantee autonomy rights to one, several or all constituent entities or which provide for specific regimes for distinct groups, such as national minorities or indigenous groups. As the guarantee of self-rule is fundamental to all federal systems, their subnational units, regions or communities are empowered to autonomously adopt and apply their own rules. Autonomy implies that the rules can differ from one unit to another, which is why it necessarily impacts on equality; different rules apply to the citizens of the same state. It comes as no surprise that proponents of the principle of equality and equal citizenship often oppose federalism in all its forms or attempt to limit self-rule whenever it clashes with equality. Different rules are often blamed for leading to – or increasing – inequalities within one and the same state, for challenging unity, and for questioning solidarity.

Why would we then publish a book that points out the challenges federal countries face with regard to the principle of equality, a book that would potentially unveil problems intrinsically linked to autonomy, a book that focuses on challenges federal systems struggle to overcome and that might give arguments to its adversaries? It might be easier and seem more rewarding to present the successes countries encounter along their journey, rather than highlighting the many conceptualisation and implementation issues faced when putting into practice federalism, decentralisation or any other power-sharing regime. However, addressing such challenges and difficulties, as well as the strategies employed to eventually overcome them, is more worthwhile. On the one hand, it is intellectually stimulating to explore the many facets of autonomy and of equality and to discover both common ground and contradictions. On the other hand, tackling the controversial issues of diversity, autonomy, unity and solidarity at its roots offers a fascinating opportunity to unpack deep reluctance towards power-sharing and investigate its relevance. Taking this kind of hesitancy and opposition seriously and openly questioning its justification or groundlessness seems to be the best way to open new ways of thinking about both federalism and diversity as well as unity and equality, and to add inspirational shades of grey to the still commonly bleak, black-and-white approach.

Respecting the principle of equality and reconciling it with equality is undoubtedly no easy task in the context of countries which have adopted

federal or decentralised systems or any other arrangement allowing for the accommodation of groups or territories with a distinct identity. How much equality does state unity require? How much inequality is acceptable in order to respect diversity? There is an important but largely unexplored theoretical and conceptual difference in the understanding of the principle of equality in federal and decentralised states which grant autonomy to regions and, on the other hand, unitary states which provide for homogenous rules applied uniformly throughout the country. Furthermore, there are challenges with regard to the protection of minorities on the federal level and the protection of minorities within minorities in autonomous regions. The equal or unequal representation of regional units in the institutions of the central governments as well as the distribution or non-distribution of resources can constitute a serious difficulty. How is such difficulty dealt with? What experiments have been undertaken with rather unconventional solutions and what new solutions could be suggested with regard to particular problems?

The answers to these questions are not merely of a legal nature, but need to be tackled from a political, economic, social and cultural perspective as well. Such is the ambition of this volume. Its purpose is not so much to cover a maximum of countries with individual case studies, but rather to develop a reflection on concepts and issues that might challenge other federal states, as well as centralised systems. Hence, the following volume addresses a variety of topics with a well-balanced geographic representation of case studies, and brings together authors from varied disciplines, all of them experts in their own field of research, yet all connected through their interest in federalism and decentralisation, ensuring a multifaceted view on the issues at stake. In addressing these questions, this volume tries to provide deep insight into the different case studies and comparative analyses and hopes to pave the path for future studies on the relation between equality, autonomy and diversity.

Looking at the principle of equality in diverse states is an important undertaking for many reasons. All states subscribe to the principle of equality, view equal rights and opportunities for all as a fundamental aspect of justice, and have committed to guaranteeing equal rights and freedoms to all without discrimination. At the same time, all states deal with diversity and most have adopted special regimes or autonomy arrangements for some regions or groups, such as islands, unpopulated territories, capitals, metropolitan areas, national minorities or indigenous groups. This is true for federations but equally so for most unitary states. Although the concept of 'one language, one culture, one people, one nation' still survives in some states, diversity is increasing overall. If it is not ethnic and cultural diversity which forcefully comes to the fore, it is geographic, social, economic or political diversity or, most often,

a combination of these elements. In fact, only very few countries still have – or hope for – an omnipotent centre making decisions that apply equally to everyone in the entire country. Even emblematic centralised states deal with diversity: France by regionalising and accommodating overseas territories, Finland by granting autonomy to the Sami people and accepting a special regime for the Aland Islands, or China by tolerating a special status for Hong Kong and Macau and special rules for ethnic minorities.

Vertical separation of powers has been the global trend for some time. Federalism, decentralisation and other autonomy arrangements usually come with the expectation of solving problems encountered between majority and minority groups and helping to combine democratic majority rule with the existence of minority groups. Federal systems are also perceived as defusing tensions, bringing the state closer to the people, improving service delivery and making the state more democratic and accountable. When faced with separatism, sharing power is usually the only way to sooth tension and avoid confrontation, outbreaks of violence or frozen conflicts. In times of internal conflicts opposing regions or communities, sharing power is usually the only possible road to peace.

However, since the relationship between power-sharing and equality is unclear, the fear of sacrificing equality in favour of autonomy and the anxiety this produces among the majority in terms of losing its grip over its minorities (and its resources), often prevents a peaceful balance between majorities and minorities and the different regions and communities of a country. In addition, defenders of human rights often articulate their criticism towards federal and decentralised states around the following arguments: How can the principle of equality be reconciled with that of autonomy, when the latter accommodates regions and communities by providing them with privileges others do not have? And how can equality prevail in a country in which different regions or communities apply different rules to the citizens of the same state? Is it acceptable that citizens of the same country enjoy different rights and carry different burdens? Can a system be fair when citizens of the same state do not all have access to the same public services and contribute equally to their costs? Critical questions are also raised in the field of democracy. Does implementing federalism and decentralisation necessarily mean that the democratic principle of one person one vote is hampered by balancing voting rights or by reserving seats for specific groups and not for others?

This book tackles these questions and explores the similarities and differences that might exist between the concepts and practices of federal systems and the principle of equality and its implementation. It understands federalism very broadly. For the purpose of this book, federal systems include

established and new federations, regional and decentralised states, and other states providing specific regions or communities with extra rights, privileges or obligations. But the diversity of diverse states should not lead us to forget that the notion of equality is even more disconcerting. In fact, equality can be viewed as being either individual or collective, *de jure* or *de facto*, formal or substantive. It can thus refer to the equality of regions and communities within the same country or to the individuals constituting them. It can focus on the obligation to treat everyone equally by law or on the duty to equalise *de facto* differences and promote equality of chances. When the duty to guarantee equality is not looked at as a static but rather as a dynamic state task, it can also be seen as a mechanism to overcome vulnerabilities or to deal with wrongs of the past, including inequalities.

Some federal states guarantee equal rights and equal responsibilities to all subnational units and ensure proportionate representation of all groups in parliament. Such *de jure* symmetrical relationships may or may not be best to implement the principle of equality. After all, subnational units usually differ greatly in terms of geographical size, population, economic and social development, resources, ethnic composition, as well as culture and history. They may be the dominant unit or the formerly or currently marginalised, neglected or disenfranchised part of the country. Formal equality can thus lead to unequal representation of citizens and variations in power and influence of the units. In other states, the institutional setup provides for differentiation between regional units and asymmetric relationships, e.g. for unequal (but equalising) representation at the centre, for special rights and privileges in favour of one or more regions or groups or other forms of imposed or negotiated compromises on the division of power. All these intricacies contribute to the fact that analysing the autonomy-equality relation is not an easy task, but a highly rewarding one.

Diverse states guaranteeing autonomy must also respond to questions related to the ownership and management of natural resources – which are typically very unequally distributed amongst the units – and design a system of fiscal federalism. Most have developed financial schemes to balance economic, social and other disparities between regions and communities. While some of these fiscal arrangements focus on the equality of the regional units and on the balance of their rights and responsibilities, others are designed to guarantee equal rights and opportunities to all citizens living in different regions. Asymmetric arrangements, which nowadays have become common in federal systems, are designed to recognise and accommodate different kinds of diversity and power relationships in order to react to separatist claims, their needs, priorities and bargaining powers and in an overall attempt to promote

internal cohesion and stability. However, such unequal relationships among regional units raise a number of questions. How can special arrangements that privilege some regional units or groups over the others be justified? Does the principle of equality require that extra-rights are compensated by extra-duties? How and to what extent is it acceptable that the use of asymmetric powers leads to inequality between citizens of different regions in terms of representation, access to power, veto rights, human rights, and access to services? These institutional questions are at the core of the discussion this book attempts to articulate.

Furthermore, equality in states characterised by diversity can be examined from an individual perspective. While constitutions and international human rights conventions guarantee all persons a right to equality and non-discrimination, diverse states often simultaneously provide for specific rights accommodating minorities or other groups. The constitutional or legal guarantee of territorial self-rule in fields such as language, culture policies, education, health, social services and infrastructure, opens a space for regional variations of policies, laws and services, potentially creating tensions with the principle of equality. Both federal and decentralised states have opted for different ways of reconciling the guarantee of equal rights and opportunities to all citizens with the collective rights to autonomy. For some, autonomy is limited by the principle of equality. According to this approach, all citizens, independent of their residence and group belonging, enjoy the guarantee of equality before the law and equal access to public services. In such a system, the autonomy of regional units or groups in the field of legislation or service delivery is largely reduced and there is either no fiscal federalism or full fiscal equalisation. The autonomy of subnational actors is then reduced to the implementation of centrally decided and financed strategies and targets. Even in such a centralised system, service delivery is not necessarily the same in all regions. As with unitary states, highly centralised federal systems often fail to deliver on their promise of ensuring equal citizenship and providing equal access to essential services.

In order to improve governance and better respect the autonomy of subnational units, some states are thus willing to accept a certain degree of *de jure* and *de facto* inequality between citizens of different regional units or even within a unit. Such political systems only provide for national minimal standards and allow regional units or groups to adopt their own legislative regimes and to offer special services. Despite their effects on equality, such systems might be acceptable in a country if all individuals enjoy minimum standards and all units have a fair chance to improve on these. It is true that this kind of decentralised federal system can threaten the cohesion and unity of the

state when some regions or communities do not function optimally, fall below minimum standards, or disadvantage certain groups or minorities within the minority. In these situations, however, the threats do not come from the federal system as such. It is rather the failure of regional powers to perform their tasks and to respect the principle of non-discrimination as well as the failure of central powers to ensure the respect of the minimum standards and to guarantee minority rights, which are at the source of inequality. Re-decentralising is rarely an effective response to such governance failures; empowering regions and communities and establishing and using supportive and supervisory mechanisms seem to be more promising reactions.

In all diverse states, balancing equality and autonomy is a controversial, challenging and continuous task. On the one hand, a comprehensive implementation of equal rights and opportunities throughout the country cannot easily be reconciled with the guarantee of meaningful autonomy. If the principle of equality is fully applied, regional units tend to be reduced to the status of implementation agencies. The national guarantee of equal services in all regions also limits the incentives of regional governments to function efficiently and to mobilise resources in order to better respond to the specific regional needs and to offer better services. On the other hand, the use of autonomy rights can be considered a risk to equality. It can lead to unfair treatment of minorities within minorities, of women or other groups; the very idea of some citizens of the same country enjoying more rights and better services than others can be seen as an unbearable violation of the principle of equality and thus as a threat to the unity and stability of the country.

Part 1 of the book, *Conceptual Determination*, aims at determining the concept of the principle of equality in diverse states. The three chapters elaborate on how equality and autonomy can be conceptualised and aim at uncovering avenues for the reconciliation of the two principles.

In chapter 1, Anna Gamper starts by acknowledging the fact that federalism and equality are often described as principles with opposed purposes. In fact, while the first aims at ensuring diversity management, the second is invoked to establish homogeneity. However, the author demonstrates that both principles share a common narrative, the idea of s*uum cuique tribuere* – to give each their own. This narrative is essential for understanding the ways in which federalism legitimises, depending on circumstances, needs, and priorities, the equal or unequal treatment of regions or person.

In chapter 2, Maja Sahadžić uses indicators of constitutional asymmetry in order to offer a comprehensive evaluation of the concepts of constitutional asymmetry and equality from a legal perspective. Her chapter also addresses the way constitutional asymmetry has an impact on equality and therefore on

legitimacy and stability in multinational systems with federal arrangements. Symmetrisation not being a suitable solution for heterogeneous states, the author takes a closer look at the question of how far asymmetry can go before is destabilises or delegitimises a multi-tiered system.

In chapter 3, Eva Maria Belser investigates the balance between autonomy and its centrifugal impetus, on the one hand, and the centripetal aspirations of human rights, on the other. By referring to the case of Switzerland, the author illustrates the frictions and synergies between autonomy and human rights standards, and attempts to sketch a conceptual framework for multilevel human rights protection and promotion.

Part 2 of the book deals with *Institutional Equality*. A great variety of models and situations can be distinguished in this field. In some states, all regional units enjoy equal rights and assume equal responsibilities but these *de jure* symmetries can easily result in *de facto* asymmetries – and vice versa. This part of the book discusses the way in which institutional equality can or ought to be achieved or the way in which institutional inequality can or ought to be justified.

In chapter 4, Erika Arban explores the way solidarity is construed as an aspirational principle fostering equality, particularly in its relationship with regionalism, through the interpretative lens offered by the Italian constitutional court. The author aims at showing how the principle of solidarity plays a crucial role in the Italian legal and constitutional architecture.

In chapter 5, Andrea Filippetti presents a comparative analysis based on 42 European countries and their 167 subsequent regions and analyses the relationship between diversity, access to local public services and regional autonomy. While he starts by showing that citizens are less satisfied with public services in regions characterised by higher diversity, he then examines whether regional autonomy can mediate this problem or not.

In chapter 6, Jayampathy Wickramaratne addresses Sri Lanka's current constitutional reform process and its historical evolution characterised by 29 years of limited devolution with successive governments taking back devolved powers. He highlights the challenge of this process, which is to forge a settlement that guarantees equality as well as genuine autonomy and that would ensure the cohesion of the country.

While Parts 1 and 2 predominantly focus on the institutional aspects of equality, the other chapters dealing with specific aspects of equality often come back to institutional issues. In fact, federalism and other power-sharing arrangements cannot be fully understood by separately analysing their legal, political, economic, cultural or social dimensions. As a consequence, the issues of implementing the principle of equality in federal states cannot easily be

divided into 'institutional', 'economic', 'political' and other aspects. To understand one of those dimensions, the other dimensions need to be included and thus further reflections on institutional equality will follow in the next chapters.

Part 3 presents case studies on *Economic Equality* and elaborates on how asymmetry, *de facto* and *de jure*, can lead to inequalities on the economic level. These may arise between both the citizens and the subnational entities. While some of the mechanisms adopted to balance economic, social and other disparities focus on the equality of the regional units, others are designed to guarantee equal rights and opportunities to all citizens living in different regions.

In chapter 7, Nico Steytler recalls that the motives of power-sharing are often grounded in practices and perceptions of racial, ethnic, linguistic and cultural discrimination and marginalisation. As centralised government often serves a narrow partisan group, federalism and decentralisation is seen as the best way forward. The constitutional processes in Solomon Islands, and Trinidad and Tobago, however, illustrate that marginalised groups often claim preferential access to resources hereby creating new risks for equality and development.

In chapter 8, Miguel Angel Asensio analyses the Argentinian case and the process aiming at reaching 'equivalent development'. The author unveils some of the major obstacles this process has encountered in the past, highlights some of the crucial challenges and limits faced by the federal fiscal system and examines options to overcome uneven development.

In chapter 9, Peter Hänni presents the considerable autonomy the Swiss Federal Constitution leaves to the cantons and to the communes with respect to the determination of direct tax rates. The chapter shows the consequences on the financial burdens of taxpayers and discusses the federal mechanisms of equalisation of financial resources and burdens.

In chapter 10, Giulia Maria Napolitano and Gabriella Saputelli refer to the situation in Italy in order to draw attention to the increasing tensions between the central state and regions in the field of social care policy. They examine to what extent these tensions are sourced by the effects of social care policy on the respect and implementation of the principle of equality.

In Part 4, the focus lies on *Political Equality.* As both symmetric as well as asymmetric federal systems can lead to unequal representation of citizens and variations in power and influence of the units at the federal level, the following chapters take a closer look at the premise of 'one person one vote' and address the different ways federal systems try to ensure a balance between equal and fair representation.

In chapter 11, Sérgio Ferrari addresses representation issues in the Brazilian bicameral system and analyses the extent to which equality is effective when

it comes to the political representation of citizens from the different units. Stating that federalism may clash with democracy, the author presents these tensions in relation to Brazil's first chamber.

In chapter 12, Soeren Keil discusses constitutional equality in Bosnia and Herzegovina by analysing a judgement by the European Court of Human Rights challenging ethnic aspects of the constitution. The author demonstrates that the judgement, which is still not implemented, questions one of the key elements ensuring peace in post-war Bosnia and Herzegovina.

In chapter 13, Dejan Vanjek states that Bosnia and Herzegovina, constituting a hybrid federal model with a multileveled-asymmetrical structure, cannot be analysed based on classical federal theory. He claims that in countries where groups are explicit actors of the federal order, unconventional mechanisms are required to achieve a balance of autonomy and co-decision making across the political system and institutional structure.

In chapter 14, Yonatan Tesfaye Fessha addresses the empowerment of ethnic communities in the Federal Democratic Republic of Ethiopia and discusses the status and treatment of individuals belonging to different peoples, nations and nationalities. He argues that, despite the constitutional commitment to uphold both individual and collective rights, the constitutional practice gives more weight to collective rights and frustrates claims based on the individual right to equal treatment.

The concluding chapter recapitulates the key findings of the book and clarifies the tensions which might exist between autonomy and diversity, on the one hand, and unity and equality on the other. It summarises the many ways in which the two sides of the justice coin can be reconciled and opens avenues for further research.

PART 1

Conceptual Determination

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CHAPTER 1

Suum Cuique Tribuere – A Common Narrative of Federalism and Equality?

Anna Gamper

1 *Suum Cuique Tribuere* – from Ulpian to Kelsen and Beyond[1]

Suum cuique tribuere – to give each his own, ascribed to Ulpian in Justinian's Digest[2] – is one of the three components of law and justice to which the relevant chapter '*de iustitia et iure*' is dedicated. According to the programmatic beginning, justice is the constant and perpetual will of *ius suum cuique tribuendi*.[3] The legal precepts are as follows: to live honestly, to injure no one and to give each his own.[4]

The enigma of this ancient formula has enthralled legions of legal scholars over centuries. However, the idea of *suum cuique tribuere* has an even older origin: it can definitely be traced back to Plato's[5] and Aristotle's[6] discourses on equality, and, according to some, to the Seven Sages,[7] Hesiod[8] and even to Babylonian law.[9] Notwithstanding its exact origins, there is no doubt that the principle it expresses has been recognised as an essential component of law and justice since ages.

In spite of how inspiring the principle has been, not all legal scholars have appreciated it. Within the domain of public legal theory, Hans Kelsen sharply criticised it, calling it a 'completely empty' and 'totally worthless' phrase.[10]

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1 I am grateful to MMag. Dr. Mathias Eller for his help in editing the footnotes.

2 Dig. 1.1.10.1.

3 Dig. 1.1.10pr.

4 Dig. 1.1.10.1: '*Iuris praecepta sunt haec: honeste vivere, alterum non laedere, suum cuique tribuere.*'

5 See the nearly identical sentence ('to have and do one's own would be recognized as justice') in Plato, *Politeia,* 433e. Two different equalities are identified by Plato, *Nomoi,* 757b.

6 Aristotle, *Politika,* 1302; Aristotle, *Ethika Nikomacheia,* 1130–1131.

7 Hans Kelsen, *Was ist Gerechtigkeit?* (Vienna: Deuticke, 1953), 23.

8 Wolfgang Waldstein, "Zu Ulpians Definition der Gerechtigkeit," in *FS Werner Flume*, eds. Horst H. Jakobs et al. (Köln: Verlag Dr. Otto Schmidt KG, 1978), 218.

9 Waldstein, "Definition," 218.

10 Kelsen, *Gerechtigkeit*, 23–24; Hans Kelsen, *Die Illusion der Gerechtigkeit* (Vienna: Manz Verlag, 1985), 221. Critically on Kelsen's assessment of *suum cuique*, Wolfgang Waldstein, "Ist das 'Suum cuique' eine Leerformel?," in *FS Alfred Verdross*, eds. Herbert Miehsler et al.

From the perspective of legal positivism, Kelsen was right in arguing that there was no absolute or general notion of *suum*, so that the question of what the *suum* is depends on each concrete legal system.[11] He was, however, incorrect in neglecting the *cuique*: the substance of the phrase does not exhaust itself in the *suum*, but it also postulates that each and every one, and not just some, should be treated according to this rule. Clearly, it depends on the respective *suum* – and the respective legal system that decides on the *suum* – whether this amounts to equal or unequal treatment, but at least the rule as such is applicable to everyone and not only to some. Moreover, the rule is also based on an individualist approach. It presumes differences between individuals, since there would otherwise be no need to speak of *suum*, and thus suggests proportionality. Thus, even though the rule does not define the exact meaning of *suum*, it nevertheless provides two basic hypotheses that are neither empty nor worthless: (1) If a legal system defines the *suum* by certain criteria, all those that meet these criteria must be treated equally among themselves. (2) There is a necessity for law to consider individual positions and to reflect these through different provisions: the *suum* – which is neither everything nor anything – suggests some proportionality between the individual and their legal treatment. Putting *suum cuique tribuere* into the context of the two preceding statements, namely *honeste vivere* and *neminem laedere*, there are, moreover, two substantive indicators of justice that also suggest a truth-oriented, rational and proportionate approach.[12]

Little attention seems to have been paid to the subtle distinction between *suum cuique tribuere* and the preceding preamble according to which *iustitia est constans et perpetua voluntas ius suum cuique tribuendi*. It is thus not only 'to give each his own', but also 'to give each his law'. Putting both sentences in context, justice is a constant and perpetual will to give each their law, and the law itself needs to give each their own. This does not imply that law will never change – according to factual changes, it would possibly need to – but that there can be no justice without a continuous consideration of an individual's position in law.

(Berlin: Duncker & Humblot, 1980), 285–320 (with further references); Anna Gamper, "'Arithmetische' und 'geometrische' Gleichheit im Bundesstaat," in *Vom Verfassungsstaat am Scheideweg – FS Peter Pernthaler*, eds. Karl Weber and Norbert Wimmer (Vienna, New York: Springer, 2005), 145–146.

11 Kelsen, *Gerechtigkeit*, 23–24; Hans Kelsen, *Reine Rechtslehre* (Vienna: Verlag Österreich, 2000), 366–367.

12 A modern transplant of the *neminem laedere*-principle into the federal context is the principle of mutual consideration; see, on its relation to the equality principle, Peter Bußjäger, "Bundesstaat und Gleichheitsgrundsatz," *Juristische Blätter* 129, no. 5 (2007): 296–297.

This chapter will examine the *suum cuique*-principle in the context of federalism. At first glance, this seems to be a rather unfamiliar environment for the application of this rule. Surely, Ulpian did not elaborate his rule with federalism in view. A close reading, however, reveals that the rule is very closely related to what Plato and Aristotle called 'arithmetic' and 'geometric' justice.[13] Later, both terms were used to describe what is more commonly referred to as symmetric or asymmetric, formal or substantive, absolute or relative equality.[14] This chapter seeks to argue that federalism and equality cannot be simply conceived as opposing principles – the one seeking to ensure diversity management, the other to establish homogeneity.[15] We can neither regard absolute equality as the one and only type of equality, nor can we contend that relative equality means everything or anything. Relative equality therefore requires the yardstick of proportionality and reasonable justification. Whatever the *suum* is, and even if it differs from the *suum* of others, it must be proportional and reasonably justified by facts. If we apply these requirements in the context of federal states, i.e. use the *suum cuique*-principle as a test, asymmetries would need to be justified by factual differences, such as, *inter alia*, territorial size or number of inhabitants. But do these factors offer a sufficient justification in all cases? And how can federalism legitimise the unequal treatment of persons living in different regions? Is there a 'true' federalism, and is this the symmetric federalism firstly conceived by the Federalist Papers?

2 Federalism and Formal Equality

Formal equality means absolute equality: equality that entails a strictly identical legal treatment. It is symmetric and, in terms of the ancient world, arithmetic, since it neither considers nor establishes differences.[16] Liberal constitutional theory regards formal equality as one side of a Janus-faced principle that, on the other side, allows for different legal treatment if this is proportional and reasonably justified by factual differences.[17]

13 Plato, *Gorgias,* 508a; Aristotle, *Politika,* 1302; Aristotle, *Ethika Nikomacheia,* 1131. See also Kelsen, *Illusion*, 220–221.

14 Peter Pernthaler, *Der differenzierte Bundesstaat* (Vienna: Braumüller, 1992), 4; Gamper, "Gleichheit," 144, both with further references.

15 Peter Bußjäger, *Homogenität und Differenz* (Vienna: Braumüller, 2006), 48.

16 Gamper, "Gleichheit," 146.

17 Susanne Baer, "Equality," in *The Oxford Handbook of Comparative Constitutional Law*, eds. Michel Rosenfeld and András Sajo (Oxford: Oxford University Press, 2012), 986 and 994–996; Brun-Otto Bryde and Michael A. Stein, "General Provisions Dealing with Equality," in

Federalism is a principle that combines diversity and unity.[18] In constitutional terms, it provides for at least two tiers that are vested with legislative and executive powers, including constitution-making power, for representation of the component units at federal level, for fiscal autonomy and/or equalisation as well as instruments and measures that ensure cooperation and coordination between the tiers.[19] At first glance, absolute equality is indeed not compatible with federalism, since it would be constitutionally impossible to treat the federal level identically with the component units. The allocation of powers necessarily implies differences between the powers of the federation and those of the component units. In this sense, federalism and equality are indeed opposing principles: firstly, it is inherent in federalism to distinguish between the federal level and the component units. Secondly, the very fact that there is more than one component unit entails that the powers allocated at component level may be used differently or only by some, while others abstain.[20] The legal diversity stemming from these different legal regimes implies that, within certain fields, federal citizens may be treated differently from region to region. As the Austrian Constitutional Court put it: 'It lies in the nature of a federal state to regulate similar state tasks differently within the framework of those powers that are constitutionally attributed to the Länder.'[21] Accordingly, 'the principle of federalism excludes that the equality principle is applied to the relation between the laws enacted by different legislatures'.[22] This is, however, only applicable with respect to the interrelationship between the federal and the component tiers or the component tiers among themselves. The equality principle remains, of course, applicable to the law enacted at each level,[23] and individuals may enjoy equality rights accordingly.

Absolute equality is, however, not incompatible with federalism inasmuch as it demands structural parity between the federal and the component levels

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Routledge Handbook of Constitutional Law, eds. Mark Tushnet, Thomas Fleiner and Cheryl Saunders (London, New York: Routledge, 2013), 288.

18 Ronald L. Watts, *Comparing Federal Systems* (Montreal, Kingston: McGill-Queen's University Press, 2008), 8; Gamper, "Gleichheit," 143.

19 Watts, *Systems*, 9; Anna Gamper, *Staat und Verfassung* (Vienna: Facultas, 2014), 86–108; with more detail, John Kincaid, "Comparative Observations," in *A Global Dialogue on Federalism, Vol. 1: Constitutional Origins, Structure, and Change in Federal Countries*, eds. John Kincaid and Alan Tarr (Montreal: McGill-Queen's University Press, 2005), 419.

20 Gamper, "Gleichheit," 151.

21 Cf., e.g., VfSlg 19.964/2015, 14.783/1997, 14.644/1996 and 12.949/1991.

22 Cf., e.g., VfSlg 19.964/2015, 19.202/2010, 18.338/2008, 16.843/2003, 14.846/1997 and 13.235/1992. See also Bußjäger, "Bundesstaat," 292–294.

23 See, with more detail, Bußjäger, "Bundesstaat," 292–293.

and among the latter,[24] even though this parity may be limited (e.g., supremacy of federal law or, at least, of the federal constitution over component law).

Moreover, absolute equality is compatible with federalism inasmuch as the position of the component units vis-à-vis other units are concerned. While the component units will usually *exercise* their powers differently, federalism does not necessarily require that their respective status or powers as such need to be different. Absolute equality between the component units seems to be suggested by the US American prototype of a federal system: the same powers for every component unit and their equal representation in the Senate. Over the last decades, however, scholars of federalism have increasingly debated whether symmetry between states was essential to federalism.[25] While they have not, as yet, challenged symmetrical federalism as such, they nevertheless challenge the idea that symmetrical federalism is the only 'true' federalism. Instead, they argue that a majority of modern federal systems (that could be classified as such in accordance with certain substantive criteria) are, to some extent, asymmetric and that the US model as a historical prototype – of both coming-together and symmetrical federalism – should not be absolutised.[26] In Orwellian terms, there remains the fear that 'all states are equal, but some states are more equal than others'. Perhaps this fear is also a reason why asymmetric federalism has traditionally been more in need of justification than symmetric federalism and why asymmetry-friendly theory focuses

24 Bußjäger, "Bundesstaat," 290; Peter Pernthaler, "Differenzierter Föderalismus," in *Auf dem Weg zu asymmetrischem Föderalismus?*, eds. Francesco Palermo et al. (Bozen: Nomos, 2007), 24.

25 See, e.g., Charles D. Tarlton, "Symmetry and Asymmetry as Elements of Federalism: A Theoretical Speculation," *The Journal of Politics* 27, no. 4 (1965): 861–874; Francesco Palermo, Carolin Zwilling and Karl Kössler, eds. *Asymmetries in Constitutional Law* (Bozen: EURAC, 2009); Francesco Palermo et al., eds., *Auf dem Weg zu asymmetrischem Föderalismus?* (Bozen: Nomos, 2007); Robert Agranoff, ed., *Accommodating Diversity: Asymmetry in Federal States* (Baden-Baden: Nomos, 1999); Watts, *Systems,* 125–130; Michael Burgess, *Comparative Federalism: Theory and Practice* (London: Routledge, 2006), 209–225; Lidija R. Basta Fleiner and Jean-François Gaudreault-DesBiens, "Federalism and Autonomy," in *Routledge Handbook of Constitutional Law*, eds. Mark Tushnet, Thomas Fleiner and Cheryl Saunders (London, New York: Routledge, 2013), 151–152.

26 Cf. e.g. Francesco Palermo, "Asymmetries in Constitutional Law – An Introduction," in *Asymmetries in Constitutional Law*, eds. Francesco Palermo, Carolin Zwilling and Karl Kössler (Bozen: EURAC, 2009), 12–13; Francesco Palermo, "Asymmetrie als Ordnungsmodell des modernen Föderalismus, Eine vergleichende Analyse," in *Auf dem Weg zu asymmetrischem Föderalismus?*, eds. Francesco Palermo et al. (Bozen: Nomos, 2007), 10–11; Gamper, "Gleichheit," 157–158.

on legitimising asymmetric federalism rather than symmetric federalism.[27] Accordingly, *de iure* asymmetries tend to be explained by the existence of *de facto* asymmetries, while symmetries are commonly accepted despite *de facto* asymmetries, even though the latter are a reality in all federal systems to a greater or lesser extent.[28]

3 Federalism and Substantive Equality

3.1 *Which Kind of Asymmetry?*

Substantive equality reflects factual inequality: it legitimises or even requires legal differentiation (including positive discrimination), but this needs to be based on a proportional and reasonable rationale.[29]

In various contexts of federalism, substantive equality comes prominently into play. The first context is the difference between the federal tier on the one side and the component units on the other.[30] For obvious reasons, federal constitutions do not treat these levels equally. Constitutional differences between the federal and component levels emerge from the allocation of powers, but they may also be found with regard to institutions, democracy or republicanism.[31] The crucial argument is that each level should be given 'its own', corresponding to factual circumstances. In fact, the principle of subsidiarity, according to which a lower tier should be responsible for all tasks that are in the particular interest of this tier and can be efficiently managed by it, is but the *suum cuique*-test[32] transplanted into a multi-level context.[33] It is precisely because there are factual differences between tiers, because their requirements, conditions and means are different, that it is necessary to take

27 Palermo rightly criticises the longstanding view of symmetrical federalism as the 'rule' and asymmetrical federalism as the 'exception'; Palermo, "Asymmetrie als Ordnungsmodell," 10.

28 Palermo, "Asymmetries in Constitutional Law," 11; Palermo, "Asymmetrie als Ordnungsmodell," 10.

29 Gamper, "Gleichheit," 146–166.

30 Gamper, "Gleichheit," 143.

31 Federal constitutions may allow for different parliamentary and governmental systems, different forms of representative or direct democracy or even provide crowned heads of state vis-à-vis republican counterparts at regional level (see e.g. Belgium, Malaysia, Canada, Australia; *vice versa* the United Arab Emirates).

32 Especially, as suggested by Ulpian's variant '*ius suum cuique tribuendi*' (Dig. 1.1.10pr.), to give each his or her own *law*, which could be understood as an allocation of law-making powers at each level.

33 See also Bußjäger, *Homogenität*, 48.

them into account and to give each level its due. Accordingly, there is not just one level that is best suited to manage everything, but a need for the law to recognise and adequately treat different levels. Both subsidiarity and the *suum cuique*-test do not demand differentiation merely for ideological reasons, but rather consider the characteristics and specificities of each level; they presuppose reasonableness and proportionality.

The second context concerns asymmetries in the relationship between the component units themselves. These asymmetries may be, as Ronald L. Watts called them, 'political asymmetries'[34] or *de facto* asymmetries, but they may also be asymmetries entrenched by law (first and foremost, the federal constitution, hence Watts' category of 'constitutional asymmetries'[35]).[36] Three main 'constitutional asymmetries' shall be examined here: different systems of power allocation, asymmetric representation in federal second chambers, and financial equalisation. These are sometimes accompanied by other asymmetries, e.g. whether the component units are classified under different categories with varying designations and position[37] or whether the federal constitution provides for differences in their institutional architecture.[38]

3.2 *Asymmetries in the Allocation of Powers*

Classical federal constitutions usually allocate powers coherently: one part of the constitution is dedicated to the entrenchment of the allocation of powers. Incoherent or 'piecemeal' allocation occurs only in exceptional cases, e.g. if

34 Watts, *Systems*, 125–127; Ronald L. Watts, "Federalism, Federal Political Systems, and Federations," *Annual Review of Political Science* 1 (1998): 123. See also the overview by Peter Bußjäger, *Föderale Systeme* (Vienna: Jan Sramek, 2016), 63–73.

35 Watts, *Systems*, 127–130; Watts, "Federalism," 123. Sometimes, these matters are regulated not (only) by federal constitutional law (see e.g. with examples Anna Gamper, "Föderale Kompetenzverteilung in Europa: Vergleich und Analyse aus verfassungsrechtlicher Sicht," in *Föderale Kompetenzverteilung in Europa*, eds. Anna Gamper et al. (Baden-Baden: Nomos, 2016), 764–765), so that *de iure* asymmetry is the more comprehensive term. The importance of differentiating in terms of law – and not just facts – is already suggested by Ulpian's variant '*ius suum cuique tribuendi*' (Dig. 1.1.10pr.).

36 On the terminology, see also Louise Tillin, "United Diversity? Asymmetry in Indian Federalism," *Publius* 37, no. 1 (2006): 48–52; Wilfried Swenden, "Asymmetric Federalism and Coalition-Making in Belgium," *Publius* 32, no. 3 (2002): 67–68; Klaus von Beyme, "Asymmetric Federalism between Globalization and Regionalization," *Journal of European Public Policy* 12, no. 3 (2005): 437–443; Michael Burgess, "The Paradox of Diversity – Asymmetrical Federalism in Comparative Perspective," in *Asymmetries in Constitutional Law*, eds. Francesco Palermo, Carolin Zwilling and Karl Kössler (Bozen: EURAC, 2009), 24–25.

37 Watts, *Systems*, 74–76 and 127.

38 See, with examples, Watts, *Systems*, 129–130.

specific powers, such as constituent constitutional autonomy, are allocated. A much more excessive use of 'piecemeal' allocation has been made in the Austrian context: even though the main body of the distribution scheme is accommodated in a distinct part of the Federal Constitutional Act, other parts of this Act include many more of these rules and, moreover, there are sundry other allocation provisions outside this Act that also have the rank of federal constitutional law.[39] But although this allocation is fragmented, it is not asymmetric in the sense that the component *Länder* would receive different kinds of powers. Still, fragmented allocations of powers often indicate asymmetries.[40] This is particularly so in the case of asymmetric quasi-federal states[41] such as Italy and Spain: in the Italian case, the competences of the five special regions are entrenched in individual constitutional laws, while the fifteen ordinary regions receive their powers from Art. 117 and 118 of the Italian Constitution. In contrast, the Spanish Constitution itself entrenches only a rudimentary allocation of powers that further delegates the task to the autonomy statutes, which are organic laws, and moreover allows for an individual and progressive increase of powers. A similar situation applies in the UK, which is, if not a quasi-federal system, a very much decentralised state: the Scotland Act 1998, Government of Wales Act 2006 and Northern Ireland Act 1998 contain very different allocations of powers.[42] In full-fledged federal systems, asymmetries between the component units are less frequent,[43] but Belgium, in which different powers are given to the linguistic communities on the one hand, and to the regions on the other, constitutes an important exception as well as Canada with regard to Quebec or India with regard to Jammu and Kashmir.[44] An even more complex example is Russia[45] with six different types of component units

39 Peter Bußjäger, "Die bundesstaatliche Kompetenzverteilung in Österreich," in *Föderale Kompetenzverteilung in Europa*, eds. Anna Gamper et al. (Baden-Baden: Nomos, 2016), 527–567.

40 Gamper, "Kompetenzverteilung," 766.

41 See Michael Keating, "Asymmetrical Government: Multinational States in an Integrating Europe," *Publius* 29, no. 1 (1999): 77–82.

42 See e.g. Peter Leyland, "The Multifaceted Constitutional Dynamics of U.K. Devolution," *International Journal of Constitutional Law* 9, no. 1 (2011): 251–273.

43 Ronald L. Watts, "Comparative Conclusions," in *A Global Dialogue on Federalism, Vol. 2: Distribution of Powers and Responsibilities in Federal Countries*, eds. Akhtar Majeed, Ronald L. Watts and Douglas M. Brown (Montreal: McGill-Queen's University Press, 2006), 336; Gamper, "Kompetenzverteilung," 766.

44 Art. 370 of the Indian Constitution; see, however, the more cautious approach by Tillin, "Diversity," 52–55.

45 See Giovanni Poggeschi, "Federalism in Russia: Ethnic and Asymmetrical," in *Asymmetries in Constitutional Law*, eds. Francesco Palermo, Carolin Zwilling and Karl Kössler (Bozen: EURAC, 2009), 97–116.

or Bosnia and Herzegovina whose entities have different substructures. The most striking asymmetries are to be found in centralised unitary states in which just one particular region – often islands – enjoys a quasi-federal status and is allocated powers accordingly.[46]

There are more subtle ways, however, to create asymmetric allocation regimes than just different laws with different lists of enumerated subject matters. Many federal constitutions allow for asymmetries in tighter compartments, such as single subject-matters, with ensuing discrepancies between the powers of the component units vis-à-vis the federal level:[47] one example is the possibility for federal laws to be enacted vis-à-vis certain component units, while others remain free to enact their own rules,[48] or for component units to assume powers in accordance with flexible opt in- and opt out-rules.[49] This is usually done because of certain needs and expediencies that arise in one unit, but not in another. Such a 'particular legislation on need' could also, according to some federal constitutions, be used by individual component units when they wish to deviate from uniform federal laws. In these cases, the federal constitution does not explicitly or directly privilege some component units against others, but asymmetric options may occur whenever and wherever 'needs' arise.[50]

Full-fledged, coming-together federal states tend to allocate powers symmetrically,[51] whereas the opposite seems to be true for holding-together and quasi-federal states.[52] Most of these states were originally designed as unitary states. Their transformation into federal or quasi-federal systems was based on a 'piecemeal' process in which some regions – with strong historical, political, cultural, geographic or ethnic identities – pioneered. Even where other regions have profited from decentralisation at later stages, one can still detect individual or even privileged constitutional positions of pioneer regions. In

46 See also Watts, "Federalism," 123; Gamper, "Kompetenzverteilung," 767.

47 Watts, *Systems*, 127–128.

48 Cf. e.g. Art. 252 of the Indian Constitution or Sec 95 of the Canadian Constitution Act 1867. A similar situation arises when a federal law regulates the same matter, but with different rules applicable in different regions (see e.g. recently the Austrian Constitutional Court's decision VfSlg 20.179/2017, in which the Court held a federal law that had enacted different rules for the respective Austrian *Länder* to be reasonably justified).

49 Watts, *Systems*, 128–129; Peter Pernthaler, "Asymmetrischer Föderalismus als systemübergreifender Ordnungsrahmen der Regionalautonomie," in *Die Verfassung der Südtiroler Autonomie*, eds. Joseph Marko et al. (Bozen: Nomos, 2005), 107; Palermo, "Asymmetrie als Ordnungsmodell," 18–19.

50 Gamper, "Gleichheit," 151–152.

51 Watts, *Systems*, 127; Von Beyme, "Federalism," 433.

52 Pernthaler, "Asymmetrischer Föderalismus," 98.

these cases, the allocations of powers normally feature two characteristics: on the one hand, some component units are vested with more powers than others which constitutes a quantitative difference. On the other hand, many regions enjoy specific powers that are particular to their own history and identity: this is the case, e.g., when the Scotland Act 1998 allocates Scots criminal and Scots private law to Scotland; when the Catalonian Statute or the Statute of Trentino-Alto Adige/South Tyrol establishes linguistic rights of the respective region or provinces, or the Belgian Constitution for the Belgian linguistic communities as 'personalised' component entities of the federal system, or when historical 'foral' law is recognised with regard to Navarra and the Basque country.[53]

Surely, not each and every competence that can be found in these special allocation systems is a perfect mirror of rationality and genuine distinctiveness. But quantitative and qualitative particularities are still clearly recognisable, and at least roughly pass the *suum cuique*-test. There still remains, however, a considerable margin of appreciation of how much and how far factual differences between component units should be recognised and implemented through differing allocation regimes. When allocation systems are static, constitutional amendments may, from time to time, be necessary in order to adapt them to new 'factual' symmetries or asymmetries.[54] However, it is also remarkable that the particular situation in Italy's five special regions would have been maintained even by the failed constitutional reform draft of 2016.[55] The Scotland Act 2016, by which further powers were devolved to Scotland, was a direct answer to the Scottish independence movement, and even if the Act could not anticipate new demands after the Brexit referendum, it nonetheless responded to Scotland's strong identity and the very particular history of its union with England.

3.3 *Asymmetries in Federal Second Chambers*

The second context examined here has traditionally been a focus of discussions on asymmetric federalism. In fact, it is as old as federalism itself, as old as the US Constitution of 1787/88, and it was already intensely discussed in the Federalist Papers: it relates to the federal second chamber, namely the question of whether the component units should be represented equally or unequally

53 See also the examples given by Palermo, "Asymmetrie als Ordnungsmodell," 17.

54 Gamper, "Kompetenzverteilung," 778–780.

55 'Disposizioni per il superamento del bicameralismo paritario, la riduzione del numero dei parlamentari, il contenimento dei costi di funzionamento delle istituzioni, la soppressione del CNEL e la revisione del titolo V della parte II della Costituzione', *Gazzetta Ufficiale Della Repubblica Italiana* 157, no. 88 (April 2016), 1 et seq.

(including weighted voting).[56] According to the US Senate model, the states are represented equally, i.e. irrespective of their size, number of people, wealth or other factual indicators. Federalist No. 62 explains this solution to be 'the result of compromise between the opposite pretensions of the large and the small States', between the 'national' and the 'federal' principle, 'founded on a mixture of the principles of proportional and equal representation'. Considering that the first chamber consists of representatives elected on an asymmetric basis, the component states should be equally represented in the second chamber. The 'equal vote allowed to each State is at once a constitutional recognition of the portion of sovereignty remaining in the individual States, and an instrument for preserving that residuary sovereignty'.[57] On the other hand, it is argued in Federalist No. 22 that the 'right of equal suffrage among the States is another exceptionable part of the Confederation'; this is regarded as an 'impropriety of an equal vote between States of the most unequal dimensions and populousness' so that a minority (of the people) could rule over the majority (of the people), given that a majority of the states 'contain[s] less than a majority of the people'.[58] What is found objectionable in the confederation, is thus accepted in the federation, but only because of the bicameral system which guarantees a balance between symmetric and asymmetric representation. Still, the discussion about symmetric or asymmetric representation confuses different issues: on the one hand, the external dimension, i.e. how the second chamber may interact vis-à-vis the first chamber, and, on the other hand, how the second chamber operates from its internal perspective.

Whether the component units still preserve a 'residuary sovereignty' in this first external dimension is less a matter of equal representation in the second chamber than a question of what powers the second chamber, as a whole, can exercise. If we imagine a weak second chamber whose decisions, even though based on equal representation, could be overturned by the first chamber, this will not be a striking token of a 'residuary sovereignty'. It is certainly true that the symmetric composition of the second chamber preserves the confederal idea[59] of equal representation: the component units thus exercise equal

56 A similar dilemma arises where the component units directly participate in federal legislative processes in accordance with weighted voting or where regions are represented asymmetrically in unicameral parliaments (see, with examples, Palermo, "Asymmetrie als Ordnungsmodell," 17 fn. 17; Gamper, "Gleichheit," 154 fn. 53).

57 James Madison, "Federalist No. 62," *The Federalist Papers*, no. 62 (1788).

58 Alexander Hamilton, "Federalist No. 22," *The Federalist Papers*, no. 22 (1787).

59 Hans Kelsen, *Allgemeine Staatslehre* (Berlin: Julius Springer, 1925), 217. On the equality of sovereign states under international law as an inspiration for coming-together federations

suffrage within the internal decision-making process. However, this does not say anything about whether these decisions will have any particular weight in the parliamentary process as a whole and whether these are a token of a 'residuary sovereignty'.

Secondly, equal representation does not guarantee each component unit a right to enforce its own will upon the others.[60] It would be paradoxical indeed to assume such a right for each and every component unit which would, of course, entail conflicting and irresolvable situations. Even where the unanimity principle prevailed – which is not usual for federal second chambers worldwide – one component unit cannot, not even by boycotting the decision made by others, enforce its own preferred decision. Normally, however, decision-making in federal second chambers relies on simple or qualified majorities. Equal representation would, therefore, not protect individual units from being overruled by the representatives of other units. The only difference is that, under symmetric representation, a majority of the votes cast would always demand a majority of the component units themselves (provided that their representatives were present), whereas, under asymmetric representation, a majority of the votes cast could possibly be reached by a minority of component units (through their representatives). As a corollary, symmetric representation cannot protect individual units (their representatives) from being overruled by the others, as long as decisions are made by whatever kind of majority instead of unanimity. Asymmetric representation, therefore, does not particularly threaten individual component units, but rather constitutes a challenge between competing majorities – majorities of the component units and majorities of their representatives. Accordingly, decisions may turn out to be counter-majoritarian and hegemonic[61] when perceived from either perspective.

Turning to the possible indicators underlying asymmetric representation, we do not only find that a majority of federal constitutions have decided against the US Senate model,[62] but also that they mostly use the number of people – rather than mere territorial size or economic criteria – as a base value.[63] There are exceptions, though, such as the six Swiss half-cantons that

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that emerge from confederations, see also Hans Huber, "Die Gleichheit der Gliedstaaten im Bundesstaat," *Zeitschrift für öffentliches Recht*, no. 18 (1968): 247.

60 Gamper, "Gleichheit," 164.

61 Kelsen, *Staatslehre*, 219.

62 See Gamper, "Gleichheit," 155–156. Absolutely equal representation is a requisite for the composition of the second chambers of Russia, South Africa and Indonesia.

63 Kelsen, *Staatslehre*, 217–218; Watts, *Systems*, 152; Gamper, "Gleichheit," 155–156.

are represented in the federal second chamber with just one representative each; this is not due to their population size, when compared to the other cantons, but to their history as 'separated' cantons.[64] In those cases, where representation is adjusted in accordance with demographic asymmetries, many federal constitutions only provide fixed numbers, irrespective of demographic changes, while others, more dynamically, require adaptations according to the national census; alternatively, they use an arithmetic system as a basis, but allow for geometric deviations of the number of representatives.[65] Moreover, federal constitutions vary as to whether they consider the number of regional inhabitants, of regional citizens, or of regional citizens with the right to vote (regarding the first chamber); they often deviate from their own systems through means of over- or under-proportional representation, by prescribing minimum and/or maximum numbers of delegates or generalise proportions in accordance with fixed classes.[66] Over- or under-proportional representation is used to counterbalance extreme factual asymmetries which has a slightly 'confederalising' effect: regions with a very low number of people that would, under a strictly proportional model, hardly be represented at all are thus guaranteed some minimum representation, whereas a maximum number ensures that regions with the largest number of people are not represented by a comparatively exorbitant number of representatives; this 'positive discrimination' measure may be used to favour smaller units.[67] In several cases, further asymmetries are constituted by the inclusion of members appointed for other reasons than federalism,[68] by the different treatment of different categories of component units[69] or by specific minority protection-oriented representation targeted at positive discrimination;[70] sometimes certain representatives are selected for combined purposes.[71] A two-fold asymmetry could be created in cases with an asymmetric allocation of powers if representatives of component units with stronger powers were not allowed to vote in certain legislative procedures at the federal level: accordingly, where federal laws are to be enacted only for some component units, in areas not falling within their power,

64 Giovanni Biaggini, "Asymmetrien im schweizerischen Bundesstaat?," in *Auf dem Weg zu asymmetrischem Föderalismus?*, eds. Francesco Palermo et al. (Bozen: Nomos, 2007), 58.

65 Gamper, "Gleichheit," 156.

66 See, with examples, Watts, *Systems*, 147–153; Gamper, "Gleichheit," 155–158.

67 Watts, *Systems*, 152–153; Palermo, "Asymmetrie als Ordnungsmodell," 17.

68 See, most recently, Art. 86 para 2 subpara b of the Constitution of Nepal.

69 See e.g. Sec 22 of the Canadian Constitution Act 1867.

70 See, most recently, Art. 86 para 2 subpara a of the Constitution of Nepal.

71 The most recent example is Art. 86 para 2 subpara a of the Constitution of Nepal. See also Palermo, "Asymmetrie als Ordnungsmodell," 17.

whereas stronger component units can enact their own laws in the same field autonomously, the representatives of the latter would abstain from voting.[72]

Although the Federalist's political explanation of the 'compromise' is perfectly plausible in the context of US American federalism, its implications may be overestimated in other contexts. The fact that most federal systems provide for imperfect rather than perfect bicameralism further lessens the significance of the second chamber and its composition. Moreover, asymmetric representation may be smoothed out if majorities need to be built on specific approval by the component units (their delegations) rather than the simple majority of votes cast. Art. 35 para 4 of the Austrian Federal Constitutional Act[73] offers an interesting example here: certain constitutional amendments not only require a majority of the votes cast in the Federal Council, but require a further majority, namely a majority of the representatives of at least four (out of nine) *Länder*. As a consequence, these amendments would not pass unless approved by a 'double majority'. Even if a minority of the *Länder* (due to their large number of people and thus representatives in the Federal Council) command a sufficient majority of the votes cast, they still would not be successful if the majority of representatives of at least six *Länder* voted against. The second 'majority' does not, of course, refer to a majority of *Länder* (four are sufficient), but refers to having a majority in each *Land*'s delegation. However, the provision ensures that a small minority of up to three *Länder* (through their representatives in the Federal Council) will not be able to enforce such a decision, even though they represent a majority of the people and, accordingly, representatives in the Federal Council. This example shows that it depends on the type of majority whether asymmetric representation truly privileges component units with larger numbers of people.[74]

When federal constitutions provide for the asymmetric composition of second chambers, the rationale mainly lies with democratic purposes.[75] Whereas

72 Similarly – with regard to the lack of an English Parliament and to 'only England' laws enacted by the Westminster Parliament – the 'West Lothian Question' has been discussed, although not resolved in the United Kingdom; see Watts, *Systems*, 130; Leyland, "Dynamics," 265–267.

73 See Gamper, "Gleichheit," 158; Anna Gamper, "Artikel 35 B-VG," in *Österreichisches Bundesverfassungsrecht*, eds. Karl Korinek et al. (Vienna: Verlag Österreich, 2017), marginal nos. 49–52.

74 Another interesting example is Art. IV § 3 subparas d-f of the Constitution of Bosnia and Herzegovina, according to which special double majorities of territorial representatives are needed; or special laws in accordance with Art. 4 para 3 of the Belgian Constitution which require special majorities of the representatives of the linguistic groups.

75 Watts, *Systems*, 154–155.

most systems of asymmetric representation are roughly guided by the numerical proportions between the 'component peoples', this is also an attempt to guarantee equal representation of all federal citizens. In fact, there is some structural similarity to the distribution of mandates between electoral districts in first-chamber elections.[76] Must we conclude, therefore, that equal representation in federal second chambers, as in the US Senate, is undemocratic? The authors of the Federalist Papers deliver an ambivalent assessment. They do indeed condemn equal representation in the confederal context, while accepting it for the federal Senate. Their first argument is rather less concerned with equality theory but reason of state, when they frankly admit: 'A government founded on principles more consonant to the wishes of the larger States, is not likely to be obtained from the smaller States [... The] advice of prudence must be to embrace the lesser evil'.[77] But, secondly, they argue that equal representation preserves the residuary sovereignty of the states.[78] To stretch this argument further: does it constitute a reasonable justification to compensate states for the loss of their sovereignty by granting them equal representation in the Senate? Or, rather, does their equal representation mirror the tiny rest of their former sovereignty exactly as the *suum cuique*-test would demand? When states lose their sovereignty because they agree on a federal system, but nevertheless retain some part of it,[79] is their equal representation just a proper and reasonable claim emanating from 'residuary sovereignty'? If the answer is yes, the justification, made from a comparison between different historical perspectives, will be diachronic. In constitutional reality, however, justification for asymmetric representation is mainly synchronic inasmuch as certain circumstances of the present are considered by the federal constitution. If we regard the *suum* as something dynamic, that needs to adapt itself according to circumstances, it will fall into the second category; if the *suum*, however, is contextualised with the past, equal representation might turn out to be the adequate compensation for states that lost their full sovereignty. Similarly, the Swiss half-cantons enjoy only half-representation, since they were not originally units in their own right. Still, the diachronic argument is valid only for original or coming-together federations, and the Federalist Papers knew only those. Holding-together federations that lack a constitutional compact

76 Gamper, "Gleichheit," 155.

77 Madison, "Federalist No. 62."

78 Madison, "Federalist No. 62."

79 Frank Delmartino, "New Dimensions of Asymmetry in (Quasi-) Federal States and in the European Union," in *Asymmetries in Constitutional Law*, eds. Francesco Palermo, Carolin Zwilling and Karl Kössler (Bozen: EURAC, 2009), 37.

between formerly independent units cannot argue that they need to protect the 'residuary sovereignty' of their regions.

As Ronald L. Watts[80] rightly argued, federalism enriches the democratic landscape – when regional institutions are elected or when instruments of regional direct democracy are exercised. This is, however, not a particular feature of federal systems with equal representation in the federal second chamber, but common to all federal systems. Still, the argument can be deployed also for equal representation cases: even though deficits in federal democracy cannot be 'compensated' by component democracy, the latter nevertheless improves the democratic nature of the overall system.

3.4 *Asymmetries in Fiscal Equalisation*

Fiscal equalisation is perhaps the most striking element found in most federal systems in which the equality dilemma between the component units is revisited.[81] Despite the great variety and complexity of equalisation mechanisms, their common idea is to distribute financial resources or revenues between and among the different tiers in order to allow them to perform their tasks.[82] Particular attention is drawn to factual differences between tiers or different units belonging to the same tier, also with a view to balance these differences and adapt the financial situation to factual needs. One way to do this is by allotting financial revenues from one level to the other or, at the same level, from one or more units at that level to the other(s). If this is done in a vertical way, it is mostly the federal government that allots financial revenues that derive from the federal tax yield to the component units.[83] Horizontal equalisation, in contrast, requires a transfer of financial revenues between units of the same level, i.e. between regions or, respectively, between local governments.[84] In a wider sense, fiscal equalisation entails transfers on a more specific and irregular basis; they refer to particular situations of need or respond to tasks that are particularly challenging so that specific resources are required. Whether the number of inhabitants is taken as a proportional key or whether it is used for over- or under-proportional classification or whether other keys are used, varies from system to system.

80 Watts, *Systems*, 155.

81 Watts, *Systems*, 129–130; Kincaid, "Observations," 426.

82 Watts, *Systems*, 103–112 and 130; Watts, "Conclusions," 334–335.

83 Watts, *Systems*, 103. See also Anwar Shah, "Comparative Conclusions on Fiscal Federalism," in *A Global Dialogue on Federalism, Vol. 4: The Practice of Fiscal Federalism: Comparative Perspectives*, ed. Anwar Shah (Montreal: McGill-Queen's University Press, 2007), 387.

84 Watts, *Systems*, 104.

Fiscal equalisation is incompatible with formal equality, since it is targeted at compensating and balancing inequalities between and among tiers. It is thus necessary not to treat all component units equally, but distinctly – not in an arbitrary way, of course, but according to actual needs due to number of inhabitants, structural problems, minority protection, emergencies or other particularities that require financing, as well as according to the tasks to be performed by each level. As § 4 of the Austrian Fiscal Constitutional Act, which is said to enshrine a particular fiscal equality principle,[85] states: fiscal equalisation 'has to be in line with the distribution of encumbrances stemming from public administration and has to take into consideration that the capacity of the concerned territorial entities is not exceeded.' The criteria are thus twofold: on the one hand, fiscal equalisation has to consider the tasks that are to be performed by the territorial entities, which refers to the allocation of powers; on the other hand, it is also their individual capacity and efficiency which itself derives from certain conditions.[86]

It would thus appear that the *suum cuique*-test serves as the very basis for fiscal equalisation. There are, however, a number of objections to be made: firstly, no system of fiscal equalisation can avoid generalisation or a certain rigidity of figures and quotas. Moreover, fiscal equalisation at least partly relies on fixed parameters whether valid for a couple of years or even longer; structural adaptations of fiscal equalisation systems usually depend on complex procedures that often require intergovernmental commissions, negotiations and compromises.[87] A particular problem is, moreover, posed regarding horizontal equalisation, as this requires financial solidarity between regions.[88] Accordingly, richer regions are asked to share financial resources with poorer regions which may increase tensions between them. Secessionist tendencies are not infrequently triggered by economic and financial discrepancies between regions and their different approaches towards financial solidarity.[89] Even the well-known *Länderfinanzausgleich* in Germany has now been replaced by a system

85 See, with more detail, Hans Georg Ruppe, "§ 4 F-VG," in *Österreichisches Bundesverfassungsrecht*, eds. Karl Korinek et al. (Vienna: Verlag Österreich, 2016).

86 See also Pernthaler, "Asymmetrischer Föderalismus," 110; Bußjäger, "Bundesstaat," 295–296.

87 Watts, *Systems*, 112–116.

88 See, with more detail, Shah, "Conclusions," 389–390.

89 Charles D. Tarlton's controversial formula that *'[w]hen diversity predominates, the 'secession-potential' of the system is high'* (Tarlton, "*Symmetry,*" *873*) is acceptable inasmuch as he speaks of a 'potential' and not of an inevitability*; see also* Burgess, "Paradox," 34. *The question, however, is if de facto or de iure asymmetries are meant: while de facto asymmetries may increase the potential, de iure asymmetries normally intend the opposite, namely to satisfy needs for more or different kinds of autonomy.*

according to which the federal level, instead of the richer *Länder*, is mainly responsible for subsidising the poorer *Länder*.[90] On the whole, fiscal equalisation realises the Aristotelian concept of redistributive justice inasmuch as poorer regions are given 'their own' not in accordance with their capacity, but in accordance with their tasks and needs[91] – in a way, this is a positive discrimination measure.

But is it in line with the *suum cuique*-test to request adequate resources for poorer regions while at the same time requiring richer regions to pay? Does it correspond to factual differences to pay or to receive respectively, or could richer regions, for instance, claim to keep their 'own' money or to demand structural reforms for poorer regions in order to improve their financial situation? Neither approach, as such, would seem to be irrational or disproportionate. This is probably one of the reasons why solidarity rules or strong equalisation measures are often entrenched in federal constitutional law; as a consequence, the respective provisions will not be subject to judicial review or examined against the yardstick of the equality principle.

4 Conclusions

When we regard the *suum cuique*-test from the viewpoint of its judicial enforcement and justiciability, a significant difference between individual and collective equality appears. Individuals can normally complain against violations of their equality rights before courts, including, where provided, a specialised constitutional court. These violations arise from unconstitutional laws or other unconstitutional legal acts that are accordingly repealed, not applied or declared to be void. Conversely, asymmetries in federal systems are often non-justiciable, since they are rooted in federal constitutional law. When, for instance, a federal constitution provides for asymmetric representation in the federal second chamber, these provisions form constitutional *leges speciales* that cannot be measured against the yardstick of the equality principle, which is entrenched in the same federal constitution. The same is true for federal constitutional norms that provide for different classes of subnational units, for asymmetric allocations of powers or fiscal equalisation. From this perspective,

90 See, in particular, the new Art. 107 para 2 of the German Basic Law; Anna Gamper, "Tausch und Reform: Die Änderung des Grundgesetzes 2017," in *Jahrbuch für Föderalismus 2017*, ed. Europäisches Zentrum für Föderalismus-Forschung Tübingen (Baden-Baden: Nomos, 2017).

91 Similarly, Fleiner and Gaudreault-DesBiens, "Federalism," 152.

the question of whether the respective asymmetry passes the *suum cuique*-test is, indeed, irrelevant.[92]

As a consequence, the asymmetric treatment of federal citizens, which emanates from differing laws on account of an asymmetric allocation of powers, is not justiciable either; a possible claim to submit the resulting inequalities under equality review will fail. The justiciability of individual equality cases entails – at least under strong-form judicial review –[93] that independent courts will have the ultimate say on the *suum cuique*. It is up to them to assess the criteria of proportionality and reasonableness. As long as the constitution-maker does not critically respond by amending the constitution, these decisions will be final. In contrast, the aforementioned inequalities in federal systems will not routinely be for the judiciary to decide. The federal constitution-maker establishes them, and this is, first and foremost, a political decision.

As this chapter has sought to point out, however, asymmetries in federalism are hardly ever born from unreasonable and arbitrary political decisions, even if this were possible (on a federal constitutional basis). Empirically, constitutional asymmetries normally are grounded on a rationale such as the specific historical, ethnic or cultural identity, geographical indicators or economic and financial resources.[94] Admittedly, not all constitutional asymmetries are perfectly compatible with the *suum cuique*-test, since they usually cannot avoid generalisation, rigidity, as well as a certain proneness to political compromise. But their strongest motivation still is a legal reflection of individual positions – so that *de iure* asymmetry at least roughly mirrors *de facto* asymmetry. While it would be wrong to hold only formal equality as 'true' equality, it would be wrong as well to hold only symmetric federal states as strongholds of 'true' federalism; it would be strange indeed that a principle which stands for diversity in unity should cherish unconditional symmetry.[95] Even the Federalist Papers bluntly describe the rationale behind equal representation of the component units as a political deal between the larger and smaller states rather than as a theoretical essential of federalism – and why should symmetry be an essential, where federalism does not even emerge from an agreement between independent states?[96]

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92 Gamper, "Gleichheit," 166.

93 See, paradigmatically, Mark Tushnet, *Weak Courts, Strong Rights: Judicial Review and Social Welfare Rights in Comparative Constitutional Law* (Princeton: Princeton University Press, 2008).

94 Pernthaler, "Asymmetrischer Föderalismus," 106; Palermo, "Asymmetrie als Ordnungsmodell," 13–14; Gamper, "Kompetenzverteilung," 767.

95 Similarly, Palermo, "Asymmetries in Constitutional Law," 11.

96 Madison, "Federalist No. 62."

However, not every type of asymmetry between territorial units can qualify them as components of a *federal* (and not any decentralised) system, and this demands what Peter Pernthaler called 'bündische Gleichheit'[97] between the federal and the component levels.[98] If asymmetric federalism allowed for everything or anything on an open scale between centralisation and decentralisation, every asymmetrically decentralised state in the world could claim to be a federal state.[99]

Suum cuiqe tribuere is a Janus-faced principle, as are equality and federalism. So far, it serves as a common narrative to both. Neither is there just one *suum*, nor is there just one equality,[100] or one federalism.[101] However, federalism is more than just an attribution of any *suum* to a number of tiers and units.[102] It is based on the conditions of self-rule and shared-rule that, where necessary, would allow overruling even individual equality. The *suum* is embedded in, and not beyond these conditions.

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97 Pernthaler, "Differenzierter Föderalismus," 24.

98 Gamper, "Gleichheit," 147.

99 Francesco Palermo and Karl Kössler rightly observe that, despite differing criteria and incomplete definitions of federalism, these are 'nevertheless fundamental to approach a full understanding of a complex phenomenon' such as federalism; Francesco Palermo and Karl Kössler, *Comparative Federalism, Constitutional Arrangements and Case Law* (Portland: Hart, 2017), 65.

100 Gamper, "Gleichheit," 146.

101 Palermo, "Asymmetries in Constitutional Law," 13.

102 Gamper, "Gleichheit," 166.

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CHAPTER 2

Constitutional Asymmetry and Equality in Multinational Systems with Federal Arrangements

Maja Sahadžić

1 Introduction[1]

Constitutional asymmetry is an important part of federal and regional studies, given the constant dynamics in this field. One dominant theoretical issue is the argument that constitutional asymmetries in contemporary systems with federal arrangements result from the challenges of diversity.[2] A marked association between multinationalism[3] and a system with federal arrangements leads us to expect that constitutional asymmetry will be the rule in these systems.[4] This may be explained by the fact that multinational systems with federal arrangements[5] rely on asymmetric solutions to preserve the unity of the system while addressing diversity.

Nevertheless, this has certain disadvantages. Contemporary federal theory is not alone in suggesting that constitutional asymmetry may put constitutional

1 This chapter is part of a research project funded by the Fundamental Research Foundation Flanders (Fonds Wetenschappelijk Onderzoek – FWO).

2 Robert Agranoff, "Power Shifts, Diversity and Asymmetry," in *Accommodating Diversity: Asymmetry in Federal States*, ed. Robert Agranoff (Baden-Baden: Nomos Verlagsgesellschaft, 1999), 11–12.

3 The discussion of multinationalism is based on the definition of the multinational state offered by Stepan who refers to a state as multinational 'if (1) it has territorially based differences (often compounding) based on linguistic, religious, cultural, and ethnic identities and (2) there are significant political groups that would like to build political sovereignties, or an independent state or states, around these territorially based differences'. Alfred Stepan, "Towards a New Comparative Politics of Federalism, Multinationalism, and Democracy: Beyond Rikerian Federalism," in *Federalism and Democracy in Latin America*, ed. Edward L. Gibson (Baltimore, Md: Johns Hopkins University Press, 2004), 39.

4 Rainer Bauböck, "United in Misunderstanding? Asymmetry in Multinational Federations," *ICE Working Paper Series*, no. 26 (2001): 14, https://eif.univie.ac.at/downloads/workingpapers/IWE-Papers/WP26.pdf.

5 This chapter uses the term multinational systems with federal arrangements rather than the term multinational federal systems. The reasons for this are explained in the section that addresses the inapplicability of traditional federal theory to contemporary federal systems.

values and principles at risk, especially in multinational systems with federal arrangements. In particular, constitutional asymmetry may threaten the concept of equality and therefore influence the legitimacy and stability of the system. As a response, symmetrisation is encouraged. However, it can hardly constitute a definitive solution.

In view of what has been mentioned, this chapter was designed to explore first, the relationship between constitutional asymmetry and equality; and second, how constitutional asymmetry impacts on equality and therefore on legitimacy and stability in multinational systems with federal arrangements. The framework of the chapter emphasises the importance of federal dynamics and relies on the indicators of constitutional asymmetry. As an outcome, the chapter offers a comprehensive evaluation of the two concepts of constitutional asymmetry and equality from a legal perspective.

2 Constitutional Asymmetry: Positioning the Concept

In examining the relationship between constitutional asymmetry and equality in multinational systems with federal arrangements, we can pinpoint two prerequisites: first, placing constitutional asymmetry in a contemporary federal framework; and second, linking constitutional asymmetries to equality in particular. With this in mind, these two issues are used as a starting point for further pondering the relationship.

The first prerequisite concerns contemporary studies in federalism. These imply that constitutional asymmetry is immanent in federalism.[6] Moreover, they recognise that constitutional asymmetry is no longer limited to federal-type systems only[7] but may also arise in unitary and even in transnational systems.[8] Apart from this, contemporary scholarship acknowledges that many

6 Francesco Palermo, "Asymmetries in Constitutional Law, An Introduction," in *Asymmetries in Constitutional Law, Recent Developments in Federal and Regional Systems*, eds. Francesco Palermo, Carolin Zwilling, and Karl Kössler (Bozen/Bolzano: Europäische Akademie Bozen/Accademia Europea Bolzano, 2009), 15.

7 Frank Delmartino, "New Dimensions of Asymmetry in (Quasi-) Federal States and in the European Union," in *Asymmetries in Constitutional Law, Recent Developments in Federal and Regional Systems*, eds. Francesco Palermo, Carolin Zwilling, and Karl Kössler (Bozen/Bolzano: Europäische Akademie Bozen/Accademia Europea Bolzano, 2009), 38.

8 John McGarry, "Asymmetric Autonomy in the United Kingdom," in *Asymmetric Autonomy and the Settlement of Ethnic Conflicts*, eds. Mark Weller and Katherine Nobs (Philadelphia, Oxford: University of Pennsylvania Press, 2011), 148. That is, unitary systems such as China and Indonesia, devolving systems such as Italy and the United Kingdom, and transnational systems such as the European Union.

contemporary federal systems are essentially multinational.[9] It has been established that variations in status originate from multiple identities overlapping with economic, social, and political differences among sub-national entities.[10] In other words, it has been argued that constitutional asymmetries are linked to differences in identity markers. It has therefore been assumed that new-fangled federal dynamics do not necessarily imply an equal positioning of different sub-national entities under the law.[11] Contemporary sub-national entities challenge the internal structure of the system by creating tiers of government through the application of asymmetrical constitutional formulas.[12] This is due to diversity in the national composition that has played a key role in the processes of fragmentation.[13]

The second prerequisite leads us to focus on the way constitutional asymmetries are articulated for equality. In fact, one of the issues in federalism studies is associated with challenges that constitutional asymmetry poses for the legitimacy and stability of the constitutional system. Recent scholarship has pointed out two important aspects of this issue. On the one hand, three concepts substantiate the legitimacy and stability of the system: equality, cohesion, and transparency.[14] In other words, equality, cohesion, and transparency

9 Patricia Popelier, "Subnational Multilevel Constitutionalism," *Perspectives on Federalism* 6, no. 2 (2014): 4.

10 Stephen Tierney, *Constitutional Law and National Pluralism* (Oxford: Oxford University Press, 2006), 9; McGarry, "Asymetric Autonomy," 148; Michael Burgess, "The Paradox of Diversity – Asymmetrical Federalism in Comparative Perspective," in *Asymmetries in Constitutional Law, Recent Developments in Federal and Regional Systems*, eds. Francesco Palermo, Carolin Zwilling, and Karl Kössler (Bozen/Bolzano: Europäische Akademie Bozen/Accademia Europea Bolzano, 2009), 24; Michael Burgess, *Comparative Federalism, Theory and Practice* (London: Routledge, 2006), 215; Michael Burgess and Franz Gress, "Symmetry and Asymmetry Revisited," in *Accommodating Diversity: Asymmetry in Federal States*, ed. Robert Agranoff (Baden-Baden: Nomos, 1999), 48.

11 Geys and Konrad suggest that traditional federal theory has neglected the fact that federal relations are dynamic and vibrant, due to the very nature of federalism, in addition to neglecting the fact that such relations take effect at several levels within the federal arrangement. Benny Geys and Kai A. Konrad, "Federalism and Optimal Allocation across Levels of Governance," in *Handbook on Multi-Level Governance*, eds. Henrik Enderlein, Sonja Wälti, and Michael Zürn (Cheltenham: Edward Elgar Publishing, 2012), 32–33.

12 Raoul Blindenbacher and Ronald Watts, "Federalism in a Changing World, A Conceptual Framework for the Conference," in *Federalism in a Changing World, Learning from Each Other, Scientific Background, Proceedings and Plenary Speeches of the International Conference on Federalism*, eds. Raoul Blindenbacher and Arnold Koller (Montreal, Kingston, London, Ithaca: McGill's Queen's University Press, 2002), 9.

13 Carl Joachim Friedrich, *Trends of Federalism in Theory and Practice* (New York, Washington and London: Praeger, 1968), 27, 30.

14 Bauböck, "United in Misunderstanding?," 14–22.

are considered safeguards of legitimacy and stability. On the other hand, constitutional asymmetries may have a considerable impact on constitutional values in multinational systems with federal arrangements.[15] To put it another way, the assumption is that constitutional asymmetry may put at risk equality, cohesion, and transparency and therefore undermine the legitimacy and stability of a system. This leads us to a valid research objective, which is to provide a legal analysis of whether constitutional asymmetry is a condition for or a threat to equality in contemporary federal systems.

3 Equality: Issues, Challenges, Difficulties

In order to examine the relationship between constitutional asymmetries and equality more closely, the present chapter's main claim is that there is a need for an approach that would include the indicators of constitutional asymmetries. However, one anticipated finding is that equality still appears as a debatable concept.[16] Since this reflects not only on the general understanding of the concept but also on its application and effects in contemporary multinational systems with federal arrangements, it is important to first question the concept of equality. In order to do so, we will first discuss the major issues with the concept of equality; this will pave the way for us to discuss some major challenges concerning the concept of equality in the contemporary theoretical framework; and finally we will address some of the major difficulties that complicate a balance between equality and diversity.

First, some of these major issues with the concept of equality emerge from the impediment mentioned above and can be explained through several interconnected theoretical tendencies. These are mostly caused by insufficient theoretical elaboration of group rights.[17] It appears that due to the narrow theoretical framework, diverse groups were compelled to make maximal claims, such as self-determination claims.[18] Traditionally, groups with distinct identity markers are viewed as nations and therefore, they were expected to follow the

15 Burgess and Gress, "Symmetry and Asymmetry Revisited," 54.

16 Susanne Baer, "Equality," in *The Oxford Handbook of Comparative Constitutional Law*, eds. Michael Rosenfeld and András Sajó (Oxford: Oxford University Press, 2012), 983–1002.

17 Wayne Norman, "Justice and Stability in Multinational Societies," in *Multinational Democracies*, eds. Alain-G. Gagnon and James Tully (Cambridge: Cambridge University Press, 2001), 94.

18 Norman, "Justice and Stability," 94.

self-determination path.[19] By the same theoretical token, the concept of equality has been typically linked to the notion of justice that is at the very core of every discussion about equality.[20] In other words, equality has been a concept that has had to portray fairness and rightfulness. This is because traditional liberal democratic theories perceive equality as a mirror of justice[21] and justice is a normative concept.[22] As a result, when this approach is applied in multinational systems with federal arrangements, it raises considerable concerns about equality. Nevertheless, what these conceptualisations about equality have in common is that they leave accommodation claims out of scope, thus making their application in multinational systems with federal arrangements inadequate.[23]

Second, regarding major challenges in the contemporary theoretical framework, the main challenge that contemporary federal theory faces is linked to how the concept of equality can be positioned in order for it to match a justified accommodation of differences, and not necessarily fairness and rightfulness. Since asymmetrical constitutional solutions generate different categories that are not necessarily evenly positioned within the system, the concept of equality becomes plural as it needs to provide accommodation for differences.[24] The challenge is then to change the view of the concept of equality. The second challenge is related to the previous one. Multinational systems with federal arrangements blend features of territorial and multinational federalism as they lean towards adjustment through asymmetrical constitutional features. As the concept of equality becomes more plural, it bridges to a difference or variation.[25] To that end, distinctive groups will push for a justified accommodation of differences, not for fairness and rightfulness.[26] All this suggests that equality also means that different categories should be treated differently. The challenge is then how to alter the constitutional design in order to accommodate

19 See Eric Taylor Woods, "Beyond Multination Federalism: Reflections on Nations and Nationalism in Canada," *Ethnicities* 12, no. 3 (2012): 272.

20 Baer, "Equality," 983; Bauböck, "United in Misunderstanding?," 2; Enric Fossas, "National Plurality and Equality," in *Democracy and National Pluralism*, ed. Ferran Requejo (London and New York: Routledge, 2001), 65.

21 Ferran Requejo, "Federalism and the Quality of Democracy in Multinational Contexts: Present Shortcomings and Possible Improvements," in *Federalism and Territorial Cleavages*, eds. Ugo M. Amoretti and Nancy Gina Bermeo (Baltimore, Md: Johns Hopkins University Press, 2004), 263.

22 Norman, "Justice and Stability," 94.

23 Norman, "Justice and Stability," 94.

24 Requejo, "Federalism and the Quality of Democracy," 263.

25 Requejo, "Federalism and the Quality of Democracy," 263.

26 Bauböck, "United in Misunderstanding?," 2.

differences.[27] Contemporary federal theory illustrates these points clearly. In traditional mono-national federal systems, it is expected that the federal system will serve as a promise of brotherhood within the scope of integrative territorial federalism. On the contrary, this cannot be expected in contemporary multinational systems with federal arrangements. This is due to the fact that a claim for accommodation of differences may challenge the existence of the system.[28] Hence, it could conceivably be argued that a discussion centred on equality related to multinational systems with federal arrangements with asymmetrical features shall be more closely analysed because these systems must address a balance between equality and diversity.[29]

And finally, as we address some of the major difficulties that complicate a balance between equality and diversity in contemporary multinational systems with federal arrangements, we can, in the first place, highlight that equality should be analysed in these systems with regards to sub-national entities, not groups. This is because, understood as a reflection of individual yardsticks, various groups appear to manifest a belonging to a distinct identity[30] along with a sentiment of territorial belonging.[31] To clarify, distinct groups should be able to raise autonomy claims only if organised as a sub-level of government with law-making power. In the second place, it is possible to argue that contemporary multinational systems with federal arrangements have an ability to accommodate any type of diversity. However, there might not be enough inclination from the central level to support the constitutional recognition of all the diverse identities organised in a sub-national entity,[32] therefore producing asymmetrical constitutional solutions. This might be associated with the fact that a right to be different is often understood as opposing the principle of equality.[33] In the third place, constitutional asymmetry circumvents the

27 Baer, "Equality," 988–989.

28 Fossas, "National Plurality and Equality," 63.

29 Anne Mullins and Cheryl Saunders, "Different Strokes for Differet Folks? Some Thoughts on Symmetry and Difference in Federal Systems," in *Evaluating Federal Systems*, ed. Bertus De Villiers (Dordrecht, Boston, London: Martinus Nijhoff Publishers, 1994), 44.

30 Ernest Gellner, *Nations and Nationalism*, *New Perspectives on the Past* (Oxford: Blackwell, 1993), 1. In addition, see the number of terms Tierney uses to refer to groups, Tierney, *Constitutional Law,* 5.

31 This argument is open for discussion. While Livingston claims that this is absolutely the rule, Burgess argues that interests may be pronounced by territorial and non-territorial actors, William S. Livingston, "A Note on the Nature of Federalism," *Political Science Quarterly* 67, no. 1 (1952): 85; Burgess, *Comparative Federalism, Theory and Practice*, 143.

32 Fossas, "National Plurality and Equality," 70.

33 E.C.D. Law, *The Protection of Minorities: Collected Texts* (Council of Europe, 1994), 396.

principle of the same treatment of sub-national entities.[34] Even though equality in multinational systems with federal arrangements shall not be understood as an inflexible concept,[35] the concept still merely requires comparable situations to be treated equally and different situations to be treated differently.[36]

Taken together, these difficulties provoke a debate on how an association between constitutional asymmetry and multinationalism in systems with federal arrangements affects equality in these systems. Two matters are crucial in addressing the debate. On the one hand, the favourable and detrimental factors of constitutional asymmetry provoke questions about the extent to which multinational systems with federal arrangements favour constitutional asymmetry and to which degree constitutional systems can tolerate it. On the other hand, the answer depends on two interrelated matters: (1) determining when constitutional asymmetry threatens equality; and (2) looking for the safeguards of equality in multinational federal arrangements. To develop a fuller picture, the next sections move on to discuss these concerns using the indicators of constitutional asymmetry.

4 Defining the Three Indicators of Constitutional Asymmetry

To address the questions raised in the last section, we will mobilise a set of three indicators of constitutional asymmetry to trace inequalities in multinational systems with federal arrangements. There are two reasons to use this approach: first, because this approach makes it easy to trace (in)equalities that emerge as an effect of constitutional asymmetries and second, it gives a structured way to detect inequalities. Under such circumstances, this approach minimises potential shortcomings in research. However, before further detailing our approach, we need to define the three indicators[37] of constitutional

34 Fossas, "National Plurality and Equality," 69, 71.

35 Fossas, "National Plurality and Equality," 70.

36 Baer, "Equality," 987; Mark Weller, "Conclusion," in *Asymmetric Autonomy and the Settlement of Ethnic Conflicts*, eds. Mark Weller and Katherine Nobbs (Philadelphia, Oxford: University of Pennsylvania Press, 2011), 304.

37 'An indicator is a named collection of rank-ordered data that purports to represent the past or projected performance of different units. The data are generated through a process that simplifies raw data about complex social phenomenon. The data, in that simplified and processed form, are capable of being used to compare particular units of analysis (such as countries or institutions or corporations), synchronically or over time, and to evaluate their performance by reference to one or more standards'; Kevin E. Davis, Benedict Kingsbury and Sally Engle Merry, "Introduction: The Local-Global Life of Indicators: Law, Power, and Resistance," in *The Quiet Power of Indicators: Measuring*

asymmetries. Defining the indicators is important not only because they enable one to connect the two concepts in contemporary federal systems, but also because they facilitate an exploration of their mutual relationship. As a matter of fact, the objective here is to use the indicators of constitutional asymmetry to identify potential (in)equalities in contemporary federal systems. As an outcome, this will open a possibility for further research on this topic beyond the contents of this chapter. We will therefore start by laying out in this section the indicators of constitutional asymmetry based on the previously established theoretical framework.[38] The theoretical framework points out three main implications. First, constitutional asymmetries emerge as variations in the status of different sub-national entities; second, constitutional asymmetries appear as variations in shaping the distribution of power and competences; and third, constitutional asymmetries come to light as variations in fiscal autonomy. Each one of these indicators can be fine-tuned in several sub-indicators.

The first indicator measures the differential status of one or more sub-national entities in contemporary federal systems and is envisaged through the existence of its legally embedded distinctiveness. The main purpose of this indicator is to show how the distinct status of the sub-national entity is projected in the multi-tiered multinational system. This means measuring the power of the sub-national entity to define its specific position at the central level. The sub-classification of this indicator includes several sub-indicators that refer to: (1) whether the status of sub-national entity is recognised in constitutional or legal acts at the central level; (2) whether a specific sub-national entity has institutional autonomy; (3) whether a specific sub-national entity enjoys the guarantees of representation in central level institutions that put them in a different position; (4) whether a specific sub-national entity is favoured with a specific scheme of involvement in constitutional reform procedures and (5) decision-making in central level institutions; (6) whether a specific sub-national entity was granted a benefit of veto powers in central level institutions; (7) whether a specific sub-national entity enjoys specific locks for the protection of autonomy at the central level; and (8) whether the central government has the power to overlook the content of decisions made by a distinct sub-national entity. It is important to emphasise that assessing sub-national entities is different from the approach that treats national states

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Governance, Corruption, and Rule of Law, eds. Sally Engle Merry, Kevin E. Davis and Benedict Kingsbury (New York: Cambridge University Press, 2015), 4.

38 Maja Sahadžić, "New Federal Systems: Multi-Tiered, Multinational, Asymmetrical," *Tijdschrift voor bestuurswetenschappen & publiekrecht*, no. 4 (2017).

as the main and lowest comparison unit.[39] This is because the chapter has set out an aim to assess variations between sub-national entities within one state, and therefore, the main comparison unit is the sub-national entity. The scope of assessment includes variations between sub-national entities at the horizontal level. However, to determine horizontal differences, a vertical relationship between the sub-national entity and central level needs to be addressed as well.

The second indicator measures the distribution of power and competences in multi-tiered multinational systems. This indicator taps into differences in the extent, type, and nature of assigned powers and allocated competences to the distinct sub-national entity and among sub-national entities in general. This indicator can be further fine-tuned through a set of sub-indicators that question: (1) whether a specific sub-national entity enjoys a broader or narrower set of competences; (2) whether differences exist in techniques of allocation of competences for a specific sub-national entity; (3) whether there is a distinction between different sets of competences granted to the sub-national entities (language, culture, education, and tax); (4) whether a specific sub-national entity is allowed to 'opt-in' or 'opt-out' with regards to specific competences; (5) whether a specific sub-national entity has the power to exercise its competences at a different speed; and (6) whether a specific sub-national entity has the power to apply and/or execute measures enacted at the central level.

The third indicator measures the extent and level of fiscal autonomy of a specific sub-national entity. The main purpose of this indicator is to point out the extent to which a distinct sub-national entity can exercise its own fiscal autonomy. More precisely, this indicator draws attention to whether tax-raising and expenditure autonomy of the distinct sub-national entity is restricted, substantial, or the same compared to other sub-national entities. This is because fiscal autonomy helps sub-national entities to shape their relative power and autonomy in multi-tiered multinational systems. This indicator can be developed through a group of sub-indicators that reveal: (1) whether a specific sub-national entity has the power to raise its own taxes; (2) whether a specific sub-national entity has the discretion to set bases and rates for major taxing powers (customs, excises, corporate taxes, sales and consumption taxes, and personal income taxes); (3) whether a specific sub-national entity has the power to raise revenues; (4) whether a specific sub-national entity is

39 Liesbeth Hooghe, Gary Marks and Arjan H. Schakel, *The Rise of Regional Authority, A Comparative Study of 42 Democracies* (New York: Routledge, 2010), 2.

responsible for spending capacity (5) whether a specific sub-national entity relies on transfers or not; (6) whether a specific sub-national entity undergoes budgetary control over borrowing or not.

For a clear-cut overview, the indicators described above are translated in the following index (Table 2.1):

TABLE 2.1 The indicators of constitutional asymmetry

Indicator	Measure
The distinct status of the sub-national entity.	The power of the sub-national entity to define its specific position at the central level.
The distribution of powers and competences. Fiscal autonomy.	The extent, type, and nature of distribution of powers and competences in a sub-national entity. The extent to which a sub-national entity can exercise its fiscal autonomy and the level of fiscal autonomy.

5 Numerous Relationships: Introducing Constitutional Asymmetry to Equality and the Other Way Around

The contemporary federal scholarship is less sophisticated in addressing (in)equalities linked to constitutional asymmetries. In general, scholars suggest that there are at least two forms of differences among sub-national entities that may be caused by constitutional asymmetries: (1) differences in the constitutional powers among sub-national entities, and (2) differences in the extent of power shared between the central level and sub-national entities.[40] In particular, these two forms of differences are mostly addressed through the delineation of sub-national entities, the representation in the central level government, and the distribution of power and competences. However, they do not comprehensively address the effects of these differences on the concept of equality. Additionally, much uncertainty still exists about the influence of

40 Brendan O'Leary, "Thinking About Asymmetry and Symmetry in the Remaking of Iraq," in *Asymmetric Autonomy and the Settlement of Ethnic Conflicts*, eds. Mark Weller and Katherine Nobs (Philadelphia, Oxford: University of Pennsylvania Press, 2011), 184. O'Leary refers to these as to asymmetrical powers and asymmetrical shares.

fiscal autonomy of certain sub-national entities on the concept of equality in multinational systems with federal arrangements.

To respond to these challenges, as explained above, this chapter uses the indicators of constitutional asymmetry to trace differences pointing to potential (in)equalities. The following sections will provide a rationale for constitutional asymmetries and evaluate whether and when the principle of equality in multinational systems with federal arrangements is compromised. In addition to evaluating the power of a sub-national entity to define its specific position at the central level and the extent, type and nature of distribution of powers and competences in a sub-national entity, we address the extent and level to which a sub-national entity can exercise its fiscal autonomy. We will not address every sub-indicator of constitutional asymmetry in detail. We will, however, take into account the sub-indicators that can offer a vivid and comprehensive analysis of the relationship between constitutional asymmetry and equality.

5.1 *The First Indicator: The Distinct Status of a Sub-National Entity*

Even though some scholars suggest that all states with federal arrangements have a bicameral legislature,[41] this is not necessarily always true, as can be seen in the case of Micronesia, Saint Kitts and Nevis, and Venezuela. Nonetheless, where the states with federal arrangements do have the bicameral legislature, the representation of sub-national entities in the central level institutions may display asymmetrical features. Most often, the first chamber represents the population and the second chamber represents a sub-national entity. The case of Bosnia and Herzegovina proves to be different in an important way. The second chamber in Bosnia and Herzegovina represents three constituent/constitutive[42] peoples based on their territorial affiliation.[43] The question boils down to 'who or what is being represented'.[44]

41 Bauböck, "United in Misunderstanding?," 20.

42 In Bosnia and Herzegovina these two terms are often discussed without a clear theoretical and practical position on their meaning. The first is used to express three ethnic-national communities (Bosniaks, Croats, and Serbs) as component parts of the state, while the second is used to point at three ethnic-national communities as creators of the Bosnia and Herzegovina. The first one is in more frequent use in foreign languages. The second one is in more frequent use in official languages in Bosnia and Herzegovina. Throughout the text I will use the first version.

43 Constitution of Bosnia and Herzegovina (1995), in particular, Article IV of the Constitution of Bosnia and Herzegovina.

44 Burgess, *Comparative Federalism, Theory and Practice*, 220.

Although representation in the central level institutions in states with federal arrangements may display more than a few forms of constitutional asymmetries, we tackle here two issues: firstly, the composition of the central level legislature; and secondly, voting. It should be noted that there is a growing body of literature that recognises the importance of several other issues with regard to representation in the central level institutions. In addition to the guarantees of representation, the following come to mind: veto powers and specific locks for the protection of autonomy at the central level that differ among sub-national entities; specific formulas of involvement in constitutional amendment procedures and decision-making processes at the central level that put a particular sub-national entity in a different position etc.

The first thing to remember is that the composition of the central level legislature in systems with federal arrangements is usually based on the representation of citizens in the first chamber and sub-national entities in the second chamber. Some authors imply that the power and influence of larger and more populated sub-national entities in the first chamber originate from a higher number of seats, compared to smaller sub-national entities.[45] The example of Canada shows how the combined populations of Ontario and Quebec enjoy the representation of more than half of the seats in the first chamber of the Parliament of Canada.[46] A less extreme example includes the relative influence of North Rhine-Westphalia, Bavaria, Baden-Wurttemberg, and Lower Saxony in Germany.[47] As for the second chamber, the representation will depend on internal vertical and horizontal relations within the system. Connected to this, studies in constitutional asymmetries point to two factors that may lead to asymmetrical constitutional features: first, the weight of citizen's votes in

45 Ronald L. Watts, "The Theoretical and Practical Implications of Asymmetrical Federalism," in *Accommodating Diversity: Asymmetry in Federal States*, ed. Robert Agranoff (Baden-Baden: Nomos Verlagsgesellschaft, 1999), 34.

46 Burgess gives a comprehensive explanation of the issue through presenting position of Quebec in practice: 'In Canada the combined population of the two provinces of Ontario and Quebec enjoy a *de facto* asymmetrical representation of 178 seats out of a total of 301 in the House of Commons, but the 'regional' principle in the non-elected Senate has had the effect of counterbalancing their combined dominance in the first chamber. In the Senate, Quebec and Ontario each have 24 seats as regions rather than as provinces. Yet this *de facto* asymmetrical representation obscures the vulnerable position of Quebec in the federation. In reality, Quebec's 75 seats in the House of Commons pits its predominantly francophone population against a nominal 226 Anglophone representatives from the 'rest of Canada' (ROC), while its 24 seats in the Senate mean that it is easily outnumbered by the remaining 81 nominally Anglophone representatives'; Burgess, *Comparative Federalism, Theory and Practice*, 219–220.

47 Watts, "Theoretical and Practical Implications," 34.

sub-national units of different sizes, and second, (over)representation of sub-national units of different sizes.[48] The first suggested factor, which involves proportionate representation of citizens in the first chamber, does not in fact provide an institutional link with the sub-national entities, as an unequal number of seats is accompanied with an equal relative weight.[49] The second factor that involves equivalent representation of sub-national entities in the second chamber implies what Watts calls 'not the same symmetry'. It involves a weighted system of the representation of states in the second chamber taking into account differences in population. Examples include Austria, Canada, Germany, and India.[50] To illustrate, in Germany each Land has at least three votes, but Länder with more than two million inhabitants have four, those with more than six million inhabitants five, and Länder with more than seven million inhabitants have six votes.[51] In Canada, provinces are grouped into Senate divisions represented as follows: Ontario by 24 senators; Quebec by 24 senators; the Maritimes by 24 senators, with Nova Scotia represented by ten, New Brunswick by ten, and Prince Edwards Islands by four senators; the Western Provinces by 24 senators, with Manitoba represented by six, British Columbia by six, Saskatchewan by six, and Alberta by six; Newfoundland by six senators; and the Yukon Territory, the Northwest Territories, and Nunavut by one senator each.[52]

Another issue connected to constitutional asymmetries in representation can be tracked down in the emerging question of whether representatives from more autonomous sub-national entities should be restricted from voting in the central level institutions on matters over which the central level does not have powers and competences in that distinct entity.[53] This question has been raised in Canada, but also in the United Kingdom in the light of Scottish devolution where it is now already solved through adding a new stage in the

48 Bauböck, "United in Misunderstanding?," 20.

49 Bauböck, "United in Misunderstanding?,"20. 'Indeed, some political theorists have defended the argument that asymmetry can be reconciled with liberal democracy, as quality for individual citizens does not necessarily require that all regions have equal powers'; Wilfried Swenden, *Federalism and Regionalism in Western Europe, A Comparative and Thematic Analysis* (Basingstoke: Palgrave Macmillan, 2006), 265.

50 Watts, "Theoretical and Practical Implications," 38–39.

51 Edin Šarčević, *Ustavno Uređenje Savezne Republike Njemačke: Osnove Njemačkog Državnog Prava* (Sarajevo: Kult/B, 2005), 169–262. In particular, Article 51 of The Basic Law (*Grundgesetz*).

52 The Constitution of Canada. available at https://www.constituteproject.org/constitution/Canada_2011?lang=en. In particular, Article IV. 22.

53 Ronald L. Watts, "Contemporary Views on Federalism," in *Evaluating Federal Systems*, ed. Bertus De Villiers (Dordrecht, Boston, London: Jutta & Company, 1994), 12.

law-making process that enable only representatives from English constituencies to vote on matters that affect only England.

5.2 *The Second Indicator: The Distribution of Power and Competences*

Before proceeding to examine constitutional asymmetry in the domain of distribution of power and competences, it is important to make a few theoretical remarks on this issue. In the first place, there are various ways to shape the distribution of competences. Competences are usually distributed as exclusive, shared, and/or concurrent. Even though a standard distribution of competences in systems with federal arrangements presumes that the distribution of competences is symmetrical for all sub-national entities, there are ways in which constitutional asymmetries may differ in one or a few sub-national entities. In addition, depending on the way they are distributed, there might be differences in institutional functioning among them. Second, the theory puts forward that in systems with federal features, there are three levels where constitutional asymmetry may appear: firstly, on the horizontal level or among sub-national entities; secondly, vertically or between the central level and the sub-national entity; and thirdly, in the power-sharing order between institutions at the central level.[54] Although studies have demonstrated that constitutional asymmetries seek a balance between the horizontal and vertical level,[55] the prevailing opinion is that their greatest influence is at the horizontal level.[56]

The literature indicates that the forms and representative cases where the constitutional provisions lay out the asymmetrical distribution of power and competences in states with federal arrangements can be addressed as follows: firstly, as reducing the power and competences in one or more sub-national entities; secondly, as increasing the power and competences in one or more sub-national entities; thirdly, as allowing some sub-national entities to 'opt-in' or 'opt-out' with regards to specific competences; and fourthly, as allowing certain sub-national entities to take the exercise of autonomy at a different speed.[57]

The first form of constitutional asymmetry in the distribution of power and competences was evident in the Federation of Rhodesia and Nyasaland,

54 Bauböck, "United in Misunderstanding?," 3.

55 James A. Gardner and Antoni Abad I. Ninet, "Sustainable Decentralization: Power, Extraconstitutional Influence, and Subnational Symmetry in the United States and Spain," *Legal Studies Research Paper Series*, no. 12 (2009): 3, 4.

56 Bauböck, "United in Misunderstanding?," 3.

57 Ronald L. Watts, *Comparing Federal Systems* (Montreal, Kingston, London, Ithaca: Institute of Intergovermental Organizations, 2008), 128–130.

that existed for only ten years, where disparities in the size and wealth of sub-national entities induced experiments with reducing autonomy for some regional governments.[58]

The second form is visible in several states. In Canada, the second form of constitutional asymmetry in the distribution of power and competences is displayed in the linguistic advantages of Quebec, exercised in education, legislature, courts, and the civil law application.[59] Even though the central level constitution in Bosnia and Herzegovina enumerates competences assigned to the central level and sub-national entities, the territorial and institutional structure embedded in sub-national entities' constitutions made the distribution of competences differently prescribed and exercised. For example, the local competences are different between the Federation of Bosnia and Herzegovina and the Republic of Srpska, and even among the cantons in the Federation when it comes to communal services, material costs of schools, etc.[60] In Belgium, the German-speaking community does not have the same powers as the Dutch-speaking and the French-speaking communities as it cannot exercise language competences, with the exception of the use of language in education, but it exercises some regional competences owing to the fact that the German-speaking community is allowed, in agreement with the Walloon Region, to exercise these competences within its territory.[61] Similarly, the French-speaking community can choose to transfer the exercise of its powers to the Walloon Region and the French-speaking Community Commission in Brussels. However, constitutional provisions do not grant the same powers to the Flemings who have merged their institutions.[62] Yet, even though

58 Ronald L. Watts, "Federalism, Regionalism, and Political Integration," in *Regionalism and Supranationalism: Challenges and Alternatives to the Nation-State in Canada and Europe*, ed. David M. Cameron (Montreal: Institute for Research on Public Policy, 1981), 16.

59 Watts, *Comparing Federal Systems*, 130; Swenden, *Federalism and Regionalism in Western Europe,* 221. This position might be regarded as similar to Scotland in the United Kingdom.

60 Halko Basarić, "Pregled Finansija Lokalne Samouprave U Bih," ed. Zoran Ivančić (Sarajevo 2015), 12, https://www.cpi.ba/wp-content/uploads/2015/03/Pregled-finansija-lokalne-samouprave.pdf.

61 Hugues Dumont et al., "Kingdom of Belgium," in *Distribution of Powers and Responsibilities in Federal Countries*, eds. Akhtar Majeed, Ronald L. Watts and Douglas M. Brown (Montreal, Kingston, London, Ithaca: McGill-Queen's University Press, 2005), 48, 49; Jan Wouters, Sven Van Kerckhoven and Maarten Vidal, "The Dynamics of Federalism: Belgium and Switzerland Compared," *Working Paper,* no. 138 (April 2014), https://ghum.kuleuven.be/ggs/publications/working_papers/new_series/wp131-140/wp138-wouters-vankerckhoven-vidal.pdf.

62 Patricia Popelier and Koen Lemmens, *The Constitution of Belgium, A Contextual Analysis* (Oxford: Hart Publishing, 2015), 80.

competences are distributed symmetrically between two types of sub-national entities, the constitution allows all or some entities to blend competences by transferring some or all powers from the region to the community and vice versa. This places Belgium under the third form as well.

The third form is best explained by the Spanish example. The Spanish constitution provides two main routes to regional autonomy, a fast-track route for historic regions, and a slow-track route for other regions,[63] thus creating an optional autonomy system[64] for regions. It is, however, important to emphasise that even though these opting mechanisms have created an initial asymmetry between the regions,[65] they do not disable regions from gaining the same level of autonomy at some point. Nevertheless, the constitutional text enables another type of asymmetry. For certain autonomous communities, such as the Basque Country and Navarre, the constitution has allowed different fiscal agreements.[66] Also, the Spanish example reveals a connection to the fourth form of constitutional asymmetry in the distribution of power and competences as it points at a relationship between 'opting-in' and 'opting-out' and the exercise of autonomy at a different speed. It is implied that sub-national entities that 'opt-in' or 'opt-out' will exercise their autonomy at a different speed.

The fourth form of constitutional asymmetry in the distribution of power and competences can be observed in several systems. In Italy, regions with special status negotiated their competences and finance bilaterally with the central level and have therefore consumed different dynamics in the distribution of power and competences.[67] In the United Kingdom, the allocation of competences varies for Scotland, Northern Ireland, and Wales. For instance, even though tax regulations are under central control, Scotland can change the basic income tax. Northern Ireland can, for instance, legislate on employment. Finally, Wales has executive powers to address the use of the Welsh language.[68]

5.3 *The Third Indicator: Fiscal Autonomy*

A fiscal framework in systems with federal arrangements is a common condition that has a considerable impact on how these systems behave in respect

63 Swenden, *Federalism and Regionalism in Western Europe,* 63.

64 Luis López Guerra, "El Modelo Autonómico," *Revista Catalana de Derecho Público, Autonomies*, no. 20 (1995).

65 Agranoff, "Intergovernmental Relations and the Management of Asymmetry in Federal Spain," 98.

66 Watts, *Comparing Federal Systems*, 130.

67 Francesco Palermo and Alex Wilson, "The Multi-Level Dynamics of State Decentralization in Italy," *Comparative European Politics* 12, no. 4 (2014): 511.

68 Swenden, *Federalism and Regionalism in Western Europe,* 66–67.

of economy and politics.[69] Generally speaking, the fiscal power of the sub-national entity may point to its ability to display a level of autonomy.[70] By drawing on variations in the population and territory size, contemporary scholarship suggests that larger and wealthier sub-national entities have the capacity to use their resources to support their autonomy.[71] In particular, these sub-national entities may have the power to raise taxes and revenues, and the power of the purse. With more resources, they depend less on federal transfers,[72] such as California in the United States of America.[73] Also, in Spain, certain autonomous communities, such as the Basque Country and Navarre, have been allowed fiscal agreements different from other autonomous communities.[74] For example, while the central level government in Spain manages the most important taxes for regions, the Basque Country and Navarre collect all taxes except for tobacco, petroleum, and customs duties.[75] This also overlaps with the second form of constitutional asymmetries in the distribution of power and competences as it corresponds to increasing autonomy for some sub-national entities.

These examples give rise to the assumption that larger and wealthier sub-national entities may easily put into play their fiscal autonomy, while smaller and less wealthy sub-national entities are dependent on their fiscal status. Yet, this does not necessarily mean that smaller and less wealthy entities are entirely powerless, let alone that they depend on the allocation of finances and fiscal policies to be able to exercise their power.[76] This link is very hard to prove, especially because problems of fiscal imbalances occur regardless of territory and population size.[77] Moreover, Mill argued that equality of taxation is equality of sacrifice.[78]

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69 Burgess, *Comparative Federalism, Theory and Practice*, 149.

70 Watts, "The Theoretical and Practical Implications of Asymmetrical Federalism," 33.

71 Burgess, *Comparative Federalism, Theory and Practice*, 218–219; on this topic also *The Swiss Tax System – Between Equality and Diversity* by Peter Hänni (chapter 9).

72 Watts, "The Theoretical and Practical Implications of Asymmetrical Federalism," 33.

73 Burgess, *Comparative Federalism, Theory and Practice*, 219.

74 Watts, *Comparing Federal Systems*, 130.

75 Swenden, *Federalism and Regionalism in Western Europe,* 65.

76 Burgess, *Comparative Federalism, Theory and Practice*, 218–219.

77 Burgess, *Comparative Federalism, Theory and Practice*, 219; Watts, "The Theoretical and Practical Implications of Asymmetrical Federalism," 33.

78 John Stuart Mill and Stephen Nathanson, *Principles of Political Economy* (*Abridged*)*: With Some of Their Applications to Social Philosophy* (Hackett Publishing, 2004), 212–13.

5.4 *Effects on Equality*

Given the points above, several implications come to mind. On the one hand, in multinational systems with federal arrangements, a bicameral legislature leaves space for discussion about equality, especially with regards to the second chamber. Nevertheless, to present a weighted system of the representation of states in the second chamber taking into account differences in population as inequality is shown to be misleading. In like manner, as long as the 'one person, one vote' standard is applied in the first chamber,[79] the principle of equal representation does not violate democratic equality in the second chamber.[80] This is because equality of individual citizens does not demand that all sub-national entities possess equal powers.[81] In addition, the second chamber may, to some extent, counteract the first chamber. In fact, in many federal systems, the second chamber is designed to counterbalance the influence of sub-national entities.[82] Finally, the main problem is that '[t]here is no single standard of equality in federal representation against which we could measure the extent of asymmetry'.[83] On the other hand, inequality may be implicated in the concept of representation in which representatives from sub-national entities are allowed to vote on matters that are of no concern to the entity and/or are also able to dissuade others from voting on matters that only concern their particular entity. This is due to the fact that their voting has a greater weight in the central level decision-making.[84] It must be remembered that, in both cases, a varied treatment can 'breed strong resentment and distrust'[85] and therefore challenge the existence of the system. This is especially true with

79 On this topic also *Federal States and Equality in Political Representation: Federalism Susperseding Democracy?* by Sérgio Ferrari (chapter 11).

80 'Indeed, some political theorists have defended the argument that asymmetry can be reconciled with liberal democracy, as quality for individual citizens does not necessarily require that all regions have equal powers'; Swenden, *Federalism and Regionalism in Western Europe*, 265.

81 Wilfried Swenden and Jan Erk, *New Directions in Federalism Studies*, Routledge/Ecpr Studies in European Political Science no. 65 (London: Routledge, 2010), 265; Swenden, *Federalism and Regionalism in Western Europe.*

82 Ronald L. Watts, "A Comparative Perspective on Asymmetry in Federations," *Asymmetry Series*, no. 4 (2005): 5.

83 Bauböck, "United in Misunderstanding?," 20.

84 John McGarry, "Asymmetry in Federations, Federacies and Unitary States," *Ethnopolitics* 6, no. 1 (2007): 112–113. As this puts these entities in a privileged position, two solutions are suggested: that votes of subnational entities with a special status shall carry less weight in the central level institutions; and that these entities shall not have power to decide on matters that are of no concern to them; Fossas, "National Plurality and Equality," 73–74.

85 Bauböck, "United in Misunderstanding?," 20.

regard to the elicit counter-demands from under-empowered regions. In particular, less empowered sub-national entities will in many cases either try to catch up with more empowered ones or oppose the very principle of asymmetry due to the fact that their position is subject to unfair discrimination, producing critical repercussions for the system.[86]

Equally important, the previous sections show that unlike in traditional federal states in which equal distribution of powers and competences among sub-national entities is expected by default,[87] in contemporary multinational systems with federal arrangements that display asymmetrical features this is not necessarily the case. The reason can be sought in the powers of self-organisation which are closely connected to the first set of indicators. In all federal arrangements, sub-national entities must have powers of self-organisation to be able to implement their attributed competences and powers.[88] Nonetheless, in multinational systems differences in their application may be sometimes understood as a threat to equality. In any case, a different application of the powers of self-organisation among sub-national entities does not stand against the fact that all sub-national entities receive the powers of self-organisation.[89] Instead, it raises an expectation of differences, for example, in procedures. However, the final outcome, in legal terms, should be the same.

Finally, it can be argued that the uneven distribution of fiscal resources may cause uneasy relations between sub-national entities.[90] On one side, resource-rich sub-national entities are more likely to advocate the return of revenues to the entity from which they originate from. On the other side, resource-poor entities are likely to argue for proportional revenue sharing.[91] Then again, there is evidence that some systems have adopted asymmetrical fiscal policies to match the differences among sub-national entities in their responsibilities.[92] The outcome is that the wealthiest sub-national entities discern that

86 Angustias Hombrado, "Learning to Catch the Wave? Regional Demands for Constitutional Change in Contexts of Asymmetrical Arrangements," *Regional & Federal Studies* 21, no. 4/5 (2011): 480.

87 Palermo, "Asymmetries in Constitutional Law," 14.

88 Gardner and Ninet, "Sustainable Decentralization," 6.

89 Fossas, "National Plurality and Equality," 70. For instance, Fossas gives an example of granting the capacity to regulate the extent to which Spanish Autonomous Communities languages may be official within their own territory.

90 Fossas, "National Plurality and Equality," 76.

91 Donald L. Horowitz, "The Many Uses of Federalism," *Drake Law Review* 55 (2007): 960, https://scholarship.law.duke.edu/faculty_scholarship/1855/.

92 Watts, "A Comparative Perspective on Asymmetry in Federations," 5.

they suffer from the asymmetrical design. To illustrate, the case of Catalonia's recent constitutional amendment reflects the intention of the central level to not allow altering of previously determined contributions by each sub-national entity.[93] It has been observed that fiscal arrangements need to be adjusted over time in order to provide correction of inequalities for the purpose of balance between diversity and uniformity of the system.[94]

5.5 *Implications for Legitimacy and Stability*

The previous sections have revealed three important aspects with regards to equality in multinational systems with federal arrangements. First, they made it possible to spell out the aspects of the unequal burden that, so far, have not come across conceptual objections. In fact, these aspects are recognised as elements that make the federal system more responsive.[95] Second, they uncovered the aspects of equal treatment of unequals. Correspondingly, equal treatment of unequals infringes the principle of distributive fairness and provokes asymmetrical pressures.[96] Thirdly, the previous sections pointed to the aspects of unequal treatment of unequals. These aspects display options that include equalisation of unequals. The two latter aspects potentially produce diverse consequences in the relationships among sub-national entities. This is especially thought-provoking as it contains questions about the effects of these aspects on legitimacy and stability in multinational systems with federal arrangements. There are several reasons for this.

On the one side, the concept of legitimacy in multinational systems with federal arrangements depends on a multi-fold basis. To put it differently, it originates not only from the central level but also from a sub-national entity level.[97] Then, when constitutional asymmetries are involved, the concept of legitimacy is complicated by several issues. Firstly, the central level struggles to maintain equilibrium among sub-national entities, while sub-national entities spare no effort to differentiate their position.[98] Secondly, the distribution of

93 Esther Seijas Villadangos, "Answers to Spanish Centrifugal Federalism: Asymmetrical Federalism Versus Coercive Federalism," *Perspectives on Federalism* 6, no. 2 (2014): E-176.

94 Bertus De Villiers, *Evaluating Federal Systems* (Juta & Company, 1994), xiii.

95 Burgess, *Comparative Federalism, Theory and Practice*, 124.

96 Brian Galligan and Richard Mulgan, "Asymmetric Political Association: The Australasian Experiment," in *Accommodating Diversity: Asymmetry in Federal States*, ed. Robert Agranoff (Baden-Baden: Nomos Verlagsgesellschaft, 1999), 57.

97 Gráinne de Búrca, "The Quest for Legitimacy in the European Union," *The Modern Law Review* 59, no. 3 (1996): 353.

98 Patricia Popelier, "Governance and Better Regulation: Dealing with the Legitimacy Paradox," *European Public Law* 17, no. 3 (2011): 9 or 2,3.

power and competences between tiers of government is such that it requires mutual consent.[99] Thirdly, greater fiscal autonomy poses a predicament for differentiation in policy decisions.[100] On the other side, the concept of stability in multinational systems with federal arrangements is not easily stipulated.[101] This is linked to two types of processes, institutional changes and relationships among sub-national entities.[102] That is to say that these two processes stimulate various ways to shape the concept of stability. This is because federal dynamics in multinational systems with federal arrangements create adaptiveness by creating volatile circumstances. And, by transforming these circumstances into aspects that include unequal treatment of unequals and equalisation of unequals, the concept of stability becomes 'a 'relatively' peaceful, constitutional, and democratic adaptation of a political system to changing circumstances'.[103] Finally, these observations confirm two things: that the legitimacy and stability in multinational systems with federal arrangements should be analysed under the scope of prevalent federal dynamics; and, in line with this, that equality in these systems should be addressed as the concept that features dynamic equality.

6 Conclusions

Following contemporary scholarship in federalism that suggests that constitutional asymmetry undermines equality, the main research objective of this chapter was to explore a relationship between constitutional asymmetry and constitutional values. For that purpose, the chapter focused on equality as a distinctive value that is said to undermine the legitimacy and stability of systems where constitutional asymmetries are established. The applied methodology consisted of conventional methods that combine legal analysis with

99 Martin Papillon, "Is the Secret to Have a Good Dentist? Canadian Contributions to the Study of Federalism in Divided Societies," in *The Comparative Turn in Canadian Political Science*, eds. Linda A. White et al. (Vancouver: UBC Press, 2008), 126.

100 Philipp Trein, Giuliano Bonoli and Marcello Natili, "A Federalist's Dilemma: Tradeoffs between Legitimacy and Budget Responsibility in Multitiered Welfare States," *Journal of European Social Policy* 29, no. 1 (February 2019) https://doi.org/10.1177/0958928718781294.

101 Mikhail Filippov, Peter C. Ordeshook and Olga Shvetsova, *Designing Federalism: A Theory of Self-Sustainable Federal Institutions* (Cambridge University Press, 2004), 11–12; Norman, "Justice and Stability," 97.

102 Filippov, Ordeshook and Shvetsova, *Designing Federalism*, 11–13.

103 Filippov, Ordeshook and Shvetsova, *Designing Federalism*, 12.

political science. However, to achieve more structured and detailed analysis, the chapter relied on the indicators of constitutional asymmetry.

A first cornerstone in using this strategy was to reflect on theoretical issues, challenges and difficulties linked to both constitutional asymmetry and the concept of equality. Having argued that multinational systems with asymmetrical features are inclined to constitutional asymmetries, the chapter explored pathways in which constitutional asymmetries relate to equality as a specific constitutional value. A second cornerstone was to test constitutional asymmetries against the concept of equality in order to evaluate effects of equality and implications for legitimacy and stability. This was done by using the indicators of constitutional asymmetry.

In conclusion, this chapter has two important outcomes. First, it enhances our understanding of a complex interaction between constitutional asymmetry, multinationalism, federal arrangements and an impact of constitutional asymmetry on equality in multinational systems with federal arrangements. Second, it opens a discussion about the type of equality that needs to be applied in multinational systems with federal arrangements. Future research should, therefore, concentrate on the investigation of dynamic equality.

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CHAPTER 3

Why the Affection of Federalism for Human Rights Is Unrequited and How the Relationship Could Be Improved

Eva Maria Belser

1 Introduction: A Story of Unrequited Affection[1]

Autonomy and human rights are in an uneasy relationship. Proponents of federal power-sharing usually work on the assumption that territorial autonomy allows actors of different tiers of government to better respect and protect human rights. They are convinced that federalism backs constitutionalism, democracy and good governance and see autonomy rights not as a hindrance to the fulfilment of individual rights and freedoms but as a useful contribution to it. However, human rights organisations and advocates rarely respond positively to the advances made by federalists. As they associate collective autonomy with different human rights standards for citizens of the same state, proponents of human rights generally look sceptically at autonomy arrangements. The federal affection for human rights is thus unrequited. Federal scholars – and international organisations promoting decentralisation and other forms of power-sharing – keep praising federalism as a mechanism able to increase the state's legitimacy and efficiency, as well as to strengthen its capacity to implement minority and human rights. Human rights experts – and international organisations mandated to support human rights implementation – however, are immune to such seduction and advocate for uniform approaches. They insist on the obligation to respect and protect all human beings equally, irrespective of their group affiliation or territory of residence.

This chapter does not question the fact that unequal human rights standards within one country occur when a power-sharing regime is fully implemented. Federalism may in fact cause citizens of a country to be treated differently depending on which subnational and local jurisdiction is applicable to them. Such a situation *prima facie* clashes with the principle of equality and

1 I am very grateful to MLaw Simon Mazidi for his valuable help in the preparation and the editing of this text.

the fundamental requirements of justice for which it stands. However, equality must be understood differently in federal states. The subnational and local units are not inescapably bound to treat their citizens equally to the citizens of other units; they are instead encouraged to improve on international and national standards applicable to all. The major claim of the chapter is thus that inequality, even in the sensitive field of human rights, is not a problem to overcome *per se* but a situation to handle within the framework of national and international human rights obligations.

The chapter first documents the rebuff of federal arrangements by the human rights community. The tendency of human rights bodies to blame and shame federalism for insufficient human rights implementation will be explored by looking at the recommendations the United Nations human rights treaty bodies[2] have issued towards Switzerland and other federal states. I will then attempt to classify these recommendations into three different groups (section 2) and endeavour to identify some of the sources of tensions and reasons for mistrust between the potential partners (section 3). The chapter will then explore avenues for improving the relationship between federalism and human rights and the respective communities. It will first recall the fact that some human rights obligations require the respect of collective rights and oblige state actors to accept and promote diversity (section 4). It will then more generally turn to multilevel human rights implementation and to the assets federalism and other forms of autonomy have to offer and suggest that the complexities of the relationship between autonomy and human rights are underexplored and many crucial questions have yet to be answered convincingly. While it is easy to conclude that we can and must accept unequal human rights standards in federal states, the question of how far inequality can go remains open. By using various examples, the chapter will show that the conventional answer – all actors must respect minimal standard and may improve on them – is not satisfactory (section 5). Finally, the chapter will, therefore, hint at avenues for further research (section 6).

2 The Rejection of Federalism by Human Rights Treaty Bodies

The Swiss Centre of Expertise in Human Rights (SCHR), a pilot project of the federal government in view of the establishment of an independent national

2 Cf. for a comprehensive study of the UN human rights treaty bodies, Helen Keller and Geir Ulfstein, *UN Human Rights Treaty Bodies: Law and Legitimacy* (Cambridge: Cambridge Univ. Press, 2012).

human rights institution, recently analysed the recommendations the United Nations and the Council of Europe had made regarding human rights implementation and implementation deficits in Switzerland during the last years.[3] The comprehensive study, published in six volumes, gives a detailed overview of the evaluation of Swiss human rights efforts and shortcomings by international human rights organisations and their implementation bodies.

When reacting to Switzerland's country and shadow reports, international bodies quite reliably welcome the adaption of new national laws, the establishment or strengthening of national institutions and the making and implementation of national action plans, e.g. the National Strategy to Combat Poverty or the National Action Plan to Fight Human Trafficking.[4] When the country does not report on new federal initiatives but refers to cantonal and municipal competences, international bodies usually frown and call for more national action.[5]

The very numerous recommendations referring to vertical power-sharing can be classified into three categories:

– In the first category, *federalism-blind recommendations*, we find comments and advice reminding Switzerland of its duty to implement human rights obligations throughout the country, irrespective of its internal organisation. Countless recommendations repeat that international treaties are binding on the entire country and that cantonal and municipal competences cannot serve as excuses for implementation deficits.
– The recommendations of the second category, *federalism-adverse recommendations*, refer to federalism as a particular challenge for human rights implementation and suggest that Switzerland harmonises its efforts, in particular by establishing national action plans, providing blueprints and frameworks for actors of all tiers, setting national priorities, coordinating and harmonising actions, and tracking progress nationally.
– In the third category, finally, we find *federalism-hostile recommendations*. These recommendations refer to federalism as a serious problem for human rights implementation and openly criticise subnational competences.

3 Schweizerischen Kompetenzzentrums für Menschenrechte, *Umsetzung der Menschenrechte in der Schweiz,* Schriftenreihe SKMR (Bern: Editions Weblaw, 2013–2014).

4 Cf. e.g., Human Rights Committee, *Concluding Observations on the Fourth Periodic Report of Switzerland*, CCPR/C/CHE/CO/4 (2017), para. 3 or Committee on the Elimination of Discrimination against Women, *Concluding Observations on the Combined Fourth and Fifth Periodic Reports of Switzerland*: CEDAW/C/CHE/CO/4–5 (2016), para. 5.

5 Judith Wyttenbach, *Umsetzung von Menschenrechtsübereinkommen in Bundesstaaten: Gleichzeitig ein Beitrag zur grundrechtlichen Ordnung im Föderalismus* (Baden-Baden, Zürich, St. Gallen: Nomos Dike, 2017), 148.

Federalism-hostile recommendations demand unified and unifying actions, for instance, by the adoption of a national law or other uniform rules or by national actions eliminating different human rights standards in the country.

The three categories of recommendations affect federalism and human rights in very different ways. While the first group states a matter of course, the second and the third groups question the conduciveness of federalism to human rights implementation.

2.1 *Federalism-Blind Recommendations*

Federalism-blind recommendations are very frequently issued when evaluating Switzerland and other federations.[6] Typical recommendations summon Switzerland to 'ensure that the authorities in all cantons and municipalities are aware of the Committee's recommendations and guarantee their proper implementation'[7] or 'to work to promote equal representation of women in political life at all levels'.[8] In rare cases, international treaty bodies express concern about the situation in one or more cantons, e.g. regarding the overcrowding of prisons in the Canton of Geneva or the detention of unaccompanied minors unseparated from adults in some cantonal institutions.[9]

Federalism-blind human rights recommendations are unproblematic from both a federal and an international human rights viewpoint. From a federal perspective, it is uncontroversial that autonomy arrangements allow for diversity only within the binding framework of superior law.[10] Vertical power-sharing between actors of different government tiers constitutes no blank check to violate the country's international obligations. Subnational units are obliged to use their competences in the field of culture, education, religion, health or economic development in a way that does not fall behind any of

6 Committee on the Elimination of Discrimination against Women, *Concluding Observations of the Committee on the Elimination of Discrimination Against Women*: *Canada,* CEDAW/C/CAN/CO/7 (2008), para. 11; Committee on the Elimination of Discrimination against Women, *Concluding Observations on the Combined Eighth and Ninth Periodic Reports of Canada*, CEDAW/C/CAN/CO/8–9 (2016), para. 11; Committee on the Elimination of Discrimination against Women, *Concluding Observations of the Committee on the Elimination of Discrimination Against Women: Belgium*, CEDAW/C/BEL/CO/6 (2008), para. 12; see for a further assessment on the unequal implementation of the UN Conventions rights in a federal state Wyttenbach, *Umsetzung von Menschenrechtsübereinkommen in Bundesstaaten*, 135 et seqq.

7 CCPR, *Concluding Observations*, /C/CHE/CO/4 (2017), para. 9.

8 CCPR, *Concluding Observations*, /C/CHE/CO/4 (2017), para. 19.

9 Committee against Torture, *Concluding Observations on the Seventh Periodic Report of Switzerland,* CAT/C/CHE/CO/7 (2015), para. 17 and 19.

10 Cf. art. 49(1) Swiss Federal Constitution.

the national or international, justiciable or programmatic, human rights obligations. Diversity, as protected by the constitution, is contained by unity, as defined namely by international and constitutional human rights. Exclusive, concurrent or parallel competences of subnational units are limited by overriding international and national law and all subnational law must give in in case of conflict.[11]

From an international human rights perspective, federalism-blind human rights recommendations are equally self-evident. Under the notion of '*pacta sunt servanda*' the Vienna Convention on the Law of Treaties famously states that every treaty in force is binding upon the parties to it and must be performed by them in good faith.[12] The Convention adds that 'a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty'.[13] The unitary, decentral, regional or federal character of a state party has no impact on the country's international obligations and is rightly of little or no concern to international organisations and treaty bodies.[14] The country as such is responsible for treaty implementation, irrespective of its internal power-sharing arrangement.[15]

Federalism is thus obviously no excuse to fall behind on international human rights obligations. While internally, the federal tier may find it difficult to ensure full and speedy compliance with international duties because it lacks (comprehensive) competences, externally such difficulties are irrelevant.[16] If one canton or municipality disrespects human rights, the state falls short of its international obligations. All multi-tier states must hence find mechanisms to apply international and national laws to the entire territory and enforce their primacy over all conflicting subnational laws and acts. If a state is unwilling or

11 Francesco Palermo and Karl Kössler, *Comparative Federalism: Constitutional Arrangements and Case Law* (Portland, Oregon: Hart Publishing, 2017), 130 et seqq.

12 Art. 26 of the Vienna Convention on the Law of Treaties.

13 Art. 27 of the Vienna Convention on the Law of Treaties; see Committee on Economic, Social and Cultural Rights, *General Comment No. 9: The Domestic Application of the Covenant,* E/C.12/1998/24 (1998).

14 Committee against Torture, *Consideration of Reports Submitted by States Parties Under Article 19 of the Convention: Concluding Observations of the Committee Against Torture, Switzerland,* CAT/C/CHE/CO/6 (2010), para. 6.

15 Florian Weber, "Die Umsetzung völkerrechtlicher Verträge im Bundesstaat," in *Föderalismus 2.0 – Denkanstösse und Ausblicke*, eds. Bernhard Waldmann, Peter Hänni and Eva Maria Belser (Bern: Stämpfli, 2011), 222.

16 Christoph Spenlé and Jan Skalski, "Das Staatenberichtsverfahren vor dem UNO-Ausschuss gegen die Diskriminierung der Frau: Das unterschätzte Instrument: Zur Funktion und Struktur der UNO-Staatenberichtsverfahren und ihrer Bedeutung für die Schweiz," *Jusletter*, 31 Ocober 2011, No. 51.

unsuccessful in using these mechanisms, international bodies rightly insist on the respect and protection of human rights by all state actors, be they federal, cantonal or municipal.

2.2 *Federalism-Adverse Recommendations*

Federalism-adverse recommendations refer to federalism and other autonomy arrangements as particular challenges for the proper implementation of human rights. The Human Rights Committee, for example, stated that it 'takes note of the federal structure of the Swiss State and the division of powers between the authorities at the federal, cantonal and municipal levels. It remains concerned, however, about information suggesting that the commitment on the part of the cantonal and municipal authorities to the implementation of its recommendations is limited.'[17] In order to make up for the situation, the Committees usually suggest that the federal tier should interfere and recommend strengthening national actors or adopting national action plans. The Human Rights Committee, for instance, invited Switzerland to 'redouble its efforts to combat the commission of or incitement to commit acts of racial or religious hatred, notably by strengthening the mandate of the Federal Commission against Racism and by envisaging the adoption of a national plan of action against racism'.[18] In the same report, it also suggested that in order to better protect persons leading a nomadic way of life, Switzerland 'should establish with the cantons a coordinated action plan to ensure that sufficient stopping areas are made available to Travellers'.[19] Similarly, the Committee on Economic, Social and Cultural Rights called for the adoption of a 'national action plan for the prevention of suicide'.[20] In addition to such a specific measure, the harmonisation of human rights measures at federal level is frequently proposed. The country should, for instance, 'establish expeditiously' universal and independent mechanisms with powers to receive all complaints concerning police violence and to maintain centralised statistics.[21] Similarly, the Committee on Economic, Social and Cultural Rights encouraged Switzerland to promote the harmonisation of standards for access to preschool and childcare, 'so as to

17 CCPR, *Concluding Observations*, /C/CHE/CO/4 (2017), para. 8.
18 CCPR, *Concluding Observations*, /C/CHE/CO/4 (2017), para. 21.
19 CCPR, *Concluding Observations*, /C/CHE/CO/4 (2017), para. 51.
20 Committee on Economic, Social and Cultural Rights, *Consideration of Reports Submitted by States Parties Under Articles 16 and 17 of the Covenant: Concluding Observations of the Committee on Economic, Social and Cultural Rights, Switzerland*, E/C.12/CHE/CO/2–3 (2010), para. 19.
21 CCPR, *Concluding Observations*, /C/CHE/CO/4 (2017), para. 29.

ensure that all children living in the territory of the State party have the same opportunities to benefit'.[22] It also asked to set 'common standards for access and entitlement to social aid'.[23]

Federalism-adverse recommendations, calling for targeted national interventions or comprehensive national strategies and frameworks,[24] are questionable from a federal point of view. They often recommend measures, which the national constitution does not allow the federal tier to take. Such international invitations to disrespect entrenched national power-sharing arrangements are problematic. If one or several subnational units use their internal competences in a way which is incompatible with the country's international obligations, the state party is undoubtedly bound to remedy the situation. The means used to do so, however, are up to the state to identify. States should not make their best efforts to fully implement international human rights at the price of constitutionalism and the rule of law, but must ensure implementation methods which are constitutional and, in federal systems, respectful of autonomy rights. Federal governments are equipped with mechanisms, such as judicial review, supervisory and intervention powers, allowing them to impose the supremacy of international over subnational law and practice. Therefore, when a subnational unit violates international human rights, the application of these mechanisms to enforce the relevant right in that unit should be the first consequence. While international bodies tend to see even unconstitutional unification and harmonisation as the only way forward, federal state parties should rather be summoned to use their constitutional powers to bring subnational outliers in line. Such targeted interventions are often more effective than the adaption of national plans and frameworks, which tend to codify a national minimum and, in the absence of implementation mechanisms, run the risk of being disrespected by the very same subnational actors violating international obligations in the first place. Hence the real issue at stake is the proper design and use of supervisory and intervention powers to deal with human rights violations, wherever they may occur. Often, the increase of information and human rights awareness, the strengthening of the judicial system

22 CESCR, *Concluding Observations*, E/C.12/CHE/CO/2–3 (2010), para. 22.

23 CESCR, *Concluding Observations*, E/C.12/CHE/CO/2–3 (2010), para. 12.

24 CESCR, *Concluding Observations*, E/C.12/CHE/CO/2–3 (2010), para. 19; CCPR, *Concluding Observations*, /C/CHE/CO/4 (2017), para. 41; Committee on the Rights of the Child, *Concluding Observations on the Combined Second to Fourth Periodic Reports of Switzerland,* CRC/C/CHE/CO/2–4 (2015), para 9, 11, and 13; Committee on the Elimination of Discrimination of Discrimination against Women, *Concluding Observations of the Committee on the Elimination of Discrimination Against Women*: *Switzerland,* CEDAW/C/CHE/CO/3 (2009), para. 20 and 22.

and initiatives to improve access to courts, in particular for vulnerable persons, are the most promising ways forward, rather than the national proliferation of human rights commitments.[25]

Federalism-adverse recommendations are debatable from a human rights perspective, too. They implicitly start from the assumption that unified and harmonised human rights standards will automatically guarantee better human rights implementation. This assumption is, however, erroneous as will be further demonstrated below. Uniform standards can just as well lead to a minimal national agreement and prevent progressive units from excelling. Instead of forcing all federal actors to uniform standards, it appears as more promising to oblige actors who are not fulfilling their duties to improve.[26]

2.3 *Federalism-Hostile Recommendations*

Federalism-hostile recommendations refer to federalism as an obstacle to human rights implementation and criticise subnational competences and the inequalities resulting from them. They suggest the limitation or suppression of subnational autonomy and the adoption of uniform actions. The aim of federalism-hostile recommendations is to eliminate different human rights standards in a country, irrespective of the country's internal organisation. Federalism-hostile recommendations, for instance, express serious concerns about 'the fact that the cantons lack a common procedure'[27] and ask Switzerland 'to see to it that the cantons establish a uniform and coordinated procedure for identifying trafficking victims'.[28] The Committee also recommends 'that the State party considers adopting a comprehensive anti-discrimination law enforced uniformly throughout the confederation'.[29] Regarding the implementation of the UN Covenant on economic, social and cultural rights, the Committee recommends that Switzerland 'take steps to agree upon comprehensive legislation giving effect to all economic, social and cultural rights uniformly between the federal Government and the cantons'. It also encourages the country 'to pursue its efforts of harmonizing cantonal laws

25 Cf. Solomon Ebobrah and Felix Eboibi, "Federalism and the Challenge of Applying International Human Rights Law Against Child Marriage in Africa," *Journal of African Law* 61, no. 3 (2017).

26 Eva Maria Belser, "Kantonale Grundrechte und ihre Bedeutung für die Verwirklichung der Menschenrechte im mehrstufigen Staat," in *Die Europäische Menschenrechtskonvention und die Kantone*, eds. Samantha Besson and Eva Maria Belser (Geneva, Zurich, Basel: Schulthess 2014), 81 et seq.

27 CCPR, *Concluding Observations*, /C/CHE/CO/4 (2017), para. 40.

28 CCPR, *Concluding Observations*, /C/CHE/CO/4 (2017), para. 41.

29 CESCR, *Concluding Observations*, E/C.12/CHE/CO/2–3 (2010), para. 7.

and practices to ensure equal enjoyment of Covenant rights throughout the confederation'.[30]

Federalism-adverse recommendations are problematic from a federal, constitutional and a human rights point of view. They encourage states to disrespect their own constitutions and the power-sharing regime that they have established. By imposing uniform solutions, they also forego the opportunity of creating a competitive atmosphere of progressive human rights improvement within the state and run the risk of impairing efficient and comprehensive human rights implementation by the joined forces of all tiers of government. The above-mentioned danger that national bodies settle on minimum standards and race these standards to the bottom, and not to the top, is real. Just as it is easier for individual states to agree on higher standards than what has been achieved between the very diverse international actors in global arenas, it is more likely for small and often more homogenous subnational units and local entities, such as cities, to strive for human rights standards that exceed the international minimum than for country as a whole. The more diverse the actors sitting around the decision-making table are, the more likely it is that they settle on a minimal agreement. Once uniform solutions have been established, they hinder regional and local innovation in human rights and prevent state actors – who are closest to the people, their needs and priorities – to experiment with new rights and freedoms as well as innovative implementation instruments. Comprehensive national legislation typically leaves either no legal space or no incentive for subnational units and local governments to improve standards above nationwide and international consensus.

3 Some Causes for the Unhappy Relationship

The UN treaty bodies' practice concerning Switzerland shows a rather sceptical approach to the federal system of the country. Federalism-adverse or federalism-hostile recommendations issued by the UN treaty bodies hint at the fact that from an international law perspective, federalism and multilevel governance are perceived as preventing the effective implementation of international human rights obligations. Before recalling to what extent numerous overlaps between federalism and human rights exist and reiterating the opportunities offered by multilevel human rights implementation, I will try to explore some of the reasons for the unhappy relationship. Why indeed does

30 CESCR, *Concluding Observations*, E/C.12/CHE/CO/2–3 (2010), para. 5.

the federal affection for human rights, despite the theoretical and often very practical advantages power-sharing has to offer, remain unrequited? What are the reasons for the international human rights community showing such a high level of mistrust towards power-sharing arrangements and cantonal and municipal competencies? As in most unhappy relationships, the reasons are manifold and linked to the different backgrounds and upbringings of the partners, the negative experiences the companions have had in the past and expect for the future, and the lack of open and regular communication that would help to overcome misunderstandings and bridge differences.

3.1 *The Different Backgrounds of the Partners*

One source of misunderstanding concerns the different approaches federal and human rights communities apply towards human rights implementation. While proponents of power-sharing arrangements tend to look at regionally and locally found and owned solutions and show a preference for bottom-up approaches to human rights implementation, advocates of human rights start from universal standards and are inclined towards top-down improvements.

The different approaches can be seen as part of the more general controversies about the universality or cultural relativity of human rights, but very often have just as much to do with the different trajectories and career paths of the respective actors. Experts of federalism, on the one hand, are often overwhelmed by the complexities of internal power-sharing and by the intricacies of establishing counter-majoritarian mechanisms entrenching autonomy for smaller and vulnerable groups; their focus lies on the protection and promotion of internal diversity, sometimes to the neglect of international law. Experts of human rights, on the other hand, frequently emphasise international obligations and show limited interest in domestic law. The respective neglect of other disciplines often has its source in different training paths and the separation of international and constitutional law at universities and in research. Experts in both communities have various educational backgrounds and often lack sensitivity and sometimes knowledge about the concepts and rules of the other field. There are presumably few federal scholars thoroughly following their countries' international obligations and the concerns of international treaty bodies, and there are probably even fewer human rights actors examining domestic constitutions beyond the human rights catalogue. While federalists work nationally and subnationally, human rights experts are active on the national and international level. The former are part of internal power struggles, the latter cooperate globally. The human rights community, linked with powerful international human rights organisation, are active in submitting shadow reports and presumably have a crucial impact on international

recommendations; the federalism community does not have similar networks and does not generally take part in the reporting and follow-up processes of human rights treaties. Overall, the two communities rarely meet.

3.2 *Negative Experiences*

Another source of mistrust between proponents of federalism and human rights stems from past and current experiences with bottom-up and top-down approaches to human rights. In the past and present, subnational actors have attempted to refer to self-rule as a justification for not respecting and protecting the rights and freedoms of all their citizens.[31] Famously, the southern states of the USA did not implement equal rights for black citizens until constitutional amendments, decisions of the Federal Supreme Court and the deployment of the National Guard forced them to do so.[32] Notoriously, the Swiss canton of Appenzell Innerrhoden refused to accept women's voting rights until it was obliged to do so by a judgement of the Federal Supreme Court in 1990.[33] Such experiences seem to teach us that national authorities are the only reliable guarantor of universal human rights.

This is especially true for new and fragile federations introducing federalism to overcome internal conflicts and deal with legacies of marginalisation and oppression. Federalism is often planted in conflict-ridden ground where trust between groups and regions is lacking. In such a fragile context, subnational autonomy can be perceived as a proxy to regional nationalism, or as a blank cheque for power abuse. It thus does not come as a surprise that in states negotiating or implementing federal systems, fears of human rights violations by subnational actors often loom. Will subnational actors organise themselves democratically or be captured by regional elites? Will they turn against minorities within minorities and serve smaller groups (including members of the majority groups residing on their territory) with the treatment they are escaping from? Will traditional groups use self-rule to break free from more liberal or progressive national rules and policies? Will the self-determination of groups come at the price of gender equality and LGBT rights?

Such fears, as justified as they might be in a specific context, disregard the fact that international and national human rights are binding on all state actors on all tiers of government. It is a characteristic of federal systems that

31 Nico Steytler, "The Constitutional Conversation Between the Federal Structure and a Bill of Rights," *IFF Working Paper Online* No. 2, 7.

32 Oliver Brown, et al. v. Board of Education of Topeka, et al., 347 U.S. 483 (1954).

33 Decision of the Swiss Federal Court, BGE 116 Ia 359; Eva Maria Belser, "Kantonale Grundrechte", 77 et seqq.

international and national law, most importantly human rights, take precedence over conflicting subnational laws and decisions. Federalism thus does not come with an inherent risk of human rights violations. Federal diversity unfolds in unity, and ends where overriding values, in particular human rights, are at stake. In no federal system does regional and local autonomy include the possibility of autonomous actors to opt out of binding international human rights obligations. It is rather a characteristic of federations that national constitutions, including their human rights catalogue, are enforced by neutral umpires, supreme or constitutional courts, and that all laws and decisions violating the constitution – whether of national, subnational or local origin – are invalid.[34] Hence, the real concern is an overall legal and political commitment to human rights, constitutionalism and an independent judiciary – often lacking in federal as well as unitary states.

It is true that human rights violations often occur in conflict-prone and fragile states characterised by deep inequalities between groups and regions. This risk, however, exists independently from the state's internal organisation and must be mitigated by giving priority to human rights implementation. If national actors (and international actors such as donors) fail to do so, human rights violations will persist in some or all regions of the state no matter whether vertical power sharing has been put in place or not. Blaming federalism for human rights violations thus is often like kicking the dog instead of its master. The tremendous discrepancies between international norms on the one hand, and local realities on the other, should rather be tackled for what they are: enforcement gaps. It is hard to see how these could be overcome without strengthening (instead of weakening) local institutions for the protection of human rights.[35]

3.3 *The Lack of Communication*

Another source of difficulty seems to come from the lack of appropriate communication between the international human rights bodies and federal states. Even in the national sphere, conversations between federalism and human rights are slow to develop. In research and practice, the two communities perceive themselves as foes rather than friends. The human rights focus

34 Ronald L. Watts, *Comparing Federal Systems*, 3rd ed. (Montreal and Kingston: McGill-Queen's University Press, 2008), 157 et seqq.; Palermo and Kössler, *Comparative Federalism*, 130 et seqq.

35 See Axel Marx et al., *Multilevel Protection of the Rule of Law and Fundamental Rights: The Role of Local and Regional Authorities and of the Committee of the Regions* (European Union, 2014), 9 et seqq.

usually lies on the tensions created by guarantees seeking to protect universal human rights norms and subnational autonomy, creating an obstacle to such an aim.[36] In contrast, the federal approach aims at a balanced combination of self-rule and shared rule and tends to perceive sweeping universal standards as a potential threat to diversity.[37] By guaranteeing rights and freedoms for all and empowering international treaty bodies and national authorities to monitor their implementation, human rights obligations are seen as mechanisms transferring decision-making powers to national and international actors and allowing them to develop and consolidate single standards applicable throughout the country.[38]

Canadian history is particularly telling in this regard. When the Canadian Bill of Rights was enacted in 1960 as an ordinary law, it was made applicable only to federal laws and did not cover provincial violations of civil liberties. It was only in 1982 that the Charter of Rights became part of Canadian constitutional law and applicable to federal as well as provincial acts of government. Ever since 'the Charter Revolution',[39] human rights are said to have a centralising effect on Canadian federalism. As in other federations, the constitutional human rights guarantees do not confer any additional powers on the federal tier but limit the powers of both federal and provincial governments. By setting a uniform national standard for the protection of civil liberties in formerly exclusive provincial jurisdictions, its centralising effect is subtler than other centralising efforts. The Charter is a unifying instrument as it intrudes into provincial competences by nationalising debates on controversial matters such as school prayers, the funding of denominational schools, Sunday closing and other religious rights, minority language education and other linguistic rights, the right to strike, police powers, pornography and hate speech, abortion, and same-sex marriage. Irrespective of the federal power-sharing arrangements and provincial competences, the Supreme Court of Canada – like other

36 See for historic debates in Canada and the United States Jamie Cameron, "Federalism, Treaties, and International Human Rights Under the Canadian Constitution," *Wayne Law Review* 48, no.1 (2002), 1 et seqq.; Koren L. Bell, "From Laggard to Leader: Canadian Lessons on a Role for U.S. States in Making and Implementing Human Rights Treaties," *Yale Human Rights and Development Law Journal* 5, no. 1 (2002), 255 et seqq.

37 Steytler, "The Constitutional Conversation Between the Federal Structure and a Bill of Rights", 3; cf. also Wyttenbach, *Umsetzung von Menschenrechtsübereinkommen in Bundesstaaten*, 251.

38 Céline Fercot, "Perspectives on Federalism: Diversity of Constitutional Rights in Federal Systems," *European Constitutional Law Review* 4, no. 2 (2008), 320.

39 Frederick L. Morton and Rainer Knopff, *The Charter Revolution and the Court Party* (Peterborough: Broadview Press, 2000).

Federal or Supreme Courts – has the final say in all matters involving chartered rights.[40]

Most federal scholars assume that national human rights actors such as constitutional or supreme federal courts have shown as little consideration for autonomy rights as international treaty bodies. The history of most established federations, they claim, tells stories of shrinking subnational policy space due to nationalised and international rights and freedoms.[41] In most countries, subnational actors continuously see their room for manoeuvre limited by national developments, which are not infrequently triggered by international recommendations and international soft law. Regional and local authorities often feel that their constitutional competences in the field of education, health and social assistance give way to uniform service delivery standards established to strengthen equal citizenship at the expense of autonomy.[42] In contrast, national human rights actors often see federalism as nothing else than a burden of history that should best be overcome and replaced by efficient and uniform human rights strategies.

The fact that advocates of federalism fear the centralising effect of human rights and courts which enforce them, and that national and international human rights bodies are unimpressed by vertical power-sharing and unwilling to respond to references to autonomy rights is caused, at least in part, by a lack of communication. The different focal points of human rights and federalism generate misunderstandings often making necessary dialogues inert. Some of the early reports of Switzerland to human rights treaty bodies, for instance, were full of gaps and voids when the country reported on the implementation of human rights by cantons and municipalities. While the reports gave detailed account of national measures in the fields of federal competences, they limited themselves to passing references to cantonal and municipal competences in

40 See Peter W. Hogg, "Federalism Fights the Charter of Rights," in *Federal and Political Community: Essays in Honour of Donald Smiley*, eds. David P. Shugarman and Reginald Whitaker (Peterborough: Broadview Press, 1989), 249 et seqq.

41 Cf. for the United States John Kincaid, "Values and Value Tradeoffs in Federalism," in *Federalism: Volume 1: Historical and Theoretical Foundations of Federalism*, ed. John Kincaid, Sage library of political science (Los Angeles: SAGE, 2011), 251 and William J. Brennan, JR., "The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights," *New York University Law Review* 61, no. 4 (1986), 540 et seqq.; cf. for Canada Roger Gibbins, Rainer Knopff, and Frederick L. Morton, "Canadian Federalism, the Charter of Rights, and the 1984 Election," *Publius: The Journal of Federalism* 15, no. 3 (1985); cf. for South Africa Steytler, "The Constitutional Conversation Between the Federal Structure and a Bill of Rights".

42 Steytler, "The Constitutional Conversation Between the Federal Structure and a Bill of Rights", 10 and 16.

all others. When reacting to international human rights recommendations (on matters relating to education, health or policing), some official documents of the federal government would limit themselves to pointing to cantonal competences, basically requesting that the treaty bodies not blame the national drafters of the report for the shortcomings of other actors over which they do not exercise any influence. Even today, numerous country reports are very extensive and even loquacious when it comes to presenting national initiatives taken and federal laws made and, conversely, sketchy or silent when it comes to subnational activities. Unfortunately, insufficient efforts are being made to comprehensively document human rights improvements and innovations made by cantons and municipalities, even though these could be inspirational for international bodies, feed into reports and recommendations, and create multilevel and transnational feedback and learning loops.

In our analysis for the Swiss Centre of Expertise in Human Rights, we studied the mechanisms used in Switzerland to react to international human rights recommendations and to organise follow-up procedures, and were obliged to recognise that the relations between the federal and cantonal tier were full of tensions in the field. To prepare the very numerous country reports, different federal actors would send questionnaires to various cantonal actors, often requiring considerable amounts of data, documents and information, sometimes on short notice and sometimes asking for completion of forms, classifications and categories, which the cantons (or the municipalities) were not able to provide.[43] Consequently, a vicious circle developed. Cantons did not report to the federal government or only handed in rather summary information. Therefore, the reports made by Switzerland documented only very partially the numerous cantonal initiatives in human rights fields. This led to the international treaty bodies issuing federalism-adverse or -hostile recommendations which, when forwarded to the cantons, further alienated them from the international human rights mechanisms. As complying to manifold international reporting duties and implementing numerous recommendations constitutes a real challenge for multilevel systems with multiple power centres, we presume that the difficulties we documented are not unique to Switzerland.[44]

43 Schweizerisches Kompetenzzentrum für Menschenrechte, *Die Umsetzung internationaler Menschenrechtsempfehlungen im föderalistischen Staat: Perspektiven für das Follow-up zu den "Abschliessenden Bemerkungen" der* UNO*-Vertragsorgane in der Schweiz* (Bern, 2012), 22 et seq.

44 See e.g. Human Rights Council, *Report of the Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living, and on the Right to Non-discrimination in This Context,* Leilani Farha: A/HRC/28/62 (2014), para. 5, 6 and 27.

While some improvements have been made and coordinating bodies set up, it seems obvious that the reporting systems within federal countries must be further developed in order to produce productive feedback loops. There is an urgent need to establish and strengthen mechanisms to document local human rights initiatives properly and to feed this information into international review mechanisms. Such multilevel reporting will improve the understanding between federal and uniform approaches to human rights and inform international actors about human rights successes, difficulties and failures on the ground, a necessity for international learning from each other.[45]

4 Avenues for Advances

At first sight, it seems like there are structural limits regarding the compatibility of human rights and federalism as both are trying to promote different agendas.[46] While international human rights bodies are dedicated to protecting and promoting universal human rights norms, the federal spirit embodies a desire to enhance subnational autonomy.[47] At second glance, however, numerous commonalities and chances for cooperation appear.

First, human rights and federalism aim at compatible and mutually reinforcing objectives. Both intend to improve governance and to protect diversity. Insofar as federal arrangements constrain power by establishing vertical checks and balances, they contribute to preventing power abuses and thus, similar to human rights, serve to limit state power and to strengthen rights and freedoms.[48] Constrained power is more likely to respect and protect human rights – in particular, civil and political rights – than uncontrolled power.

Second, in states characterised by ethnic, religious or linguistic diversity, sharing power between groups and regions can be a requirement of international law. To recommend limiting or abandoning federal systems in such

45 Eva Maria Belser and Simon Mazidi, "Das Zusammenwirken von Bund und Kantonen bei der Einhaltung völkerrechtlicher Menschenrechtsverpflichtungen der Schweiz," in *Jahrbuch des Föderalismus 2018: Föderalismus, Subsidiarität und Regionen in Europa*, ed. Europäisches Zentrum für Föderalismus-Forschung Tübingen (EZFF) 19 (Baden-Baden: Nomos, 2018), 257.

46 Cf. Wyttenbach, *Umsetzung von Menschenrechtsübereinkommen in Bundesstaaten*, 250 et seq.

47 Steytler, "The Constitutional Conversation Between the Federal Structure and a Bill of Rights", 3; cf. also Kincaid, "Values and Value Tradeoffs in Federalism", who draws a similar line between individual and communitarian liberty, 250.

48 Wyttenbach, *Umsetzung von Menschenrechtsübereinkommen in Bundesstaaten*, 250.

a context, therefore, makes no sense, either from a federal or from a human rights perspective. Given the generally negative approach of international human rights bodies towards federalism and the various reasons for misunderstandings and distrust, it seems appropriate to recall that the full implementation of human rights often requires domestic power-sharing arrangements. In such situations, federalism and human rights are clearly friends rather than foes.

4.1 *The Right to Self-Determination*

As far as federal systems serve to implement the right to self-determination of nations or peoples, multi-tier governance follows a human rights agenda. The right to self-determination of peoples is an aim of the United Nations[49] and the only human right guaranteed in both UN human rights covenants. Peoples have an internationally guaranteed right 'to freely determine their political status and freely pursue their economic, social and cultural development'.[50] According to the High Commission for Human Rights, the right of self-determination 'is of particular importance because its realization is an essential condition for the effective guarantee and observance of individual human rights and for the promotion and strengthening of those rights'.[51] Insofar as the right to self-determination is implemented internally (and not externally, through secession namely), it requires some form of power-sharing between the different peoples of the same state.[52]

As establishing a federal system is one way of implementing the right to self-determination, it is surprising that UN Treaty Bodies – by recommending unified laws and uniform implementation – suggest limiting or abandoning such a regime. There can be no doubt that federal systems are a privileged mechanism for multinational states to respect the right to internal self-determination and to prevent separatists from turning into secessionist claims for external self-determination. At least for states hosting diverse peoples, federalism-adverse or even hostile recommendations go against the spirit of Article 1 of the Covenants and thus against the mandate of the UN treaty bodies.

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49 Art. 1 and Art. 55 UN Charter.

50 Art. 1 of both UN Covenants.

51 Human Rights Committee, *CCPR General Comment No. 12: Article 1* (*Right to Self-Determination*)*, the Right to Self-Determination of Peoples* (1984), No. 1.

52 See e.g. Obiora Chinedu Okafor, "The International Law of Secession and the Protection of the Human Rights of Oppressed Substate Groups: Yesterday, Today and Tomorrow," in *Nigerian Yearbook of International Law 2017*, eds. Chile Eboe-Osuji and Engobo Emeseh (Cham: Springer International Publishing, 2018), 143 et seqq.

4.2 *The Rights of Minorities*

The same is true for recommendations questioning minority rights arrangements. The Covenant on Civil and Political Rights obliges states with ethnic, religious or linguistic minorities to respect their right 'to enjoy their own culture, to profess and practice their own religion, or to use their own language' in community with the other members of their group.[53] One way of protecting the interests of minorities and respecting their rights is to transfer powers to the respective regions or groups.[54] Minorities concentrated in one or more regions of the country then do not depend on central authorities to enjoy their culture, religion and language but autonomously establish their own institutions and policies. The will to fully implement these minority rights can thus lead states characterised by diversity to preserve or to establish power-sharing regimes designed to accommodate the members of minority groups. In the case of minority groups, the strong link between human rights and autonomy becomes evident as self-rule and autonomy in some policy areas ultimately contribute to the fulfilment of human rights. The aim of such arrangements is not to create groups more privileged than others. It is rather to guarantee conditions in which minorities are able to enjoy human rights equally with other groups, to effectively prevent assimilation and to offer smaller groups entrenched mechanisms protecting them from being overruled by the majority in policy fields linked to their language, religion, culture and ways of life.[55]

This is in line with the UN Declaration of 1992[56] requesting states to protect minorities, to promote their identities, and to adopt appropriate legislative and other measures (Article 1). The Declaration makes it clear that persons belonging to minorities have a right to enjoy and develop their culture, religion and language, the right to maintain their own associations and 'the right to participate effectively in decisions on the national and, where appropriate, regional level'. Although there are many ways to fulfil these obligations, federal states – which combine minority self-rule and participation in the establishment of shared rule – are certainly in line with the wording and spirit of the Declaration. When human rights bodies, in such contexts, recommend

53 Cf. art. 27 CCPR.

54 James A. Gardner, "In Search of Sub-National Constitutionalism," *EuConst* 4 (2008), 334; cf. also Watts, *Comparing Federal Systems*, 165 et seqq; Steytler, "The Constitutional Conversation Between the Federal Structure and a Bill of Rights", 7.

55 Cf. Surendra Bhandari, *Self-Determination & Constitution Making in Nepal: Constituent Assembly, Inclusion, & Ethnic Federalism* (Singapore: Springer, 2014).

56 UN General Assembly, *Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities*, 3 February 1992, A/RES/47/135.

establishing national laws, frameworks and actions plans, they risk encouraging states to impinge on the rights of minorities. This being said, it is undoubtedly true that the effective protection of all minorities, including small and scattered groups, requires additional measures as well as mechanisms ensuring that all subnational actors respect and promote the minority rights of all groups living on their territory.

4.3 *The Rights of Indigenous Peoples*

Finally, the protection of indigenous peoples' rights can push states to establish and develop autonomy arrangements.[57] Indigenous peoples, often simultaneously qualifying as both peoples and minorities, enjoy specific protection by ILO Conventions[58] and a UN Declaration (UNDRIP). Indigenous and tribal peoples have the right to the respect and protection of their identity,[59] to special actions compatible with their aspirations and ways of life,[60] 'special measures for safeguarding the persons, institutions, property, labour, cultures and environment of the peoples concerned'[61] and a right to consultation and participation.[62] The ILO Convention also states that indigenous peoples have 'the right to decide their own priorities for the process of development as it affects their lives, beliefs, institutions and spiritual well-being and the lands they occupy or otherwise use, and to exercise control, to the extent possible, over their own economic, social and cultural development'.[63] In addition, 'they shall participate in the formulation, implementation and evaluation of plans and programmes for national and regional development which may affect them directly'.[64]

In short, the respect of indigenous rights requires states hosting such groups to establish a system of self-rule and shared rule – i.e. to create or maintain some sort of a federal system. Here again, the purpose of a specific power-sharing arrangement responding to the needs of indigenous peoples does not promote political fragmentation but rather strengthens political unity by e.g.

57 See e.g. Mauro Barelli, "The Interplay Between Global and Regional Human Rights Systems in the Construction of the Indigenous Rights Regimes," *Human Rights Quarterly* 32, no. 4 (2010), 959 et seqq.

58 International Labour Organisation (ILO), *Indigenous and Tribal Peoples Convention, C169*, 27 June 1989.

59 Art. 1 ILO-Convention 169.

60 Art. 2 ILO-Convention 169.

61 Art. 4 ILO-Convention 169.

62 Art. 6 ILO-Convention 169.

63 Art. 7 ILO-Convention 169.

64 Art. 7 ILO-Convention 169.

ensuring equal citizen rights to indigenous peoples (Article 6 UNDRIP). When it comes to respecting the rights of autochthonous peoples, human rights are the starting point and the endpoint of any power-sharing arrangements. Firstly, this is because local autonomy and self-rule is construed as a means to realise human rights effectively. Secondly, indigenous peoples' rights cannot be invoked discriminatorily against human rights of other people. Article 46(2) UNDRIP highlights that the exercise of indigenous peoples' rights is limited by the primacy of human rights of all people.[65] In the context of indigenous peoples, federalism-adverse or -hostile recommendations of human rights bodies are nonsensical.

5 Chances for Reciprocal Affection

The respect and protection of the right to self-determination of peoples and minorities as well as indigenous peoples' rights often oblige states to establish a power-sharing regime or to make other arrangements to allow for diversity. The interlinkages and synergies between federalism and human rights, however, are far more general and deeper. After all, human rights can easily be proclaimed internationally, but they must always be lived locally. Universal rights remain very abstract and lifeless if they are not brought into action where people live, work, grow up and raise their children. Free and fair elections, fair trials, human treatment in prisons, decent labour conditions, and access to education and adequate health services are either guaranteed day after day locally – or do not reach most people. In many ways, multilevel governance, designed and implemented to bring government closer to the people and to make it more legitimate and effective, and multilevel human rights obligations, are predestined for long and lasting relationships.

Regional and local autonomy contributes to peaceful diversity management and has the potential to deepen democracy, to strengthen government accountability and to implement human rights responsively to regional and local priorities. It is thus worth advocating for subnational space in human rights even beyond the respect of the people's rights to self-determination and the protection of minority rights. Without the right to be different, autonomy and everything it stands for is not meaningful. If subnational actors are responsible for education, health, environment, police and social assistance, policies and laws will necessarily be different, and these differences will often affect the

65 Bhandari, *Self-Determination & Constitution Making in Nepal*, 144 et seq.

right to education, health, security and decent living conditions, giving them regional and local characteristics. Diversity in human rights protection, however, does not question the principle of equality. Equality just plays out differently in federations and other states based on regional and local autonomy.

While equality is often the ultimate guideline in unitary states, the respect for diversity and its constitutional protection are just as important in federal systems. The baseline of the duality of the objectives is that the concept of equality is understood and conceptualised differently. Federal constitutions and national laws are limited to establishing the minimum floor subnational units must respect but are invited to exceed. Regional as well as local actors are free to go beyond whatever overriding law obliges them to do; they are empowered to produce inequality as long as they improve standards and do not fall behind them. Just like international treaties, federal human rights catalogues thus refrain from providing comprehensive national human rights building in which all citizens are guaranteed equal conditions as they are only setting a minimum threshold. All citizens, irrespective of where they live, can claim these minimum standards. In addition, some but not necessarily all citizens may benefit from the extra efforts their region or municipality has made. This conventional wisdom of the minimum floor makes sense in international as well as in national multilevel systems. It must, however, be challenged as it does not convincingly answer all questions linked to multilevel human rights implementation. It can easily apply to the progressive implementation of human rights, in particular socio-economic rights (as long as there is agreement on definitions of progress versus steps backwards). It is conversely not apt to respond to more complex human rights controversies, in particular those involving several human rights dimensions and different conflicting human rights.

5.1 *Respect of the Minimum Floor as a Guarantee to All*

The paradigm of the minimum floor has always been part of international human rights law. International human rights treaties define minimum standards which contracting parties have to comply with but are allowed to exceed. Most international human rights treaties explicitly or implicitly contain rules prescribing such interpretation, making it clear that international standards cannot be understood as limiting rights and freedoms a person would otherwise enjoy.[66] International human rights standards thus entrench and complement domestic rights and freedoms by adding a minimum floor – not a

66 See e.g. article 60 of European Convention of Human Rights: "Nothing in this Convention shall be construed as limiting or derogating from any of the human rights and fundamental

ceiling. States bound by international human rights law thus have to respect the treaty but are under no obligation to apply uniform human rights standards. The internationally guaranteed rights and freedoms must be regarded as minimum standards with the aim of harmonising, not unifying, human rights practices. In no way should international guarantees hinder or crush domestic laws guaranteeing more rights and freedoms or protecting and implementing them more effectively.

Federal states reiterate the international human rights system internally. They add their own national minimum standards, which must necessarily respect the international ones but can go beyond it, and the subnational units must implement it but are allowed to improve it. In fact, multilevel human rights protection takes the shape of a pyramid in the federal system as it becomes stronger and broader at the bottom. It is not a column implementing the same standards on the local, regional and national level. For this reason, human rights operate differently in federations. While unitary states implement uniform human rights standards applicable throughout the country, federal states define a minimum standard that all subnational actors must comply with but may improve on. The federal protection of civil, political, economic, social and cultural human right sets a federal floor of rights, which allows for 'diversity only *above and beyond* this federal constitutional floor'.[67] Setting a minimum floor of rights prohibits subnational units from falling behind the standard (which would violate overriding law and transform the column into a kind of hopper) but it does not prevent regional and local actors from improving on such a floor. It rather invites them to do so.[68]

Two situations often confounded in theory and practice must therefore be distinguished. In the first, a subnational actor falls behind the federal constitutional floor or international human rights standards. The unequal treatment of citizens, in this case, does not stem from the use of autonomy but rather from its misuse; it is not a result of subnational policy and law-making but of failing national law implementation. As mentioned above, such a situation, which is in breach of overriding law, must be remedied by courts or by the use

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freedoms which may be ensured under the laws of any High Contracting Party or under any other agreement to which it is a Party."

67 Brennan, JR., "The Bill of Rights and the States", 550.

68 Kincaid, "Values and Value Tradeoffs in Federalism", 252; similar also Kristin Henrard, "Equality Considerations and Their Relation to Minority Protections, State Constitutional Law, and Federalism," in *Federalism, Subnational Constitutions, and Minority Rights*, eds. George A. Tarr, Joseph Marko and Robert F. Williams (Westport CT: Praeger, 2004), 35 et seq.

of supervisory and intervention powers. In the second situation, diversity – and thus inequality – results from the fact that a subnational actor has acted beyond the minimum floor. Such inequality is as acceptable within a state as it is between states. No human rights actor should frown at it but rather appreciate the innovation and effort coming from regional and local actors.

5.2 *The Right to Go beyond the Minimum*

Subnational constitutions regularly have their own human rights catalogues, which cannot fall behind international and national ones but may go beyond. In these constitutions and also in law and practice, subnational governments can perform their famous role as 'laboratories for innovation and experimentation' in which new ideas can be tested at the regional level and, if successful, be copied by others and inspire national and international innovation.[69] There is abundant evidence of the successful use of this role.[70] The constitution of the state of Córdoba, for instance, granted women's rights in 1927, long before the federal constitution did the same. While it is well known that the Swiss Cantons of Appenzell Innerhoden unconstitutionally refused to introduce female suffrage, it is also true that numerous cantons introduced it long before the federal constitution did.

There is also evidence that national actors enforcing unified human rights concepts have sometimes prevented subnational governments from progressing. There is no doubt that national actors are crucial actors in enforcing (minimum) human rights standards and preventing subnational governments from violating binding standards. It would however be erroneous to conclude that they are necessarily the source of human rights innovation. As they can also operate as breaks and slow down human rights progress, checks and balances and multiple power centres are important devices to make human rights evolution more resilient. Famously, the Supreme Court of the United States held in the Dred Scott case of 1857 that a federal law purporting to ban slavery from

69 Kincaid, "Values and Value Tradeoffs in Federalism", 253; Wyttenbach, *Umsetzung von Menschenrechtsübereinkommen in Bundesstaaten*, 145 et seqq; Subnational human rights catalogues are not only laboratories for innovation, but also establish a (competing) legal protection system at the subnational level, which is of particular importance when national and international levels of human rights protection fail to meet their respective obligations. See Gardner, "In Search of Sub-National Constitutionalism", 341.

70 Cf. e.g., Peter W. Hogg, *Constitutional Law of Canada* student ed. (Toronto: Carswell, 2009), 705 et seqq.; Andrew Wolman, "The Relationship Between National and Sub-national Human Rights Institutions in Federal States," *The International Journal of Human Rights* 17, no. 4 (2013); Mahendra P. Singh, "Federalism, Democracy and Human Rights: Some Reflections," *Journal of the Indian Law Institute* 47, no. 4 (2005), 429 et seqq.

certain parts of the United States could not have the effect of freeing slaves brought into those states, because that would constitute a deprivation of the slave owner's property rights.[71] The due process clause of the American Bill of Rights thus became an obstacle to the emancipation of slaves, which was only removed by a constitutional amendment after the civil war. Another notorious case, decided by the same court in 1905, is Lochner in which the Supreme Court struck down a New York law limiting working hours in a bakery to 60 per week and 10 per day. The court held that the state law violated the due process clause by denying the liberty of the employer to contract with his workers on the terms of his choice.[72] The Lochner case is just one of hundreds of cases in which the Supreme Court applied a broad notion of property, liberty and due process to strike down state laws adapted to protect the right to liberty of all, the health and wages of workers, and the right of assembly of unionists. Only after President Roosevelt announced his plan to pack the court with more justices, did the court start to change its mind and allow the New Deal to improve socio-economic rights.[73]

Like most constitutional courts, the Swiss Federal Supreme Court has consistently held that cantonal fundamental rights might have independent significance if they provide protection going beyond the fundamental rights provided by the Federal Constitution or if they guarantee a right that is not enshrined in the Federal Constitution.[74] While some cantons are content with referring to the human rights protected by federal and international law[75] and show little interest in improving on it, others cantons have opted for a human rights catalogue that goes beyond what is guaranteed on the upper level.[76] Nine cantons guarantee the right to choose freely any form of living together in partnership.[77] Other cantons decided to extend the scope of political rights on the cantonal level. While on a federal level, Swiss citizens have to be 18 years

71 Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1856).

72 Lochner v. New York, 198 U.S. 45 (1905).

73 See Hogg, *Constitutional Law of Canada*, 731.

74 Cf. e.g., Decision of the Swiss Federal Court, BGE 121 I 267, 269.

75 Cf. e.g., para. 10(2) Constitution of the Canton of Lucerne, para. 10 Constitution of the Canton of Schwyz or art. 7 and 8 Constitution of the Canton of Grisons; cf. Andreas Auer, *Staatsrecht der schweizerischen Kantone* (Bern: Stämpfli Verlag, 2016), No. 1448.

76 Gardner, "In Search of Sub-National Constitutionalism", 335.

77 Art. 13 Constitution of the Canton of Zurich; art. 13(2) Constitution of the Canton of Berne; art. 14(2) Constitution of the Canton of Fribourg; para. 11(11) Constitution of the Canton of Basel-Stadt; art. 12(1c) Constitution of the Canton of Schaffhausen; art. 10(2) Constitution of the Canton of Appenzell Ausserrhoden; art. 14(2) Constitution of the Canton of Vaud; art. 12(2) Constitution of the Canton of Neuchâtel and art. 22 Constitution of the Canton of Geneva; cf. Auer, *Staatsrecht der schweizerischen Kantone*, No. 1451.

or older to vote,[78] the Canton of Glarus already allow 16- and 17-year-olds to vote on cantonal and communal matters.[79] Similarly, some – mostly francophone – cantons grant the right to vote to non-Swiss citizens in cantonal and communal ballots.[80] In the United States, the subject of same-sex marriage became prominent when the Hawaii Supreme Court decided in 1993 that the state's prohibition of same-sex marriage might be unconstitutional.[81] In 2004, the mayor of San Francisco issued the first marriage licence to a same-sex couple; the same year Massachusetts became the first state to legalise same-sex marriage.[82] The consequence of extra efforts by subnational actors is inequality: in some cantons, non-Swiss nationals are allowed to participate in elections, whereas in others, such rights are strictly limited to Swiss nationals. In some cantons, same-sex couples or elderly people enjoy extra protection; in others, their rights are limited to what the federal constitution has to offer.[83] In all these situations, imposing equality throughout the country would lower the overall human rights achievements of the country and raise human rights standards to the bottom, not the top. Most of these innovations and expansion of rights are subnational exactly because there is no sufficient consensus in the country (yet) to adopt them on the national level. For the time being, voting rights for non-nationals are unlikely to be introduced nationally. The same can be said for voting rights from the age of 16 years, the recognition of all forms of family lives, special human rights mandates to respect the autonomy of elderly people, to cite a few examples. In all these situations, the existence of uniform standards prevents more progressive cantons from making a step forward and inspiring others.

Cantonal innovations reach beyond special guarantees and affect human rights implementation mechanisms as well: some governments have established human rights ombudspersons or new mechanisms to strengthen human

78 Art. 136(1) Swiss Federal Constitution; cf. also art. 25 CCPR which states that political rights can only be exercised under the condition of being a citizen of the state.

79 Art. 56(1) Constitution of the Canton of Glarus.

80 Cf. e.g., art. 37(1b and c) Constitution of the Canton of Neuchâtel and art. 2(c) and 3(c) of the cantonal Act on Political Rights; art. 73 Constitution of the Canton of Jura and art. 3 of the cantonal Act on Political Rights.

81 Baehr v. Lewin, 74 Haw. 530, 852 P.2d 44 (Haw. 1993).

82 The legalisation was a reaction to the Massachusetts Supreme Judicial Court decision of the same year: Goodridge v. Department of Public Health, 798 N.E.2d 941 (Mass. 2003).

83 Cf. for protecting same-sex couples above and beyond the national layer of human rights protection, Fn. 65; special fundamental rights protecting the rights of elderly people can be found in art. 35 Constitution of the Canton of Fribourg and para. 16(2) Constitution of the Canton of Basel-Landschaft.

rights mainstreaming, they have made extra efforts to support civil society and other crucial actors, or have come up with special reporting systems, round tables, participatory projects and the like.[84] Obviously, all these innovations have the particularity of being limited to only one or a few cantons, at least at the beginning, and bring territorial inequality into the human rights system.

Subnational constitutions may also experiment with new or more strictly enforced social and economic rights.[85] In Switzerland and Germany for instance, some cantons and Länder have included socio-economic rights imposing positive obligations beyond the national consensus. They have guaranteed rights to free education, for instance in the field of early childcare, tertiary education, continuous education or catch-up training. Some have also been more progressive than the national government in guaranteeing standards in the field of the right to housing, health care, social assistance, or the right to decent and sufficient work.[86] Recently, the canton of Neuchâtel decided to introduce a minimum wage for its population and to undertake actions against poverty amongst workers.[87] A similar plan, proposed by a popular initiative on the federal level, failed in 2014.[88] In 2017, the Federal Supreme Court decided on appeal that the failure of the 'Minimum Wage Initiative' on the national level did not prevent a canton from taking similar initiatives on its own.[89] It thereby accepted the idea that the population of one canton benefits from labour rights not guaranteed in other cantons.

Numerous countries guaranteeing local autonomy witness a multitude of human rights innovation on the city level. Since 2000, the number of Human Rights Cities has increased and numerous initiatives, especially in the field of economic, social and cultural rights, have emerged from them.[90] Human Rights Cities and other local initiatives may create inequality between citizens of different local entities within the same state, but also offer the great chance

84 Cf. e.g., the Canton of Berne which has created an ombudswoman's office for issues related to age, care and institutions in 2003, the Canton of Geneva has had a Cantonal Human Rights Commission since 2000 or the Canton of Zurich which introduced a round table against human trafficking in 2001.

85 Auer, *Staatsrecht der schweizerischen Kantone*, No. 1484 et seqq.

86 Cf. Fercot, "Perspectives on Federalism", 314; cf. also for Switzerland, Auer, *Staatsrecht der schweizerischen Kantone*, No. 1489.

87 The Federal Assembly validated art. 34(a) Constitution of the Canton of Neuchâtel by Federal Decree on 11 March 2013. By doing so, it confirmed that the cantonal constitutional provision is in accordance with federal law, cf. BBl 2013 2617, 2618.

88 Federal Decree on the result of the referendum of 18 May 2014, BBl 2014 6349, 6350.

89 Decision of the Swiss Federal Court, BGE 143 I 403.

90 Cf. the activities of the World Organisation of United Cities and Local Governments (CGLU) in the field of human rights, such as the World Human Rights Cities Forum.

of improving the life of residents and creating good and better practices which can serve as sources of innovation for others.

Some subnational governments have even experimented with third-generation human rights. While countries such as Austria, Canada, Germany and the United States have provisionally closed the door to constitutionalising substantive environmental rights, some regions in these countries have decided otherwise and included the right to a healthy environment in their constitutions.[91] Others have recognised a right to peace and intercultural dialogue.[92] In recent years, some subnational actors have also shown more willingness to deal with human rights violations of the past and have come up with institutions, processes and ideas of how to make up for historic wrongs, such as administrative custody for poor and marginalised people, forced sterilisations and adoptions. Some regional governments have, before the federal one, opted for official apologies, mandated research, supported victims and taken commemorative and preventive measures.[93] If federal countries would follow the federalism-adverse and -hostile recommendations and adopt uniform standards, such initiatives would no longer be possible.

5.3 *The Need to Revisit the Paradigm of the Minimum Floor*

While it is easy to conclude that it can be beneficial to accept unequal human rights standards in federal states, the question of how far inequality can go remains open.[94] Is it acceptable to allow for the death penalty in some regions but not in others? Is it possible that the right to die is guaranteed in some parts of the country but not in others? Is it conceivable that same-sex couples can marry and adopt children in some regions but not in others and do we have to

91 Subnational units in Brazil, Canada, Germany, and the United States explicitly guarantee a right to a quality environment. Cf. James R. May and Erin Daly, *Global Environmental Constitutionalism* (New York: Cambridge University Press, 2016), 71 et seqq. See for an example Art. 19 Constitution of the Canton of Geneva.

92 Art. 7 Constitution of the Canton of Zurich.

93 The Governor of California for instance apologised to the more than 20,000 people who were involuntarily sterilised under a eugenics program which operated until 1964, and the provincial government of British Columbia apologised to all Canadians who had suffered severe emotional and sexual abuse while in homes for developmentally disabled. Elazar Barkan and Alexander Karn, "Group Apology as an Ethical Imperative", in *Taking Wrongs Seriously: Apologies and Reconciliation*, eds. Elazar Barkan, Alexander Karn (Standford: Stanford University Press, 2006), 6. Cf. also Ronald Rudin, *Kouchibouguac: Removal, Resistance, and Remembrance at a Canadian National Park* (Toronto: University of Toronto Press, 2016).

94 Kincaid, "Values and Value Tradeoffs in Federalism", 252 et seq.

accept the idea that standards in education and health are different and equal citizenship not fully enforced?

The paradigm of the minimum floor is surely helpful in answering some of these questions. In the field of progressive duties, each competent actor has to take all appropriate measures to work for the full implementation of all economic, social and cultural rights. Differences will automatically result and are acceptable as long as all actors fulfil the minimum standards provided by international and national law. There is no reason to prevent a region from exceeding these and fulfilling its obligations more rapidly and more fully. The same can be said for regional and local political rights, such as regional and local consultations and referenda, and procedural rights, such as child-friendly justice or free simultaneous translation for foreigners.

Quite often, however, matters are more complex. This is the case whenever there is disagreement on the minimum floor and how it is to be interpreted (statically or dynamically) and by whom and whether it allows for exceptions (for cultural or other reasons). It is also the case when there are controversies over the question of whether a regional initiative is to be considered a human rights progress or regress. Whenever more than one human right is involved, the classic theory of the national minimum standard which can be exceeded by subnational actors is incapable of solving these disputes. In fact, the paradigm of the minimum floor has severe shortcomings and is not helpful in managing multilevel human rights implementation whenever there is a conflict between different human rights, for instance when religious freedoms clash with free speech, the right to privacy or the right to equality. Does a subnational actor introducing a burka ban (as the cantons of Ticino and St Gallen have recently done) improve gender equality, as they claim, or rather violate religious freedoms and discriminate against Muslim women?[95] Does a subnational actor forcing bakers to sell wedding cakes to same-sex couples improve the right to non-discrimination or violate religious freedoms?[96] Does a subnational entity regulating political financing improve political rights or impinge on the freedoms of political and economic activity?[97] Does a canton prohibiting sexist advertising promote gender equality more effectively than other cantons do or does it violate the right of enterprises to speak and act freely?[98]

95 Cf. Stephan Zlabinger, "Schleierhafte Gesetzgebung? – Das St. Galler Gesichtsverhüllungsverbot unter dem Aspekt der Rechtsgleichheit in der Rechtsetzung," *ZBl* 119 (2018), 584 and 590 et seqq.

96 Cf. Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission, 584 U.S. (2018).

97 Decision of the Swiss Federal Court, BGE 125 I 441.

98 Cf. the Parliament of the Canton of Vaud which adopted unanimously – with one abstention – a new provision which will prohibit any advertising of sexist content, see for more

In addition, the minimum floor theory also fails when there is a tension between different human rights duties, such as the duty to respect, protect and fulfil rights and freedoms. If a subnational unit guarantees the right to die does it then improve human rights standards by respecting a person's personal freedom to decide on the time or way of their own death or does it instead neglect the duty to protect the right to life of all by creating the risk that people rush into assisted suicide or are pushed into it by self-interested family members? If a region prohibits abortion, does it improve the protection of the right to life or does it fall behind the minimum floor of respect due to the freedom rights of the pregnant woman?[99]

All these examples demonstrate that the minimum floor theory falls short of the mark. First, the different dimensions of each human right all have different minimum floors. The duties to respect individual rights and freedoms and not to interfere, to actively protect from dangers and to progressively fulfil human rights fully and for all have their own minimum requirements and all these floors continually evolve. The duty to *respect* privacy is probably more easily standardised than the duty to *protect* privacy in the private sphere. But the duties to protect can still more easily be harmonised than the duties to progressively *fulfil* it throughout the legal system and to adapt it to new societal and technological challenges. Second, most human rights conflicts are complex and involve more than one human right. The identification of the floor and the decision whether a regional law or decision builds on it or violates it, are then even more controversial.

In sum, the conventional answer – subnational actors can go beyond international and national human rights standards but are not allowed to fall behind – is not sufficient. The mediation between local, regional, national and international approaches to human rights is far more complex. In order to improve the relations between federalism and other forms of multilevel governance and human rights, we need to increase our understanding of multilevel human rights governance.[100] Surely, some inspiration can be derived from the way constitutional or federal courts use their adjudication power.

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information: humanrights.ch, "Der Kanton Waadt verbietet sexistische Werbung im öffentlichen Raum", https://www.humanrights.ch/de/menschenrechte-schweiz/inneres/frau-mann/gleichstellung/sexistische-werbung, (accessed 7 July 2019).

99 Cf. e.g., the developments on the state level in Mexico and Australia, Reed Boland and Laura Katzive, "Developments in Laws on Induced Abortion:1998–2007," *International Family Planning Perspectives* 34, no. 3 (2008), 113 and 114.

100 Samantha Besson, "Droits de l'homme et fédéralisme: une introduction thématique", in *Die Europäische Menschenrechtskonvention und die Kantone*, eds. Samantha Besson and Eva Maria Belser (Geneva, Zurich, Basel: Schulthess, 2014), 32.

What threshold do they apply? And how much margin of appreciation do they leave to subordinate actors? Do they unify or harmonise human rights and in what field and why do they opt for the former and the latter? On the international level, the European Court of Human Rights must answer the very same questions, although based on the limited catalogue of the European Convention of Human Rights, which only guarantees civil and political, but not economic, social or cultural rights. Based on its limited mandate of implementing minimum human rights standards, it has developed a practice on the intensity of its scrutiny that is as controversial as it is sophisticated.[101] The margin of appreciation is dependent on the human right involved and is stricter in the field of inhuman treatment, procedural rights, free speech and non-discrimination than it is in the field of religion and family law where cultural differences play a more prominent role.[102] It also depends on the human right dimensions involved; as a rule, the duty to respect requiring non-interference is more uniformly applied than is the duty to protect which demands that states take all appropriate measures to prevent human rights interferences by a private actor. Most importantly, the level of scrutiny depends on the existence or absence of a European consensus.[103] It is on this consensus that the dynamic evolution of the European human rights catalogue is based. What a member state is bound to comply with thus also depends on what other member states are doing and what progress they are making. For the living tree document to live and flourish, inputs must hence come from its national sources. Uniform standards imposed from above would cripple these sources and impede further bottom-up human rights evolutions.[104] The same logic of

101 Andreas Follesdal and Nino Tsereteli, "The Margin of Appreciation in Europe and Beyond," *The International Journal of Human Rights* 20, no. 8 (2016), 1055 (with further references) or Samantha Besson, "Subsidiarity in International Human Rights Law – What Is Subsidiary About Human Rights?," *The American Journal of Jurisprudence* 61, no. 1 (2016), 73 (with further references).

102 Cf. Eva Maria Belser, "Kantonale Grundrechte," 87; see also the findings of Luzius Wildhaber, Arnaldur Hjartarson, and Stephen Donnelly, "No Consensus on Consensus? The Practice of the European Court of Human Rights," *Human Rights Law Journal* 33 (2013), 259 et seqq.

103 Cf. e.g., Eyal Benvenisti, "Margin of Appreciation, Consensus, and Universal Standards," *New York University Journal of International Law and Politics* 31, no. 4 (1999) or Wildhaber, Hjartarson and Donnelly, "No Consensus on Consensus?"

104 Cf. Amrei Müller, "Domestic Authorities' Obligations to Co-Develop the Rights of the European Convention on Human Rights," *The International Journal of Human Rights* 20, no. 8 (2016), 1059 or Besson, "Subsidiarity in International Human Rights Law – What is Subsidiary about Human Rights?", 100.

multilevel dialogues between innovative (and sometimes failing) states and controlling supranational entities must apply within federal states.

6 Conclusions: A Promising Partnership

Various reports and recommendations issued by UN treaty bodies emphasise that the national government, in the case of Switzerland the Confederation, has the primary responsibility to ensure the domestic implementation of the conventions.[105] Undoubtedly, solely the federal tier has the duty to report and follow-up on international recommendations.[106] Whether one can conclude that the federal tier carries the 'primary responsibility' is however doubtful. Externally, the federal government, representing the Swiss Confederation in its entirety, is obviously the guarantor for the fulfilment of international law. Internally, the federal government is, however, often not, or not exclusively, competent to realise treaty obligations. In the field of human rights in particular, international obligations often affect cantonal and municipal competences. Such is, for instance, the case in the field of the right to education, housing, health services, social aid, police and prisons or integration policies. Other human rights obligations, such as the right to information or the full and comprehensive implementation of gender equality, require efforts from all state actors on all tiers.[107]

In its general comment No. 3 (1990) to the Covenant on economic, social and cultural rights, the Committee rightly states that it is its role to ultimately determine whether a state has taken all appropriate measures to implement the obligations of the Covenant. Just as importantly, it states that 'each State party must decide for itself which means are the most appropriate under the circumstances with respect to each of the rights'.[108] Unfortunately, most treaty

105 CESCR, *Concluding Observations*, E/C.12/CHE/CO/2–3 (2010), para. 5; CEDAW, *Concluding Observations*, CEDAW/C/CHE/CO/3 (2009), para. 10 and 20; Committee on the Elimination of Racial Discrimination, *Consideration of Reports Submitted by States Parties Under Article 9 of the Convention*: Concluding Observations of the Committee on the Elimination of Racial Discrimination, Switzerland, CERD/C/CHE/CO/6 (2008), para. 8.

106 Cf. Art. 54 and 184 Swiss Federal Constitution.

107 Schweizerischen Kompetenzzentrums für Menschenrechte, *Die periodische Überprüfung der Menschenrechtslage der Schweiz* (*UPR*): Eine Zwischenbilanz nach drei Zyklen (Bern: 2018), 12; Belser and Mazidi, "Das Zusammenwirken von Bund und Kantonen bei der Einhaltung völkerrechtlicher Menschenrechtsverpflichtungen der Schweiz", 245.

108 Committee on Economic, Social and Cultural Rights, *General Comment No. 3: The Nature of States Parties' Obligations* (*Art. 2, Para. 1, of the Covenant*): E/1991/23 (1990), No. 4; cf. also CESCR, *General Comment No. 9*, E/C.12/1998/24 (1998), No. 5: 'Although the precise

bodies tend to disregard the general comment. As far as and as long as states take all appropriate measures, international bodies have no reason to interfere with the country's internal organisation.

Human rights obligations mandating the respect of diversity – and implicitly requiring some form of autonomy – make it evident that approaches focusing on multi-level government, on the one hand, and approaches concerned with human rights for all, on the other hand, are not following contradictory aims, which must be mitigated. They rather share common concerns and interests. Conventional wisdom suggesting that promoting self-determination for peoples and minority rights and protecting human rights of individuals are competing priorities is thus erroneous. It is also inappropriate to propose balancing the two. Such proposals imply that securing individuals in their human rights requires special limits on the rights of their peoples or the groups they belong to, and vice versa. In contrast, federalism and human rights, as has been shown above, are often in a win-win-relation, in which the strengthening of one approach does not come at the price of weakening the other.

Diversity, even in the sensitive field of human rights, is not *per se* a problem to overcome but a situation to handle within the framework of national and international human rights obligations. Different human rights standards can be acceptable, desirable or even required by human rights. On the one hand, human rights implementation can call for the respect of collective autonomy; on the other hand, the combination of self- and shared rule can be conducive to human rights implementation and create productive multilevel feedback loops.

There is, however, a need for more differentiation. It may be in line with international human rights obligations to accept or promote different linguistic or cultural rights for different regions and to allow autonomous regions to go beyond minimum standards in the field of social and economic rights. The same does not necessarily apply to certain civil rights and liberties, such as the right to a fair trial or the right to non-discrimination, where uniform standards may be required. Different rules for different human rights and different human rights obligations are thus needed and the leeway of subnational actors and their margin of appreciations must be clarified in a differentiated and dynamic way.

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method by which Covenant rights are given effect in national law is a matter for each State party to decide, the means used should be appropriate in the sense of producing results which are consistent with the full discharge of its obligations by the State party. The means chosen are also subject to review as part of the Committee's examination of the State party's compliance with its obligations under the Covenant.'

The potential partnership between federalism and human rights, often characterised by scepticism and distrust, would surely improve if communication were more open and intense. International treaty bodies typically only take an interest in internal power-sharing when one or several subnational or local actors fail to respect human rights. A limited focus on shortcomings, however, disregards the great potential of bottom-up solutions and oversees the numerous examples of special regional and municipal achievements. The assessment of the effects of federalism on human rights should thus be more comprehensive and look at violations as well as improvements. These are the progresses which source international consensus and eventually enable the rise of minimum standards. Tracking regional and local progress, appreciating it nationally and valorising it internationally are also prerequisites for transnational learning. Good and best practices are made available to other subnational and local actors, feed into international reports and recommendations and enter into recommendations made to other states. A more comprehensive assessment thus allows multilevel learning and feedback loops, necessary for the participatory, inclusive, and local implementation of universal rights. Even though the relations between constitutional guarantees of regional and local autonomy and human rights have been uneasy in the past, it seems worth trying again in the future.

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PART 2

Case Studies on Institutional Equality

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CHAPTER 4

Italy: The Principle of Solidarity as a Principle of Equality

Erika Arban

1 Introduction[1]

As an aspirational principle and all-encompassing concept, solidarity infuses – more or less extensively – several federal and federal-like systems as a concept that tends to promote equality, social rights, well-being, and friendship among and between the various players of a compound polity, even when it is not clearly spelled out in the articled parts of a constitutional text. Italy represents a clear example in this sense: in fact, solidarity is firmly entrenched in article 2 of the Constitution among the fundamental principles of the Republic, but it also infuses several other constitutional provisions, thus occupying a prominent role in the constitutional architecture of the state. In particular, solidarity deeply informs the relationship between the central state and regional governments, uniquely shaping Italian regionalism.

The purpose of this chapter is to chart the meaning and scope of solidarity in the Italian context in all its various understandings, but with particular attention to its relationship with regionalism. This chapter is divided in three parts. Section 1 sets the framework for the discussion, illustrating why Italy is a diverse and asymmetrical regional state where its constituent units (e.g. regions) enjoy mild forms of autonomy; section 2 describes solidarity and equality as aspirational values that deeply inform the socio-economic and political relationships among and between individuals and public institutions in Italy, while section 3 focuses on solidarity in the specific context of Italian regionalism, particularly after the constitutional reform of 2001. In the conclusion, I argue that the principle of solidarity as entrenched in the Italian Constitution can be construed as an aspirational value fostering equality and unity in a rather diverse country. However, despite the noble intentions of this principle, its constitutional entrenchment has not fully succeeded in

1 This research was fully funded by the Australian Government through the Australian Research Council (ARC) Laureate Program 'Balancing Diversity and Social Cohesion in Democratic Constitutions'.

preventing the consolidation of inequalities that might jeopardise equality in a state that has been historically characterised by deep socio-economic and political asymmetries: a return to the very meaning of solidarity should thus be encouraged.

In terms of methodology, the chapter will offer an extensive textual/analytical analysis of solidarity as embedded in the Italian Constitution, by also taking into account the readings of this principle offered by the Italian Constitutional Court (ItCC),[2] considering that judges have the task of identifying, among other things, the values of the constitution. The goal of this chapter is not to be prescriptive or normative, nor to use a single case study to make general claims: as noted, its less ambitious purpose is to offer an analytical and descriptive account of solidarity as a principle of equality to better understand its value and meaning in Italy, also considering the challenging times and tensions that the country is facing at the time we are writing. Finally, while the chapter shows the interconnections between the twin principles of solidarity and equality, it extensively elaborates on the intellectual meaning of the former, without expounding the various understandings of the latter, whose meaning is thus implied.

2 Autonomy and Diversity in Italy

2.1 *De Facto Asymmetries*

Italy is a profoundly *diverse* country both *de facto* and *de iure.* From a factual standpoint, Italy has been traditionally characterised by a deep natural, historical, cultural, socio-economic, and linguistic fragmentation. Its natural diversity is reflected in the significant physical, geographical and climatic differences crossing the peninsula from the Alps to the Mediterranean, but Italy has also been historically characterised by other forms of asymmetries. As Eva explains, over the last 2800 years, Italy has had only a few centuries of unified history, mostly under the Roman Republic and Empire (from approximately 89

2 I ran a keyword search on the website of the ItCC (http://www.cortecostituzionale.it/actionPronuncia.do) using the term *solidarietà* and covering the 2002 to 2017 period: this specific timeframe is justified as I wanted to specifically take into consideration the reading of solidarity in relation to regionalism after the constitutional reform of 2001, considering the debate on federalism and solidarity that animated the political and constitutional discourse at the time. This keyword search returned about 379 results: however, only a smaller number of decisions were studied in preparation for this chapter, since a cursory reading of the decisions showed that in most cases solidarity was used in other contexts or mentioned in the text but the ItCC did not provide any clarification in this regard.

B.C. to the fall of the Empire in 476 A.D.) and the period since unification (1861–1870).[3] In the aftermath of the Congress of Vienna of 1815, the Italian peninsula was still divided into eight different states: the Kingdom of Piemonte and Sardegna (under the rule of the House of Savoy); Lombardo-Veneto (a province of the Austrian Empire); the Dukedom of Modena and Reggio Emilia (under the rule of Frances IV); the Dukedom of Parma and Piacenza (administered by Mary Louise – daughter of the Austrian Emperor and Napoleon's widow); the Grand-Duchy of Toscana (governed by Leopold II of Lorraine – nephew of the Austrian Emperor); the Princedom of Lucca (governed by the Bourbons); the Papal State (which included part of Emilia, the Romagna, Marche, Umbria, and Lazio); and finally, the Kingdom of the Two Sicilies (under the Bourbons' rule, who were also linked to Austria). The fact that Italy was such a compound of non-homogeneous political structures (e.g. dukedoms, absolute monarchies, and theocracies – each of them with its own laws and institutional apparatus) had as a direct consequence the presence of substantial political and socio-economic differences among the various geographical areas: in this scenario, Northern territories such as Piemonte, Lombardia and Veneto have historically been amongst the most economically developed areas. Italy's diversity is also reflected in the linguistic richness of the country, with hundreds of different dialects spoken across the peninsula,[4] and linguistic minority groups living in specific parts of the territory. All these asymmetries have inevitably impacted and shaped the way the country functions and operates even today.

2.2 *De Iure Asymmetries*

But Italy is also *de iure* asymmetrical: mindful of the diverse fabric of the state, the Italian Constitution implemented in 1948 did not create a federal state, but

3 Fabrizio Eva, "Deconstructing Italy: (Northern) Italians and their new perception of territoriality," *GeoJournal* 48, no. 2 (1999): 102.

4 Eva also explains how, at the time of unification, 'less than 3 % of Italians spoke the Tuscan dialect – the basis of modern Italian – and many noble families preferred French as their main language. By 1955 still only some 30 % of the population spoke Italian habitually or often. And even in 1987, 28 % of Italians still used some dialect as their everyday language, although with an acceptable level of proficiency in Italian': Eva, "Deconstructing Italy," 102. Maiden points out that what is known as Italian was just one of the many dialects spoken in Italy (a Florentine variety of the Tuscan dialect). Therefore, Italian dialects are not variants of Italian, but of Latin, the latter thus being the 'mother' of all dialects spoken in the peninsula, including Italian. And because the 'common ancestor' is old, enormous differences exist between the various dialects (the greater the geographic distance, the greater the difference): Martin Maiden, "The Definition of Multilingualism in Historical Perspective," in *Multilingualism in Italy, Past and Present*, eds. Anna Laura Lepschy and Arturo Tosi (Oxford: European Humanities Research Centre of the University of Oxford, 2002), 32.

nonetheless committed itself to the promotion of local self-government and to the broadest administrative decentralisation of services. In this regard, article 5 Const. postulates that

> The Republic is one and indivisible. It recognises and promotes local autonomies and implements the fullest measure of administrative decentralisation in those services which depend on the State. The Republic adapts the principles and methods of its legislation to the requirements of autonomy and decentralisation.

Most importantly, the Constitution divides the territory into twenty regions,[5] five of them vested with *special* status: Friuli Venezia Giulia, Sardegna, Sicilia, Trentino-Alto Adige and Valle d'Aosta.[6] The rationale for this special status is a combination of geographical, linguistic and autonomist reasons: all five regions were very peripheral and thus disadvantaged at the time of their creation (with Sicilia and Sardegna being major islands), all of them were (and to a certain extent still are) characterised by the presence of more or less active movements fostering more autonomy and even independence, and the three regions in the North also present linguistic minorities in the territory.[7] The *special* or *autonomous* status basically means that these five regions enjoy special forms and conditions of autonomy, implying more extensive – and thus asymmetric – powers than ordinary regions, especially in fiscal matters.[8]

The constitutional model created in 1948 was significantly revised in 2001 with the amendment of Title V of the Constitution (pertaining to the relationships between central and peripheral governments): among other things, this constitutional reform strengthened the legislative and administrative powers of ordinary regions, while leaving the powers of autonomous regions substantially untouched. This reform was the culminating point of a political mobilisation which began in the late 1980s, particularly in the North, where the wealthier and more industrialised regions sought to acquire more financial or fiscal autonomy, through increased decentralisation and even federalism: in other words, they sought to acquire more powers over the economy, infrastructure

5 See article 131 Const.

6 See article 116(1) Const. As further specified by article 116(2) Const., in Trentino-Alto Adige the two provinces of Trento and Bolzano also enjoy autonomous status.

7 French speaking minorities are present in Valle d'Aosta, German minorities exist in Trentino-Alto Adige, while Slovenian minorities live in Friuli Venezia Giulia.

8 According to article 116(1) Const. these five regions enjoy 'special forms and conditions of autonomy pursuant to the special charters adopted by constitutional law'.

and other services so as not to depend on decisions coming from the central government, perceived as distant from the needs of these territories.[9]

In addition to confirming the binary division between autonomous and ordinary regions, the 2001 reform introduced another element of *de iure* asymmetry in article 116(3) Const., which now allows ordinary regions to negotiate, with the central government, particular forms and conditions of autonomy in specific subject matters.[10] This provision has been dubbed 'differential regionalism'[11] or 'regionalism having a variable geometry'[12] or even 'asymmetric federalism.'[13] I will revert to this provision later in the chapter.

Although (asymmetrically) decentralised, Italy is not a federal state in classical terms. Yet, at the time of the constitutional reform of 2001 there

9 It is not the goal of this chapter to retrace the history of the Italian decentralisation process and the facts, issues and political actors involved, as an abundant literature already exists on the topic. While not claiming to be exhaustive, the following is a short bibliography on the subject: Ugo Amoretti, "A new look at federalism: Italy decentralizes," *Journal of Democracy* 13, no. 2 (April 2002): 126; Gianfranco Baldini and Brunetta Baldi, "Decentralization in Italy and the Troubles of Federalization," *Regional and Federal Studies* 24, no. 1 (2014): 87; Beniamino Caravita, "Italy: Between the Hybrid State and Europe's Federalizing Process," in *Routledge Handbook of Regionalism and Federalism,* eds. John Loughlin, John Kinkaid and Wilfried Swenden (London and New York: Routledge, 2013), 287; Gian Franco Cartei and Vincenzo Ferraro, "Reform of the Fifth Title of the Italian Constitution: A First Step Towards a Federal System?," *European Public Law* 8, no. 4 (2002): 445; Louis Del Duca and Patrick Del Duca, "An Italian Federalism? The State, its Institutions and National Culture as Rule of Law Guarantor," *American Journal of Comparative Law* 54, no. 4 (Fall 2006): 799; Sergio Fabbrini and Marco Brunazzo, "Federalizing Italy: The Convergent Effects of Europeanization and Domestic Mobilization," *Regional and Federal Studies* 13, no. 1 (Spring 2003): 100; Tania Groppi and Nicoletta Scattone, "Italy: The Subsidiarity Principle," *International Journal of Constitutional Law* 4, no. 1 (January 2006): 131; Martino Mazzoleni, "The Italian Regionalization: A Story of Partisan Logics," *Modern Italy* 14, no. 2 (May 2009): 135; Cesare Pinelli, "The 1948 Italian Constitution and the 2006 Referendum: Food for Thought," *European Constitutional Law Review* 2, no. 3 (October 2006): 329.

10 Article 116(3) Const. lists the areas where enhanced autonomy can be negotiated: all matters of shared jurisdiction between the state and the regions, as specified by article 117(3); specific subject matters normally falling within the exclusive legislative jurisdiction of the central state, such as: organisational requirements of the justice of the peace (article 117(2)(l)); general norms on education (article 117(2)(n)); and protection of the environment, eco-system, and cultural heritage (article 117(2)(s)).

11 Carlo Dapelo, "The Trends towards Federalism in Italy," *St. Thomas Law Review* 15, no. 2 (Winter 2002): 346.

12 Paolo Caretti and Giovanni Tarli Barbieri, *Diritto regionale* (Torino: Giappichelli, 2012), 34.

13 Augusto Barbera, "Da un federalismo 'insincero' ad un regionalismo 'preso sul serio'? Una riflessione sull'esperienza regionale," *Forum di Quaderni Costituzionali* (October 2012): 15, http://www.forumcostituzionale.it/wordpress/images/stories/pdf/documenti_forum/paper/0340_barbera.pdf.

was a widespread belief that this amendment represented the first step of a more drastic federalisation that would be completed in the years to come.[14] However, this transformation has not yet taken place; federalism debates have lost momentum and, at the time we are writing, further federal amendments have basically disappeared from the agenda of all political parties, leaving only academics to engage in debates on the nature and status of Italian regionalism.

2.3 *Federalism and Solidarity in Italy*

The 1948 Constitution can be regarded as the product of a compromise between unitary and decentralising forces: in fact, the Italian state model is usually identified as an example of *regional* state, although nowhere in the Italian Constitution it is so indicated. While it may be difficult to precisely distinguish *regional* from *federal* states, the former are commonly labelled as *quasi*-federal since they present some federal traits without amounting to pure federations, and centralising forces are prevalent. For example, in our specific case study, the Italian Constitution entrenches a division of legislative powers between central and regional governments (this being a classic *federal* element), but it lacks many other important *federal* traits such as a *federal* Senate or a direct regional involvement in constitutional amendments.

As indicated above, a federal reform in Italy was discussed, initiated in 2001, but never completed. There are clear reasons suggesting why a complete reform in federal terms has not yet occurred. In fact, among other things, a widespread belief exists that a fully-fledged federal reform would irreparably compromise the unity of the state and the solidarity-based relationships that inform the Italian constitutional architecture, considering the prominent position that solidarity occupies among the fundamental principles of the Republic. In other words, federalism and solidarity are seen as hostile and competing values, in view of the risk that a federal solution would divide, rather than unite, the various territories of the country, thus compromising the idea of territorial solidarity among regions.[15] Consequently, a fully-fledged federal state would

14 *Ex multis,* see Cartei and Ferraro, "Reform of the Fifth Title of the Italian Constitution," 445; Siegfried Wiessner, "The Movement Toward Federalism in Italy: A Policy-Oriented Perspective," *St. Thomas Law Review* 15, no. 2 (Winter 2002): 301; Del Duca and Del Duca, "An Italian Federalism?," 799, who talk about a 'nascent federalism combining Regionalization and Supranationalism'.

15 Andrea Patroni Griffi, "Federalismo, Mezzogiorno e sviluppo solidale," *Forum di Quaderni Costituzionali*: 3, http://www.forumcostituzionale.it/wordpress/images/stories/pdf/documenti_forum/paper/0247_patroni_griffi.pdf.

deepen, rather than limit, the socio-economic inequalities among the twenty regions.

This tension between solidarity and federalism can be partially explained by the fact that the constitutional reform of 2001 was the result of years of intense political debate carried out under the aegis of federalism and initially led by the *Northern League* (LN), a political party rooted in the wealthier regions of the North that achieved electoral success and national visibility by critically questioning established behaviours of the elite class (e.g. excessive state spending, poor performance of public services, waste, corruption). The LN voiced the discontent of Northern Italy over the political attitude of the central government, which seemed to neglect the interests and needs of the most industrialised, fast-paced, and richer areas of the country to the advantage of the South. However, because these requests for increased autonomy were made by a political party firmly rooted in the richest area of the country, and thus embedded in the economic disparity existing between the wealthier North and the poorer South, one of the strongest censures made to the LN was that its federalism program merely aimed at furthering the economic and financial greed and selfishness of certain regions, while overlooking the needs of the poorer areas of the country. In other words, that part of the country that was seeking federal solutions was believed to want more powers without obligations towards the rest of the country (specifically, the South): for this reason, federalism was ostracised because of the conviction that it would discourage solidarity among the various areas of the territory.[16] Consequently, while solidarity is a fundamental constitutional principle that significantly informs the constitutional framework of the state, a discussion on solidarity would not be complete without reference to regional autonomy and issues of socio-economic inequality, as will be better illustrated in section 3.

3 The Principle of Solidarity as an Aspirational Principle

3.1 *Aspirational Principles in General*

Constitutions are usually intended to endure several generations and are commonly seen as the place to design the institutional architecture of a state. Building upon Stone and Arcioni, this chapter shares the view that constitutions are not only meant to last for a long time and to outline the main features

16 André Lecours and Erika Arban, "Why Federalism Does Not Always Take Shape: the Cases of Italy and Nepal," *Regional and Federal Studies* 25, no. 2 (2015): 187.

of the polity in question, but they can also be construed as the repositories of shared values, as they often contain fundamental principles to which citizens aspire.[17] In this regard, solidarity can be considered a shared value for citizens, as being a principle that helps define their identity (solidarity in its *private* understanding), the functioning of the state (solidarity in its *public* understanding), as well as other fundamental values (e.g. the preservation of human life, the protection of human dignity, rights provisions and social goals): this is particularly true in the case of post-conflict constitutions or constitutions that have emerged out of dictatorship, as was the case with many constitutions enacted after WWII.[18] For this reason, the aspirational value of solidarity infuses several federal and quasi-federal systems as a principle that fosters equality, social rights, well-being, and friendship among and between the various actors – public and private – of a polity; and this is true even when it is not expressly spelled out in the constitution.[19]

Aspirational concepts such as solidarity thus help to define the overall ideals to which a given legal system ultimately strives for; but aspirational concepts risk remaining empty paradigms if not matched by some concrete mechanism that breathes life into them. It is thus important to understand the real meaning of solidarity to grasp how it can be construed as a principle of equality, both in general terms and in the specific case of Italy. When entrenched in a constitution, solidarity becomes aspirational in the sense that it directs certain policies to foster equality and eliminate obstacles; it also directs state policies to address certain issues based on equality.

3.2 *The Different Meanings of Legal Solidarity*

It is not the purpose of this chapter to thoroughly retrace the meaning of the solidarity principle as a philosophical concept, as an abundant literature already exists on the subject.[20] As I have extensively explained

17 Elisa Arcioni and Adrienne Stone, "The Small Brown Bird: Values and Aspirations in the Australian Constitution," *International Journal of Constitutional Law* 14, no. 1 (January 2016): 1 and 4.

18 Arcioni and Stone, "The Small Brown Bird," 2–3.

19 Erika Arban, "Exploring the Principle of (Federal) Solidarity," *Review of Constitutional Studies* 22, no. 2 (September 2017): 242.

20 *Ex multis,* see Arban, "Federal solidarity," 243; Lorenza Carlassare, "Solidarietà: un progetto politico," *Costituzionalismo.it*, no. 1 (May 2016): 45, http://www.costituzionalismo.it/download/Costituzionalismo_201601_559.pdf; Charles D. Gonthier, "Liberty, Equality, Fraternity: the Forgotten Leg of the Trilogy, or Fraternity: the Unspoken Third Pillar of Democracy," *McGill Law Journal* 45, no. 3 (June 2000): 567; Juliane Ottmann, "The Concept of Solidarity in National and European Law: The Welfare State and the European Social Model," *Vienna Journal on International Constitutional Law* 2, no. 1 (January 2008): 36;

elsewhere,[21] however, there is a conceptual distinction between moral and legal solidarity: in fact, while the former can be understood as a voluntary charitable act premised on mutual assistance or philanthropy,[22] legal solidarity shall be understood as an 'obligatory act based on legal rights and duties' although some sentiments of mutual assistance might always come into play.[23]

Another important classification that should be made is that legal solidarity can acquire different meanings depending on whether it is entrenched in international or domestic law, in private or public law, or in federal theory.[24] In private law, solidarity is linked to the concept of *obligatio in solidum* of Roman origins or, in the words of Black's law dictionary, '[t]he state of being jointly and severally liable (as for a debt)'.[25] Solidarity in international law can be traced back to the French term *fraternité* which, along with *liberté* and *égalité*, was one of the three linchpins animating the French Revolution, later passed on to the French Constitution and, from there, to the Universal Declaration of Human Rights.[26] According to some scholars, solidarity can in fact be understood as the *legalisation* or *juridicalisation* of the term *fraternité*.[27]

Within the ambit of public law, the spirit of solidarity can find expression in at least three different ways: the first relates to socio-economic rights and, more generally, welfare provisions, such as programs providing for health and social services.[28] Second, solidarity can permeate provisions dealing with drastic emergencies such as terrorist attacks or natural disasters, usually binding actors at the local, national and even international levels.[29] Third, solidarity in its public law understanding may refer to the general responsibility of the individual towards the community at large: in this sense, political solidarity commonly includes duties performed by subjects such as voting, homeland

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Vincenzo Tondi delle Mura, "La solidarietà tra etica ed estetica, Tracce per una ricerca," *Rivista dell'Associatione Italiana dei Costitutionalisti*, no. 00 (July 2010): 1, https://www.rivistaaic.it/images/rivista/pdf/TondidellaMura01.pdf.

21 Arban, "Federal solidarity," 243 et seq.

22 Ottmann, "The Concept of Solidarity," 40; Willem T Eijsbouts and David Nederlof, "Editorial: Rethinking Solidarity in the EU, from Fact to Social Contact," *European Constitutional Law Review* 7, no. 2 (June 2011): 172; Arban, "Federal solidarity," 243.

23 Ottmann, "The Concept of Solidarity," 39–40 and 44; Arban, "Federal solidarity," 243.

24 Arban, "Federal solidarity," 243 et seq.

25 *Black's Law Dictionary,* 9th ed, *sub verbo* "solidarity"; Arban, "Federal solidarity," 243.

26 Gonthier, "Liberty, Equality, Fraternity," 572.

27 Carlassare, "Solidarietà," 47, fn. 8.

28 Ottmann, "The Concept of Solidarity," 39; Arban, "Federal solidarity," 244.

29 Arban, "Federal solidarity," 244–245.

defence or military service, whilst socio-economic solidarity comprises the duty to obtain proper education, to work, or to contribute to public expenses.[30]

Finally, solidarity may assume yet another specific meaning within the ambit of federal theory. Here, solidarity infuses provisions on equalisation payments, found in federal and quasi-federal states alike, whose purpose is to reduce the socio-economic imbalances or inequalities that may characterise the various regions and territories of the federation. Furthermore, federal solidarity is often linked to the doctrine of federal loyalty, whose roots can be traced back to the German notion of *Bundestreue* whose literal meaning can be rendered as fidelity, loyalty or faithfulness to the federal compact.[31] As we will see in the remainder of the chapter, all these different nuances of the principle of solidarity can be found in the Italian constitutional text.

3.3 *Solidarity in the Italian Constitution: A Fundamental Principle and an Aspirational Value*

The 1948 Italian Constitution had immense practical and symbolic value at the time it was enacted. In fact, it was the first constitution that Italy had ever had, if we consider that the document previously in force – the *Statuto Albertino* – was a bill that King Carlo Alberto had granted in 1848 to the Kingdom of Piemonte and Sardegna: the *Statuto* was later extended to the whole peninsula after unification, and it remained in force also during the Fascist dictatorship, although it was mainly disregarded.

The 1948 Constitution was penned by the Constituent Assembly (*Assemblea Costituente*), whose members were democratically elected in June 1946 by universal suffrage with the specific task of drafting a new Constitution. Considering the time and circumstances in which it came into being, the 1948 Constitution represented, at the time, one of the most advanced examples of a post-war, post-dictatorship fundamental document, imbued with the highest and most elevated democratic values. Within this framework, the principle of solidarity immediately acquired a prominent place among the fundamental principles of the Constitution, an aspirational value informing the entire

30 Giovanna Razzano, "La materia concorrente della produzione, trasporto e distribuzione nazionale dell'energia nella recente giurisprudenza costituzionale, fra leale collaborazione e doveri di solidarietà," *federalismi.it, no.* 13 (June 2011): 12, http://www.federalismi.it/ApplOpenFilePDF.cfm?artid=18394&dpath=document&dfile=28062011112903.pdf&content=La+materia+concorrente+della+produzione,+trasporto+e+distribuzione+nazionale+dell%27energia+nella+recente+giurisprudenza+costituzionale,+fra+leale+collaborazione+e+doveri+di+solidariet%C3%AO+-+stato+-+dottrina+-+, with references; Arban, "Federal solidarity," 245.

31 Arban, "Federal solidarity," 246 et seq.

constitutional architecture. According to Tondi delle Mura, before representing a legal innovation, the constitutional entrenchment of solidarity marked a historical and cultural turn, at least compared to the previous legal system, thus transforming Italy into one of the most innovative and complete systems of the post-war era.[32]

Technically speaking, the principle of solidarity is explicitly spelled out only in two articles of the Constitution: article 2 (as one of the fundamental principles of the Italian Republic) and article 119 (with regards to fiscal federalism). However, both the ItCC and most constitutional scholars acknowledge that the spirit of solidarity in its broadest sense infuses several other provisions of the constitutional text. In fact, being based on the 'centrality of the human being', solidarity influences the dynamics of public and private powers, as well as of individual freedoms,[33] and is the 'founding paradigm' upon which the unity of the state is premised.[34]

Article 2 Const. spells out solidarity in the following terms:

> The Republic shall recognise and protect the inviolable rights of the person, both as an individual and in the social groups where human personality is expressed. The Republic expects that the fundamental duties of political, economic and social solidarity be fulfilled.

First, this article categorises two types of solidarity, *political* and *socio-economic*. As indicated *supra,* these duties generally refer to the responsibilities of the individual towards the community to which they belong, and include duties such as voting, accessing proper education, and working.[35]

Yet, this study of solidarity as a fundamental principle and aspirational value would not be complete without considering article 3 Const., as implicit in the principle of solidarity is the principle of equality.[36]

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32 Tondi delle Mura, "La solidarietà fra etica ed estetica," 1–2.

33 Tondi delle Mura, "La solidarietà fra etica ed estetica," 2.

34 Alessandro Morelli, "I principi costituzionali relativi ai doveri inderogabili di solidarietà," *Forum di Quaderni Costituzionali,* (April 2015): 3, http://www.forumcostituzionale.it/wordpress/wp-content/uploads/2015/04/morelli.pdf.

35 Razzano, "Materia concorrente," 12.

36 Article 3 Const. mandates that '[a]ll citizens shall have equal social dignity and shall be equal before the law, without distinction of gender, race, language, religion, political opinion, personal and social conditions. It shall be the duty of the Republic to remove those obstacles of an economic or social nature which constrain the freedom and equality of citizens, thereby impeding the full development of the human person and the effective participation of all workers in the political, economic and social organisation of the country.'

Read together, articles 2 and 3 Const. are considered an expression of what the ItCC termed *interpersonal* or *intergenerational* solidarity.[37] In this narrative, the 'centrality of the human being' is confirmed by the prominence that article 3 Const. gives to the concept of 'human dignity'. Constitutional scholars have defined it as a constitutional value that belongs to all human beings, regardless of their personal or social conditions, because the absence of dignity implies the 'negation of the same identity' of the individual:[38] solidarity in this sense means the respect of the individuals in their physical being and needs.[39]

Solidarity and equality (understood also as prohibition of discrimination and absence of privileges)[40] in this way become indissolubly intertwined considering that individual and collective inequalities are no longer seen as a reason for social disintegration or personal impediment, but become the incentive to trigger public intervention and private participation, as one scholar has indicated.[41] Equality is thus the 'engine' of solidarity.[42] In this framework, solidarity and equality can be seen as principles complementing each other, as they contribute to regenerating each other and reciprocally give some concrete meaning.[43] Furthermore, Morelli explains how solidarity and equality are intimately related in the sense that the constitutional entrenchment of equality alone would not be sufficient to ensure the cohesion of the many heterogeneous components of the state: this is why solidarity is also needed.[44] Social and economic inequalities among citizens can be overcome only through an active participation of the state through the principle of solidarity.[45]

With regards to the type and meaning of social solidarity as spelled out in article 2 Const., the case law of the ItCC has offered interesting explanations that help better delineate the scope of this principle. In particular, in decision 75/1992 the ItCC confirmed that solidarity shall be read as a principle

37 The concept of *interpersonal* or *intergenerational* solidarity was used for the first time by the Italian Constitutional Court in decision 203/2013, para. 3.4.

38 Carlassare, "Solidarietà," 53.

39 Carlassare, "Solidarietà," 55.

40 Carlassare, "Solidarietà," 52.

41 Tondi delle Mura, "La solidarietà fra etica ed estetica," 2.

42 Carlassare, "Solidarietà," 57.

43 Antonio Ruggeri, "Eguaglianza, solidarietà e tecniche decisorie nelle più salienti esperienze della giustizia costituzionale," *Rivista dell'Associazione Italiana dei Costituzionalisti*, no. 2 (May 2017): 5, https://www.rivistaaic.it/images/rivista/pdf/2_2017_Ruggeri.pdf. The intimate link between solidarity and equality, the latter to be understood as a value that contributes to infusing the former with some concrete meaning, is also stressed by Carlassare, "Solidarietà," 52.

44 Morelli, "Principi costituzionali," 3.

45 Morelli, "Principi costituzionali," 6, with further references.

positioned among the fundamental values of the Italian legal system to the point that it is solemnly protected and acknowledged – along with the inalienable rights of the individual – as the basis for social cohabitation and normatively canvassed in the constitutional text. This means that solidarity does not only have a descriptive meaning but is deeply imbued with a prescriptive value: consequently, while both solidarity and equality can be seen as aspirational and elevated principles, they are also prescriptive ones.[46]

This understanding of solidarity is further elaborated on in decision 500/1993, where the ItCC once again underlines the link existing between equality and solidarity. Solidarity thus acquires a modern gloss, as it goes beyond traditional conceptualisations premised on assistance and charity, or duties and obligations imposed by law, to become a way to concur and accomplish the substantial equality that allows the development of the personality as entrenched in article 3 Const. Its purpose is to reach the necessary collaboration to achieve common goods such as scientific research, cultural and artistic enhancement, and health and wellbeing for all individuals. The court thus confirms the public value of the individual and associative expressions of solidarity: I will return to this aspect when discussing solidarity in conjunction with subsidiarity.

Although article 2 Const. is the only provision where solidarity as a fundamental principle is explicitly spelled out (along with article 119 Const. on fiscal federalism), the spirit of solidarity clearly infuses other parts of the Constitution, especially those related to socio-economic rights. For example, article 4 Const. recognises and protects the right of all citizens to work, where work is construed not only as a right but also a duty so that, through their working activity, each individual can contribute to the 'material or spiritual progress of society'.[47] Solidarity in relation to work performance is implicit also in article 36(1) Const. providing that workers are entitled to a salary proportional to the quantity and quality of the job performed, but in any event sufficient to guarantee to the worker and their family a free and decent life. Similarly, article 37 Const. mandates for equal salary treatment for working men and women for the same job and protects the working conditions of women in fulfilling their 'essential role in the family' and in ensuring 'appropriate protection for the mother and child'. The spirit of solidarity also prominently permeates article 38 Const. in providing for specific welfare and/or support services to citizens

46 Carlassare, "Solidarietà," 46.

47 Incidentally, labour also occupies a prominent place in the constitutional text, considering that it is the foundation upon which the whole Italian Republic is anchored: in fact, article 1 Const. mandates that 'Italy is a democratic republic founded on labour'.

unable to work and without means of subsistence; accident, illness, disability, old age and involuntary unemployment support to workers; and vocational training and education to disabled and handicapped persons. This provision is not to be read as an expression of the spirit of 'brotherhood' but as a clear duty of the state.[48]

Within the ambit of freedom of religion, article 8 Const. mandates that 'all religious denominations shall be equally free before the law' and this provision, read together with the prohibition against religious discrimination of article 3 Const., shall be construed as another example of solidarity, a value that religious intolerance destroys.[49]

With regards to family matters, article 29 Const. acknowledges and protects the rights of the family and the moral and legal equality of spouses, and this is usually construed as an example of the interpersonal or intergenerational solidarity enunciated above. Article 31(1) Const., provides that '[t]he Republic shall assist the development of a family and the fulfilment of its duties, with particular consideration for large families, through economic measures and other benefits'.

Article 32(1) Const. is also construed as entrenching solidarity-based values in protecting health as a fundamental right of the individual and as a collective interest and in guaranteeing free medical care for the indigents (so-called 'health solidarity').

Implicitly, solidarity also infuses article 34 Const. on the right to education, by mandating that primary education is compulsory and gratuitous, and that all capable and deserving students have the right to pursue their studies regardless of their economic capacity, as the State implements a system of scholarships, allowances and benefits to less advantaged families.

The right to vote enshrined in article 48 Const. is also seen as an expression of political solidarity entrenched in article 2 Const. Finally, article 53(1) Const. spells out a duty usually referred to as 'social solidarity' when it mandates that '[e]very person shall contribute to public expenditure in accordance with their capabilities'.[50] Social solidarity also permeates article 54 Const. providing for a duty to all citizens to 'be loyal to the Republic and to uphold its Constitution and laws'.

This reading of articles 2 and 3 Const. (along with the other provisions on socio-economic and fundamental rights listed above) shows that solidarity shall be construed both as a right *and* a duty: on the one hand, by mandating

48 Carlassare, "Solidarietà," 57–58.

49 Carlassare, "Solidarietà," 55.

50 See also ItCC ruling 270/2007.

that the Italian Republic expects the fulfilment of the fundamental duties of political, economic and social solidarity, article 2 Const. goes beyond the meaning of mere voluntary or charitable action[51] and is rather construed as a *duty* engaging both the state and the individuals to act according to certain canons. On the other hand, in the provisions on socio-economic rights, solidarity becomes a *right* for the individual to expect some specific performance from public institutions that thus have a duty to act on the basis of solidarity and equality.

Issues of *interpersonal* or *intergenerational* solidarity and equality *ex art.* 2 and 3 Const. have played a prominent role in Italian constitutional case law over these past few years, especially with regards to immigration issues in relation to fundamental rights. As an example, in ruling 192/2006 the ItCC ruled on solidarity in its connection to the right to health embedded in article 32 Const. The Justice of the Peace of Genova questioned the constitutional legitimacy of a specific provision contained in state law 286/1998 on immigration, whereby an expulsion decree could be executed also towards a (non-EU) foreign national, illegally present in the Italian territory, in a relationship with a pregnant Italian citizen, thus preventing him from providing adequate moral and material care and support to the woman. According to the trial judge, such a decree would infringe upon articles 2 and 32 Const. as it would limit or violate, among other things, the mandatory duty of solidarity linked to the right to health. In rejecting the claim, the ItCC held that the reasons of human solidarity are not in contrast with immigration laws enacted to provide for organised migratory flows and for the adequate reception and integration of foreign nationals. In confirming the above statement, rulings 64/2011 and 144/2011 further explained that solidarity is, however, expressed in the legislative provisions applying also to illegal immigrants the norms on refugee aid and international protection and in non-criminalising all human aid and assistance given in Italy to foreign individuals in such need; decision 250/2010 reached similar conclusions.

This overview of solidarity and equality as percolating from articles 2 and 3 Const. shows that the type of interpersonal or intergenerational solidarity is a well-articulated principle in the Italian constitutional framework: in fact, it moves vertically from the individual to the community and central institutions and vice versa from central institutions to individuals, in a dynamic movement that brings reciprocal benefits to the parties involved.

51 Gianluca Bascherini, "La solidarietà politica nell'esperienza costituzionale repubblicana," *Costituzionalismo.it,* no. 1 (June 2016): 126, http://www.costituzionalismo.it/download/Costituzionalismo_201601_565.pdf.

4 Solidarity and Federalism

4.1 *In General*

When discussing solidarity, the focus is usually on fundamental or socio-economic rights and duties: in this sense, the study on solidarity and equality carried out so far in the Italian context is a good example of this common approach. However, I explained above that, aside from it being a general and/or aspirational principle with a normative and prescriptive value, solidarity as a legal concept may acquire a very distinctive nuance within the ambit of federal theory: an analysis of solidarity would thus be incomplete without also considering this important facet of the principle.

In section 1, I argued that, while Italy is not a fully-fledged federation, there is a longstanding and quite contested relationship between solidarity and federalism. Among other things, federalism implies a decentralisation of powers, including fiscal powers, since the fiscal autonomy of the peripheral units is one of the elements that distinguishes a federal state from a unitary one. It is exactly this fiscal autonomy of the peripheral units that has created problems in Italy in the past. To better understand this, we need to go back to the socio-economic asymmetries characterising Italy.

Solidarity has emerged almost as an obsessive concern for Italian decision makers since unification in the 1860s, particularly because of the socio-economic disparities existing between the richer regions in the North and the poorer areas in the South, so that solidarity-based mechanisms have persistently been invoked to contain these imbalances. Before the constitutional reform of 2001, one of the major worries in political circles was that a transformation of Italy into a fully-fledged federation would amplify, rather than reduce, the socio-economic disparities between the North and the South. In other words, the fear was that federalism would be against the solidarity-based interests linking regions to each other and to the state.[52]

When in the 1990s the LN[53] included federalism in its political agenda, it was understood, by non-LN voters, as the expression of a certain economic and political interest representative of the wealthier Northern Italy only, to the detriment of the rest: this contributed to the lack of popularity of federal ideas outside traditional LN strongholds. The LN fed into the North/South divide in claiming that Rome used money coming from taxpayers in the North to subsidise the South without giving back anything to the allegedly most hard-working

52 Lecours and Arban, "Italy and Nepal," 187 et seq.

53 As discussed above, the LN is a political party whose supporters mainly resided in the wealthier North.

part of the country. The LN insisted that each region should be responsible for its own money and deal with all local aspects without depending on interventions from the centre. But the consequences of this federal project were seen as dire for the South: by vesting individual regions with more powers, especially in the fiscal domain, the wealthier areas in the North would risk becoming even wealthier to the detriment of the poorer regions in the South, severely penalised in such a scenario as they could no longer rely on central transfers. In other words, the federal ideas advocated by the LN were understood by many as the expression of the Northern selfishness towards the South that would run against the spirit of solidarity and equality.[54]

When in 2001 Title V of the Constitution was amended, it did not transform Italy into a full-fledged federation, but it strengthened the (legislative and administrative) powers of regional governments and provided for a mild form of fiscal federalism. This is important for our narrative, considering that constitutional provisions on fiscal federalism exude solidarity concerns. When discussing the principle of solidarity in its specific connection with Italian regionalism, the following articles of the Italian Constitution need to be discussed: article 117 on the division of legislative powers between the regions and the central government; article 118 on horizontal and vertical subsidiarity, article 119 on fiscal federalism, and article 120 on loyal cooperation.

4.2 *Solidarity and Division of Powers* (*Article 117 Const.*)

Article 117 Const. enshrines the division of legislative powers between the two levels of government: article 117(2) Const. lists all subject matters falling within the *exclusive* legislative powers of the central government; article 117(3) Const. enumerates the subject matters falling within the *concurrent* jurisdiction of central and regional government,[55] while article 117(4) Const. reserves all *residual* powers (e.g. powers not specifically detailed in the constitutional text) to regional governments. General solidarity and equality concerns, however, lurk behind some of the choices made by the constitutional legislator in dividing powers between central and regional governments. For example, article 117(2)(*l*) Const. provides that the central government has exclusive jurisdiction over civil and criminal law and procedure, as well as the administrative judicial system; article 117(2)(*m*) Const. reserves to the exclusive jurisdiction of the central government the power to set the basic levels of benefits for the enjoyment of

54 Lecours and Arban, "Italy and Nepal," 187 et seq.

55 Article 117(3) Const. explains that when powers are *concurring,* State (or central) legislation is responsible for laying down fundamental principles, whilst regional governments are vested with the actual legislative powers.

social and civil rights; articles 117(2)(*n*) and (*o*) Const. assign to the exclusive power of the central state the regulation of general provisions on education and social security, respectively; article 117(2)(*s*) Const. reserves as the exclusive competence of the national Parliament the power to legislate in areas such as environmental protection, ecosystem and cultural heritage.[56]

In the specific context of the division of powers, the principle of solidarity has been used by the ItCC as a justification for deviating from the way powers are distributed between the state and regional governments. For example, in ruling 10/2010 the ItCC upheld a state intervention that introduced a so-called *social card* in 2008 to help disadvantaged people buy necessary goods, in apparent violation with the regional power over services and public assistance. The ItCC justified the state intervention by resorting to the principles of solidarity and equality to function as some sort of 'national interest' clause.[57]

4.3 *Solidarity and Subsidiarity* (*Article 118 Const.*)

Among the many novelties introduced by the 2001 constitutional reform, there was the entrenchment of the principle of subsidiarity in article 118. Article 118(1) Const. provides that *administrative* functions belong to the level of government closest to the citizens (e.g. municipalities), unless they are attributed to a higher level of government (provinces, metropolitan cities, regions, or the State) if there is a need for uniform interpretation in a given subject matter pursuant to the principles of subsidiarity, differentiation, and adequacy (or proportionality). Article 118(1) Const. thus entrenches subsidiarity in its most classic understanding, as a tool where all the administrative functions that are best handled locally are assigned to the level of government closest to citizens.

For purposes of our discussion, however, it is article 118(4) Const. that acquires an interesting gloss. In fact, this provision mandates that

> The State, regions, metropolitan cities, provinces and municipalities shall promote the autonomous initiatives of citizens, both as individuals and as members of associations, relating to activities of general interest, on the basis of the principle of subsidiarity.

56 This exclusive reservation has been explained by the need to set uniform terms of environmental protection across the national territory based on the need to offer and guarantee the use of water resources according to solidarity-based criteria (among other things): *ex multis,* see ItCC rulings 93/2017 and 246/2009.

57 Angelo Schillaci, "Governo dell'economia e gestione dei conflitti nell'Unione Europea: Appunti sul principio di solidarietà," *Costituzionalismo.it*, no. 1 (March 2017): 40, http://www.costituzionalismo.it/download/Costituzionalismo_201701_604.pdf.

This provision enshrines the so-called *horizontal* aspect of subsidiarity, one that relates to the 'sharing of competences and initiatives between public and private actors'[58] so that, in this sense, 'subsidiarity could be conceived like a sort of 'division of labor' between public sector and civil society (person, family, non-profit organization, market)'.[59] Consequently, on the basis of subsidiarity as enshrined in the Constitution, the State and other local governments 'shall promote the autonomous initiatives of citizens, both as individuals and as members of associations, relating to activities of general interest'. As explained by one scholar, this provision 'aims to promote general interests' and is addressed to 'public authorities and private bodies'.[60]

Subsidiarity implies cooperation, and so it can be seen here as a cooperative principle: in this sense, the principle is linked to solidarity understood as cooperation.[61] Some theorists confirm this allegation and argue that this specific entrenchment of subsidiarity can be conceived as an expression of solidarity: in fact, article 118(4) Const. invites public and private actors alike to collaborate in the 'arrangement of services to the individual, while respecting the complexity of the needs of each single beneficiary'.[62] Consequently, article 118(4) Const. entrenches the idea of solidarity between the individual and the community:[63] in this sense, it could be understood as an expression of article 2 Const. in the part where it provides for the recognition and protection of inviolable basic rights of the individual as part of the social groups in which one's personality is expressed.

4.4 *Solidarity and Fiscal Federalism* (*Article 119 Const.*)

Because of the specific nature of the constitutional and political debate over federalism, it is with regard to article 119 Const. that issues of solidarity and equality prominently come into play. Article 119 Const. on fiscal federalism was one of the most notable novelties of the 2001 constitutional reform. The first two paragraphs of article 119 Const. mandate that regions (along with other local self-governments) shall enjoy financial autonomy of revenues and

58 Alessandro Colombo, "The 'Lombardy Model': Subsidiarity-informed Regional Governance," *Social Policy and Administration* 42, no. 2 (April 2008): 182; see also Erika Arban, "Re-centralizing Subsidiarity, Interpretations by the Italian Constitutional Court," *Regional and Federal Studies* 25, no. 2 (2015): 129.

59 Colombo, "The Lombardy Model," 182; Arban, "Re-centralizing Subsidiarity," 129.

60 Claudia Tubertini, "Public Administration in the Light of the New Title V of the Italian Constitution," *European Public Law* 12, no. 1 (2006): 40.

61 Schillaci, "Governo dell'economia," 41.

62 Tondi delle Mura, "La solidarietà fra etica ed estetica," 10.

63 Morelli, "Principi costituzionali," 4.

expenses, and shall set and levy taxes and collect revenues of their own, in compliance with the Constitution, with tax system principles and with the principles of coordination of state finance; furthermore, regions and other local entities also share in the tax revenues related to their respective territories. Article 119(3) Const. introduces equalisation payments, a solidarity-based tool that is common to several federal or decentralised systems: the paragraph mandates that national legislation shall provide for equalisation funds (with no allocation constraints) for territories having a lower per-capita taxable capacity. As the constitutional text further provides (article 119(4) Const.), and as the same ItCC has explained, all revenues that regions (and other local governments) raise in accordance to articles 119(2)(3) Const. exhaust the list of resources that allow them to fully finance the public functions attributed to them. However, article 119(5) Const. further provides that the central government shall allocate supplementary resources and adopt special measures in favour of specific regions or other local governments to promote economic development, social cohesion and solidarity, to reduce economic and social imbalances, to foster the exercise of individual rights or to achieve goals other than those pursued in the ordinary implementation of their functions. I will revert to this paragraph in a moment, but to complete the overview of this constitutional provision, it shall be recalled that article 119(6) Const. mandates that regions and other local governments have their own properties and may resort to indebtedness only as a means of funding investments, while state guarantees on loans contracted for this purpose are not admissible.

We noted above that article 119 Const. was one of the most important innovations introduced by the 2001 constitutional amendment, but it did not come without concerns for solidarity. To better clarify this point, it might be helpful to point out how the previous version of article 119 Const. had a rather different gloss, as it specifically targeted Southern regions in requiring the national government to statutorily grant special contributions to individual regions, particularly in order to valorise the *Mezzogiorno* and the Islands.[64] In any event, contrary to the *interpersonal* or *intergenerational* connotation of solidarity enshrined in article 2 Const. and outlined above, article 119 Const. relates to a more 'public' aspect of the principle, as this provision requires the central government to play a pivotal role in assisting disadvantaged regions and containing the imbalances between richer and poorer areas through equalisation

64 Patroni Griffi, "Federalismo e Mezzogiorno," 3.
Mezzogiorno is a term commonly used to refer to the South of Italy, whereas the term *Islands* usually refers to Sicilia, Sardegna, but also to the myriad of smaller islands positioned in the Mediterranean Sea that are also considered disadvantaged.

payments. However, it is always the principles of solidarity and equality entrenched in articles 2 and 3 Const. that constitute the basis for solidarity in article 119 Const. In other words, the exact contours of solidarity are often porous, as the fiscal component is never completely separated from the more moral nuance of the principle. This means that the various facets of solidarity overlap, making it a very fluid value.

As anticipated above, it is the allocation of supplementary resources and implementation of special financial interventions in favour of specific local governments (article 119(5) Const.) that has raised most concerns, and the ItCC has been called into play many times to clarify the scope of this provision. In fact, regional governments have often lamented that the central state has resorted to article 119(5) Const. to control regional or local resources, even when this was prohibited by the Constitution. In ruling 16/2004, for example, Regione Umbria questioned the constitutional validity of a few provisions included in the 2002 Budgetary Law, in particular in the part where it created a state Fund aimed at financing the adoption of development and renovation programs for municipal territories. A significant portion of this Fund was reserved for smaller municipalities, particularly those located in Southern Italy. According to Regione Umbria, the creation of this Fund infringed upon, among other things, the fiscal autonomy of regions as the Fund could not be traced back to the type of interventions listed in article 119(5) Const. Rather, it was destined to unspecified recipients, even if the provision seemed to favour smaller municipalities in the South. The ItCC explained that the central government cannot directly finance interventions (with allocation constraints) in favour of municipalities, for activities that fall within the jurisdiction of the latter and that are outside the subject matters of exclusive national competence; likewise, the state cannot directly finance special interventions in favour of certain municipalities as per article 119(5) Const. In particular, it is not admissible for the state to provide for such financing in areas belonging to the exclusive competence of the regional governments. Furthermore, the types of intervention indicated in article 119(5) Const. shall be considered additional to the integral financing provided for by article 119(4) Const. of tasks belonging to local governments. They shall refer to equalisation goals or goals other than the normal performance of their functions and shall be destined to specifically identified local governments. In light of the above, the ItCC concluded that the challenged state provision did not comply with constitutional requirements, it being a mere direct transfer of state funds from the state to municipalities for purposes set by state law, and foreign to the constitutional architecture painted by article 119 Const. Similar arguments were confirmed in ItCC rulings 37/2004 and 49/2004.

ItCC ruling 222/2005 also falls along the same lines: here, the Court explained that, within the framework sketched by article 119 Const., the central government cannot establish its own financial support in subject matters falling entirely within regional (exclusive) legislative jurisdiction; neither can it establish sectoral funds to finance regional activities. The only exceptions in this regard are those enshrined in article 119(5) Const., allowing the central government to finance activities that would normally fall within exclusive regional competences, as long as the goal is to promote economic development, socio-economic cohesion and social solidarity.

With ruling 451/2006, the ItCC upheld a state legislative provision creating a fund for special housing rent: the objective of this intervention was to broaden the number of beneficiaries of subsidised rate leases and thus remove barriers to the enjoyment of housing especially in those territories where rents are particularly high.

With ruling 45/2008, the ItCC upheld as complying with article 119(5) Const. a state law providing for the allocation, by the Ministry of Health, of significant sums of money to Southern regions to ensure the continuation of special interventions for the diffusion of oncological screening. The ItCC saw this as an example of a special intervention pursuant to article 119(5) Const. as it aimed at fostering social solidarity, and the effective exercise of individual rights.

An interesting ruling of the ItCC on solidarity and article 119 Const. is 118/2015: here, the court declared the unconstitutionality of some sections of a Regional Law of Veneto calling, among other things, a referendum asking citizens whether they would be in favour of keeping locally at least 80 % of the taxes paid every year to the state, and whether the region should keep at least 80 % of the taxes levied in the regional territory. The ItCC argued that these two questions had the effect of significantly altering the balance of public finance, thus jeopardising the solidarity-based links between the people living in the region and the state. Among other things, the proposals affected some structural elements of the national system of financial planning necessary to ensure the cohesion and solidarity in the state, as well as its legal and economic unity. The two questions implicitly impacted solidarity among regions, between the region and the state, and even among individuals because, as the court indicated, the referendum proposed to subtract a significant portion of public finance to direct it to the exclusive advantage of a single region and its inhabitants.

To complete this survey of solidarity-based mechanisms as enshrined in article 119 Const., one last question needs to be asked: does article 119 Const. extend this type of solidarity duty also *horizontally*, e.g. among regions? This question was addressed by the ItCC in ruling 176/2012, when the Court was

called upon to decide whether article 119(5) Const. also encompasses a duty upon 'virtuous regions' to support less advantaged regions, so that the duty to support less developed regions falls not only within the jurisdiction of the central government but also that of richer regions. The ItCC clarified that equalisation and other solidarity-based mechanisms can only come from the central government (thus *vertically*), as the intention of the constitutional legislator was to provide only for *vertical* equalisation payments.

4.5 *Solidarity and Loyalty (Loyal Cooperation) (Article 120(2) Const.)*

As I have extensively illustrated elsewhere, federal theory often links solidarity to the doctrine of federal loyalty or *Bundestreue*, the latter being a notion developed in German constitutionalism and reflecting an idea of loyalty or faithfulness to the federal compact.[65] *Bundestreue* implies, among other things, some form of cooperation in trust and good faith between central and peripheral governments, including the duties to support and consult one another and coordinate their actions.[66] This explains why cooperative federalism is often construed as an expression of *Bundestreue*. Yet, the two are not perfectly identical: in fact, *Bundestreue* 'is not exhausted in the idea of intergovernmental relations and overlapping jurisdiction' between central and peripheral governments, as it also includes dimensions traceable back to mutual aid and assistance that are well incarnated by the concept of solidarity.[67]

In article 120(2) Const., as amended in 2001, specific reference is made to *loyal cooperation* in the ambit of 'substitution powers' that the central government can use in the event the periphery fails to properly exercise these powers.[68]

According to the ItCC, this article protects the legal and economic unity of the state,[69] and it can be seen as another example of solidarity promoting

65 Arban, "Federal solidarity," 247.

66 Dirk Brand, "The South African Constitution – Three Crucial Issues for Future Development," *Stellenbosch Law Review* 9, no. 2 (1998): 186; Arban, "Federal solidarity," 247.

67 Arban, "Federal solidarity," 252.

68 More specifically, article 120(2) Const. mandates that '[t]he Government can subsume the authority of a Region, metropolitan city, province or municipality if it fails to comply with international rules and treaties or EU legislation, or in case of grave danger for public safety and security, or whenever such action is necessary in order to preserve legal or economic unity and in particular to ensure the minimum level of benefits relating to civil and social entitlements, regardless of the geographic borders of a local authority. The law shall lay down the procedures to ensure that subsidiary powers are exercised in compliance with the principles of subsidiarity and loyal co-operation'.

69 ItCC ruling 239/2015.

equality, as it requires the state to collaborate with regions on an equal basis: the ItCC has explained in ruling 222/2005 that loyal cooperation requires a real and current agreement between the state and regional governments in order to be complied with. In other words, it is not sufficient that the central government 'hears' regional governments, because in such situations the constitutional autonomy recognised for regions would be seriously restrained. Without a traditional *federal* senate or upper chamber in the Italian legal system, the ideal *locus* for the various levels of government (state and regions) to dialogue and find a common understanding is the State-Regions Conference or the Unified Conference.[70]

4.6 *Other Solidarity-Based Decisions in State-Regions Controversies*

To complete this overview of solidarity, it is useful to briefly discuss two other ItCC rulings where solidarity as a principle of equality was called into question in state-region controversies.

In the aftermath of the 2008 worldwide economic crisis, driven by the need to improve the overall credibility of Italy in the global context, a constitutional law was passed in 2012 to amend some sections of the Constitution: the string of amendments mainly dealt with the constitutional entrenchment of the principles of balanced budget and debt sustainability for all tiers of government, along with the respect of EU obligations. In ruling 88/2014 the ItCC made reference to these amendments and argued that the fulfilment of the obligation of public debt sustainability should be construed as a responsibility that, along with the principles of *intergenerational* solidarity and equality of articles 2 and 3 Const., belongs not only to public institutions but also to each individual citizen when acting towards the others, including future generations. As explained by one scholar, the rationale for this constitutional change was that, if public debt becomes unsustainable, the responsibility for this falls on everyone, private individuals and public bodies alike: for this reason, the twin values of solidarity and equality should inform all behaviours.[71] All citizens thus bear the sacrifice to guarantee the sustainability of public debt: this duty is grounded in the constitutional principles of solidarity and equality.[72]

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70 See *ex multis* ItCC ruling 297/2012. The 'system of conferences' was introduced in Italy in 1997, and it includes the permanent state-regions conference (composed by the president of each region, of each autonomous province, by the president of the council of ministers and by the ministers involved in the specific question) and the state-cities conference; the unified conference is composed by the members of both state-cities and state-regions conference.

71 Ruggeri, "Eguaglianza," 22.

72 Ruggeri, "Eguaglianza," 22.

Another interesting ItCC ruling is 331/2010: here, the Italian government questioned the constitutionality of a string of provisions contained in various regional laws and pertaining to the decision, made by some regional governments, to exclude regional territories from the installation of nuclear plants and storage unless a preliminary agreement was reached between regions and the state regarding the specific location of these plants. The ItCC ruled against these regional laws on various grounds, but most importantly was the argument whereby regions cannot unilaterally avoid the sacrifices that come with the enactment of a state law with a national scope (in the specific case, the sector of energy production), because this would violate the mandatory duties of socio-economic solidarity entrenched in the Constitution. Solidarity was invoked in this case to soften the self-centred behaviours of certain regions faced with legislation enforced at the national level in the interest of the whole country.

In conclusion, it is worth noting that scholars like Patroni Griffi harshly criticised many novelties introduced in 2001 that, in his opinion, betray solidarity, in particular the new fiscal system introduced by article 119 Const.:[73] in fact, he contends that asymmetrical federalism, or any form of federalism that puts territories in competition with one another, should be rejected as non-responding to the spirit of solidarity that animates the constitutional framework.[74] The only form of federalism acceptable for Italy would be 'unitary', in the sense of reducing asymmetries and inequalities among the various territories.[75] The risk of creating territorial asymmetries requires finding a balance between territorial pluralism, solidarity, subsidiarity and equality.[76] In this sense, scholars have explained that the constitutional reform of 2001 was meant to 'delineate some sort of Italian way to a unitary and solidarity-based federalism'.[77]

5 Conclusion: Solidarity as a Principle of Equality

Prominently entrenched in article 2 Const. among the fundamental principles of the Constitution, solidarity crosses the whole constitutional text,[78] thus

73 Patroni Griffi, "Federalismo e Mezzogiorno," 6.

74 Patroni Griffi, "Federalismo e Mezzogiorno," 6.

75 Schillaci, "Governo dell'economia," 42. Although the use of the term 'unitary' to define federalism might appear contradictory, the author probably refers to a form of 'symmetrical' or 'uniform' federalism.

76 Schillaci, "Governo dell'economia," 38.

77 Gian Candido De Martin, "Riforme autonomistiche incompiute e problemi culturali," *Amministrazione in Cammino* (May 2013): 2, https://www.amministrazioneincammino.luiss.it/wp-content/uploads/2013/01/GCDeMartin_studi-onoreN_Greco.pdf.

78 Carlassare, "Solidarietà," 46.

informing not only interpersonal and intergenerational relationships, but also the relationships between public institutions and individuals and, eventually, between the various levels of government, both in the sense of (federal) solidarity and of *Bundestreue* (or loyal cooperation). This chapter attempted to show how the principle of solidarity plays a crucial role in the Italian legal and constitutional architecture: as such, solidarity can be construed as an aspirational principle informing not only the constitutional provisions on fundamental and socio-economic rights, but also the constitutional provisions on autonomy and federalism. In other words, in the intentions of the drafters, solidarity was not an abstract or empty value, but an ideal that should acquire concrete sense in connection with the twin principle of equality.

In conclusion, this chapter advances the idea that solidarity as an aspirational principle tends to identify two major values: equality and unity. In fact, it appears rather clearly that, intrinsic in the notion of solidarity is a sense of equality, so that solidarity can be construed as a principle of equality. The *interpersonal* or *intergenerational* solidarity emerging from the combined reading of articles 2 and 3 Const. postulates the ideal of equality of all individuals in the enjoyment of their fundamental individual rights, including socio-economic rights. Furthermore, the solidarity-based mechanisms delineated in the various paragraphs of article 119 Const. are premised on the assumption that all regions should enjoy, as much as possible, the same equal conditions in terms of socio-economic and fiscal powers, so that solidarity can be construed as a tool to further fiscal equality and reduce fiscal imbalances. Finally, solidarity in the specific understanding of *loyal cooperation* as enshrined in article 120(2) Const. seems to suggest that the central government shall take into account the role of regions, almost as if these two levels of government were equal in decision-making.

Yet, solidarity is also a principle of unity: in fact, it plays a very important role as an aspirational concept that can be used to pursue and foster social cohesion in a state such as Italy, characterised by deep socio-economic asymmetries. In this sense, solidarity can be read as an aspirational constitutional principle that identifies a common value to seek the unity of the people and of the various units that compose the state even under conditions of profound diversity.

Unfortunately, however, despite the prominence and elevated moral and legal value that the Constitution assigns to solidarity as a principle of equality, inequalities and obstacles (that the state has a constitutional duty to remove) have dramatically increased over these past few decades in Italy.[79]

79 Carlassare, "Solidarietà," 58.

The North-South socio-economic cleavage seems without effective solutions, and is exacerbated by the role played by corruption in local and national politics. But inequalities are not a prerogative of Northern vs. Southern regions, as they increasingly shape the social sphere, thus jeopardising social cohesion. In times of global crisis such as we are currently experiencing, some scholars invite us to look back at the Constitution and its aspirational values of solidarity and equality as guidance in personal and institutional decisions to be made.[80]

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80 As an example, see Bascherini, "Solidarietà," 126.

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CHAPTER 5

Does Regional Autonomy Improve Local Public Services in More Diverse Regions?

Andrea Filippetti

1 Introduction

This chapter examines the relationship between diversity, access to local public services and regional autonomy. It starts from a common belief that the presence of marked diversity in communities might impair the functioning of the welfare state. By looking at the satisfaction of citizens about local public services – school, health and local policy – in European regions, this chapter shows empirically that citizens tend to be less satisfied about public services in regions characterised by higher diversity. This can question the access to public services in heterogenous places. In a second step, we examine whether regional autonomy can mediate this problem by relying on fiscal federalism theory, which argues that in the presence of heterogeneity across jurisdictions, a decentralised management of public services is more efficient. We find that in diverse regions, regional autonomy improves the satisfaction of citizens concerning local public services. This suggests that regional autonomy can represent a possible solution to guarantee equal access to public services in heterogenous societies.

The next 'Europe of regions' will profoundly differ from the present one. In fact, one of the most pressing challenges in many European countries stems from a relentless increase in the heterogeneity of population. This is the result of intra-European Union (EU) mobility, and migration from outside the EU. While some countries – such as France and the United Kingdom – have already experienced such differences within their borders due to their relationships with former colonies, and others – such as Germany – have experienced more recent flows related to job opportunities, for most European countries and regions this will be a new phenomenon for public policy to cope with.[1]

1 Gregory B. Christainsen, "Biology, Immigration, and Public Policy," *Kyklos* 65, no. 2 (2012), 164–178; James Dennison and Andrew Geddes, "Brexit and the Perils of 'Europeanised' Migration," *Journal of European Public Policy* 25, no. 8 (2018), 1–17.

One of the consequences of this process is the increasing pressure on the welfare states, particularly regarding the provision of local basic services, such as health, public housing, local policy and education. Alesina and Glaeser argue that 'one natural implication of our conclusion that fractionalization reduces redistribution is that if Europe becomes more heterogeneous due to immigration, ethnic divisions will be used to challenge the generous welfare state'.[2] As such, they raise a concern about a trade-off between a generous immigration policy and a generous welfare state. This is crucial for the European Union, since mobility of people represents one of its cornerstones. In the words of Britain's ambassador to Berlin, Sir Sebastian Wood, 'it is freedom of movement for workers, and not freedom of movement for 'welfare shopping''.[3] This problem has been restated recently in a commentary by Branko Milanovic, a leading expert on global inequality, who argues that welfare states attract a lot of unskilled migrants.[4]

Since in most cases local public services are either provided or managed at the regional or local level, the regions – and the regional governments – are expected to play an increasing role in managing this process. This issue has been addressed at the subnational level by research limited to the United States, precisely because public spending at the state level is of a different kind than at the country level.[5] This chapter aims to inform this debate by looking at the issue of diversity and the provision of local public services in European regions.

Several studies have enquired whether the presence of a highly heterogeneous population reduces the quality of local public policies. The answer is positive in most cases,[6] although much of the research has addressed ethnic diversity and has been carried out either in the Unites States or in developing countries, in which these ethnic differences are considerable.[7]

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2 Alberto Alesina and Edward Ludwig Glaeser, *Fighting Poverty in the US and Europe: A World of Difference* (Oxford: Oxford University Press, 2004), 11.

3 Tom Barfield, "UK asks for German help to stop 'welfare shopping'," *The Local*, 18 Febuary 2016, https://www.thelocal.de/20160218/uk-asks-german-help-to-stop-welfare-shopping.

4 Branko Milanovic, "Migration Vs. the Welfare State?," *the Globalist*, 16 May 2017, https://www.theglobalist.com/migration-vs-the-welfare-state/.

5 David M. Cutler, Douglas W. Elmendorf and Richard J. Zeckhauser, "Demographic Characteristics and the Public Bundle," *National Bureau of Economic Research NBER Working Paper*, no. 4283 (February 1993), 1–18, https://doi.org/10.3386/w4283,.

6 For a recent review see Holger Stichnoth and Karine van der Straeten, "Ethnic Diversity, Public Spending, and Individual Support for The Welfare State: A Review of the Empirical Literature," *Journal of Economic Surveys* 27, no. 2 (2013), 364–389, https://doi.org/10.1111/j.1467-6419.2011.00711.x.

7 See for example Tom Clark, Robert D. Putnam and Edward Fieldhouse, *The Age of Obama: The Changing Place of Minorities in British and American Society* (Oxford: Oxford

Decentralisation and regional autonomy have often been seen as an effective institutional setting to provide local public services efficiently and effectively, particularly in the presence of heterogeneity of the population. It is not by chance that the United States, Canada and Australia, countries that have their roots in migration, are among the most decentralised countries in the world, being in fact federal states. This is quite a common fact: countries where there are ethnic or linguistic minorities tend to be either federal or highly decentralised, such as for instance Canada, India, Nigeria and South Africa, to name a few. This is also evident in unitary countries – taking the form of asymmetric federalism – where there are minorities whose regional governments benefit from specific augmented forms of autonomy, as is the case in the United Kingdom, Spain, and Italy.[8]

Federalism, fiscal devolution and political decentralisation have been the major institutional reforms that have been carried out with the aim of reducing the gap, perceived as increasingly larger by citizens, between the government and territories.[9] For these reasons, over the past decades, several countries have carried out reforms that go in the direction of 'bringing the government closer to the people'.[10] We can mention major constitutional reforms in Italy and Spain, as well as recent reforms in France; but also a stronger 'voice' rising from the bottom, through which regions claim greater autonomy, as the cases of the referendums in Scotland, Cataluña, and those recently experienced in two regions in the North of Italy, suggest.

This chapter brings together these two streams of research, both of which have addressed the provision of local public service and public policies, but from a different angle. The former has addressed the relationship between diversity and local public policies; the latter has dealt with the role of decentralisation and regional authority in the provision of local public services.

University Press, 2013); Edward Miguel and Mary Kay Gugerty, "Ethnic Diversity, Social Sanctions, and Public Goods in Kenya," *Journal of Public Economics* 89, no. 11 (2005), 2325–2368; Andreas P. Kyriacou, "Ethnic Segregation and the Quality of Government: The Importance of Regional Diversity," *Constitutional Political Economy* 23, no. 2 (2012), 78–101.

8 Roger D. Congleton, Andreas Kyriacou and Jordi Bacaria, "A Theory of Menu Federalism: Decentralization by Political Agreement," *Constitutional Political Economy* 14, no. 3 (2003), 167–190.

9 Jorge Martinez-Vazquez, Santiago Lago-Peñas and Agnese Sacchi, "The Impact of Fiscal Decentralization: A Survey," *Journal of Economic Surveys* 31, no. 4 (2016), 1095–1129, https://doi.org/10.1111/joes.12182; Luis Diaz-Serrano and Andrés Rodríguez-Pose, "Decentralization, Subjective Well-Being, and the Perception of Institutions," *Kyklos* 65, no. 2 (2012), 179–193, https://doi.org/10.1111/j.1467-6435.2012.00533.x.

10 Gary Marks, Liesbet Hooghe and Arjan H. Schakel, "Measuring Regional Authority," *Regional and Federal Studies* 18, no. 2–3 (2008), 167–181.

More particularly, we investigate the relationship between diversity and the provision of local public service for European regions, exploring the following two research questions: *i. Does diversity affect the provision of local public services? ii. Is regional autonomy a moderator between diversity and the provision of local public services?* We do not look specifically at ethnic diversity, but we rather address the issue of national diversity; this allows us to extend the research to a wide sample of regions hence addressing a broader phenomenon which is relevant for EU policy.

The empirical analysis is based on 167 European regions. In order to measure the provision of local public goods at the regional level we employ the composite indicator developed by *The Quality of Government* (*QoG Institute* based on the citizens' perception about local public services.[11] Hence, in this chapter the provision of local public services is measured in terms of citizens' satisfaction. On the one hand, as a subjective measure it does not assure a perfect overlap with the real functioning of public services. On the other hand, when it comes to policy, the perception of citizens is relevant, in that it drives their decisions. As far as the level of regional autonomy is concerned, we employ the *Regional Authority Index* developed by Hooghe, Gary and Schakel;[12] these two indicators have a number of strengths and have been increasingly employed in this type of studies.[13] Finally, a variable taking into account the diverse composition of the population – a *diversity index* – is developed following other studies;[14] the index is based on the census of 2011 and considers three types of residents: native citizens, foreign EU residents, and foreign non-EU residents.

11 Quality of Government Institute of the University of Gothenborg, "Measuring the Quality of Government and Subnational Variation," *Report for the European Commission Directorate-General Regional Policy Directorate Policy Development* (December 2010), 1–48, https://ec.europa.eu/regional_policy/sources/docgener/studies/pdf/2010_government_1.pdf; Nicholas Charron and Victor Lapuente, "Why Do Some Regions in Europe Have Higher Quality of Government?," *QoG Working Paper Series*, no. 1 (January 2011), 1–38, https://www.pol.gu.se/digitalAssets/1357/1357846_2011_1_charron_lapuente.pdf.

12 Liesbet Hooghe, Gary Marks and Arjan H. Schakel, "Operationalizing Regional Authority: A Coding Scheme for 42 Countries, 1950–2006," *Regional and Federal Studies* 18, no. 2–3 (2008), 123–142.

13 See for example Nicholas Charron, Lewis Dijkstra, and Victor Lapuente, "Regional Governance Matters: Quality of Government within European Union Member States," *Regional Studies* 48, no. 1 (2014), 68–90; Roberto Ezcurra and Andrés Rodríguez-Pose, "Political Decentralization, Economic Growth and Regional Disparities in the OECD," *Regional Studies* 47, no. 3 (2012), 1–14, https://doi.org/10.1080/00343404.2012.731046.

14 Alberto Alesina and Ekaterina Zhuravskaya, "Segregation and the Quality of Government in a Cross Section of Countries," *The American Economic Review* 101, no. 5 (2011), 1872–1911; Kyriacou, "Ethnic Segregation and the Quality of Government," 166–180; Ceren Ozgen, Peter Nijkamp and Jacques Poot, "The Impact of Cultural Diversity on Firm

We find evidence that the presence of a heterogeneous population composition in the region is associated to a relatively worse performance in the provision of local public goods; regional autonomy can act, only partially, as a moderating mechanism between diversity and local public services.

The chapter is organised as follows. In the following section we put forward two hypotheses on the grounds of research on diversity and public policies, and research on fiscal federalism; section three presents our measures of public services, regional authority and diversity. Section four presents the empirical strategy and the results, while section five discusses them and concludes.

2 Local Public Services, Diversity and Regional Autonomy: Two Hypotheses to Be Tested

This chapter aims to bridge two different streams of research. The first deals with the impact of diversity on the provision of local public services.[15] The second deals with the role of federalism and regional autonomy, as a desirable institutional setting to deliver local public policies in the presence of heterogeneous communities. In what follows we derive two hypotheses regarding these two strands of research which will be tested in the empirical part.

2.1 *Diversity, Local Public Goods and Local Public Policies*

The provision of local public policies seems to become more problematic in the presence of a heterogeneous population. Alesina and Glaeser, for instance, foresee a reduction of the size of the welfare state in Europe as a result of increased immigration and fractionalisation.[16] Empirical research finds that social spending, such as expenditure for public schools, government transfers, health spending etc. tend to be all negatively correlated with diversity.[17] Several studies have addressed the phenomenon of ethnic diversity and the provision of public goods provision, particularly in developing countries where this phenomenon is more acute, suggesting several theoretical mechanisms and

Innovation: Evidence from Dutch Micro-Data," *IZA Journal of Migration* 2, no. 1 (2013), 1–18, https://doi.org/10.1186/2193-9039-2-18; Ceren Ozgen et al., "Does Cultural Diversity of Migrant Employees Affect Innovation?," *International Migration Review* 48, no. 1 (September 2014), 377–416, https://doi.org/10.1111/imre.12138.

15 In the remainder of the chapter the provision of local public services means the citizens' satisfaction about them.

16 Alesina and Glaeser, *Fighting Poverty*.

17 Stichnoth and van der Straeten, "Ethnic Diversity, Public Spending, and Individual Support for The Welfare State," 364–389.

finding empirical evidence that ethnic diversity tends to undermine local public policies, e.g. education and health.[18] Alesina, Baqir and Easterly find that the shares of spending on productive public goods in US cities are inversely related to the city's ethnic fragmentation, even after controlling for other socio-economic and demographic determinants.[19] Cross-country studies tend to confirm these results.[20]

Two main possible arguments have been suggested to explain this finding. The first is an economic argument, and it foresees an increase in the demand of public welfare as a result of a more heterogeneous population. This is particularly true when migrants are relatively poorer than domestic citizens, which brings about an increase in the competition for local public goods. This will lead to – ceteris paribus – a deterioration in the provision of public services. Further, greater inequalities between groups have been found to undermine institutions and reduce government quality.[21]

The second argument is more sociological in nature. As Stichnoth and van der Straeten explain, '[i]f citizens are more supportive of redistribution when people from their own ethnic group benefit from it, ethnic diversity will reduce the support for redistribution, which in turn will tend to decrease the actual level of redistribution'.[22] Communities comprising of different ethnic or social groups can also lead to lower interaction, trust and social cohesion,[23] relying

18 See for example James Habyarimana et al., "Why Does Ethnic Diversity Undermine Public Goods Provision?," *American Political Science Review* 101, no. 4 (2007), 709–725, https://doi.org/10.1017/S0003055407070499; Miguel and Gugerty, "Ethnic Diversity,".

19 Alberto Alesina, Reza Baqir and William Easterly, "Public Goods and Ethnic Divisions," *The Quarterly Journal of Economics* 114, no. 4 (1999), 1243–1284, https://doi.org/10.1162/003355399556269.

20 Alberto Alesina and Eliana La Ferrara, "Ethnic Diversity and Economic Performance," *Journal of Economic Literature* 43, no. 3 (September 2005), 762–800, https://doi.org/10.1257/002205105774431243; Stichnoth and van der Straeten, "Ethnic Diversity, Public Spending, and Individual Support for The Welfare State," 364–389.

21 Andreas P. Kyriacou, "Ethnic Group Inequalities and Governance: Evidence from Developing Countries," *Kyklos* 6, no. 1 (2013), 78–101, https://doi.org/10.1111/kykl.12012.

22 Stichnoth and van der Straeten, "Ethnic Diversity, Public Spending, and Individual Support for The Welfare State," 370.

23 See for example Dietlind Stolle, Stuart Soroka and Richard Johnston, "When Does Diversity Erode Trust? Neighborhood Diversity, Interpersonal Trust and the Mediating Effect of Social Interactions," *Political Studies* 56, no. 1 (2008), 57–75; Melissa J. Marschall and Dietlind Stolle, "Race and the City: Neighborhood Context and the Development of Generalized Trust," *Political Behavior* 26, no. 2 (2004), 125–153; Silvia Camussi, Anna Laura Mancini and Pietro Tommasino, "Does Trust Influence Social Expenditures? Evidence from Local Governments," *Kyklos* 71, no. 1 (2018), 59–85, https://doi.org/10.1111/kykl.12162; Henning Finseraas and Niklas Jakobsson, "Trust and Ethnic Fractionalization: The

on the idea that an individual's behaviour and engagement are affected by the characteristics of her neighbours:

> People (both natives and immigrants) generally prefer to live among people with the same background and are less likely to be willing to share resources with those who they perceive as different from themselves. They prefer to interact socially with others who share the same ethnic heritage, the same socioeconomic status, the same lifestyle, and who therefore share common interests, experiences and tastes or, put simply, people they have more to talk about with.[24]

This has been recently documented not only in the urban areas of the United States, but also in several European countries.[25]

For the reasons outlined above we derive the following hypothesis #1:

> Hip#1: the higher the level of diversity in a region, the lower the performance in the provision of local public services.

2.2 *Regional Autonomy, Diversity and Public Services*

A central mechanism which connects diversity with dysfunctionality in public policy is the heterogeneity of preferences, in that heterogeneous tastes across ethnic groups are the channel through which diversity affects collective action.[26] In their study on ethnic diversity and public goods in Kenya, Miguel and Gugerty discuss the implications of decentralisation of local public goods in communities characterised by high heterogeneity, and they raise two important arguments against the centralisation of public services in these cases.[27] Firstly, in many less developed countries, central governments underprovide recurrent expenses. Secondly, centralisation of funding could lead to more regional and ethnic favouritism in the allocation of national government funds.

Importance of Religion as a Cross-Cutting Dimension," *Kyklos* 65, no. 3 (July 2012), 327–339, https://doi.org/10.1111/j.1467-6435.2012.00541.x.

24 Vassilis Tselios, Philip McCann and Jouke van Dijk, "Understanding the Gap between Reality and Expectation: Local Social Engagement and Ethnic Concentration," *Urban Studies* 54, no. 11 (August 2017), 2592–2612, https://doi.org/10.1177/0042098016650395.

25 Stichnoth and van der Straeten, "Ethnic Diversity, Public Spending, and Individual Support for The Welfare State," 364–389.

26 Alesina, Baqir and Easterly, "Public Goods and Ethnic Divisions," 1243–1284.

27 Miguel and Gugerty, "Ethnic Diversity," 1–11.

If diversity affects economic choices and the outcome of public policies by directly entering individual preferences,[28] then decentralisation and regional autonomy are natural candidates as effective institutional arrangements which can address the provision of local public services in the presence of diversity. Theories on fiscal federalism and decentralisation claim that regional autonomy improves the quality of local governments, both in terms of the efficiency and the level in the provision of public goods,[29] accountability to citizens' preferences,[30] and control of the public expenditure.[31] By making the government closer to the people, regional autonomy is expected to provide local policies that are better able to respond to the differentiated needs arising in highly diverse regions; hence, regional authority is considered an effective solution to cope with the presence of high heterogeneous preferences at the regional/local level.[32]

When it comes to the rationale for decentralisation and regional autonomy, local public services play a prominent role. As Serrano and Rodríguez-Pose put it, the primary aim of decentralisation has never been about delivering greater economic growth, reducing inequality or increasing social capital; rather, 'the original aim of decentralization is fundamentally to improve the delivering of public goods and services to individuals and, consequently, the level of satisfaction of the population with government'.[33]

Several counter arguments have been raised. Local governments can be less efficient than central governments; the provision of public services can benefit from economies of scale in the case of a central provision; issues of capture and corruption of local policy makers are easier to observe in a number of countries.[34] Empirical research shows that countries with centralised governments

28 Alesina and La Ferrara, "Ethnic Diversity and Economic Performance," 762–800.

29 Mancur Olson, "Dictatorship, Democracy, and Development," *American Political Science Review* 87, no. 3 (1993), 567–576; Charles M. Tiebout, "A Pure Theory of Local Expenditures," *Journal of Political Economy* 64, no. 5 (1956), 416–424; Andrea Filippetti and Agnese Sacchi, "Decentralisation and Economic Growth Reconsidered: The Role of Regional Authority," *Environment and Planning C: Government and Policy* 34, no. 8 (2016), 1793–1824.

30 Wallace E. Oates, *Fiscal Federalism* (New York: Harcourt Brace Jonanovitch, 1972).

31 Geoffrey Brennan and James M. Buchanan, *The Power to Tax: Analytic Foundations of a Fisc al Constitution* (Cambridge: Cambrige University Press, 1980).

32 Tiebout, "A Pure Theory of Local Expenditures," 416–424.

33 Luis Diaz-Serrano and Andrés Rodríguez-Pose, "Decentralization, Happiness and the Perception of Institutions," *IZA Discussion Paper*, no. 5647 (April 2011), 2, 1–28, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1812532; emphasis by the author of this chapter.

34 See for example Thushyanthan Baskaran and Lars P. Feld, "Fiscal Decentralization and Economic Growth in OECD Countries: Is There a Relationship?," *Public Finance Review* 41, no. 4 (July 2013), 421–445, https://doi.org/10.1177/1091142112463726; Vito Tanzi, "Pitfalls

can also deliver *local* public services as efficiently as decentralised countries do.[35] However, these criticisms are not directed towards the claim that regional authority works better in heterogeneous population.

Following on these lines of reasoning, we put forward the second hypothesis:

> Hip#2: regional autonomy is expected to moderate between diversity and the performance of local public services. [Put differently, for any given level of diversity, a higher level of regional autonomy is expected to be associated to a higher performance of local public services].

3 Data: Measuring the Quality of Local Public Services and the Level of Regional Autonomy

3.1 *The Provision of Local Public Services*

The organisation for the provision of local public services differs across countries depending primarily upon formal provisions at the level of the constitution. According to these, the type of state can be grouped in three broad categories: federal states, regionalised states, and unitary states. Firstly, we need to distinguish between exclusive competences attributed to the regional and local governments, and competences that are instead shared between the central government and the regional and local governments. Secondly, competences can be divided into legislative and administrative; typically, in unitary states the legislative competences belong to the central government, while the administrative competences can be attributed to different levels of subnational governments. In decentralised settings, such as federal or regionalised countries, both the legislative competences and the administrative competences of some local services can be attributed to the regional (and local) level. The revenue system for local public services also varies considerably across countries: in federal or regionalised states, regional governments often have some taxation power; by contrast, in unitary states local services tend to be financed through a mechanism of transfers from the central government. As a result, one can observe a great deal of heterogeneity when it comes to the regional

on the Road to Fiscal Decentralization," *Working Papers*, no. 19 (April 2001), 1–41, https://carnegieendowment.org/files/19Tanzi.pdf.

35 Andrea Filippetti and Giovanni Cerulli, "Are Local Public Services Better Delivered in More Autonomous Regions? Evidence from European Regions Using a Dose-Response Approach," *Papers in Regional Science* 97, no. 3 (January 2017), 801–826, https://doi.org/10.1111/pirs.12283.

competences across countries regarding the provision of public services, even when they are local services, such as for instance in the cases of education, public transport, health or local police.[36] There are countries such as Bulgaria, Estonia, Lithuania, the Netherlands, Slovenia and Sweden where regions have no specific competences on their own; federal countries like Belgium, in which regional governments have no competences on education, or like Germany, in which instead the *Länder* have competences over a large number of services. Similar patterns can be found for other local public services (e.g. health).[37]

This chapter employs a composite indicator of the performance of local public services provided by the *Quality of Government Survey* based on the citizens' perception of three local public services: education, health and law enforcement.[38] These are also those public services that are usually investigated in decentralisation studies.[39] The indicator is a perception-based indicator built from a 34,000-respondent survey from 172 regions within eighteen EU member states; to date, this constitutes one of the most comprehensive surveys about the quality of local public goods at the subnational level.[40] The survey was undertaken between 15 December 2009, and 1 February 2010, and consisted of 34 questions to the approximately 200 respondents per region. Respondents were asked about three general public services in their regions – education, health care and law enforcement. In focusing on these three services, respondents were asked to rate their public services with respect to three related concepts, namely the *quality*, *impartiality* and an inverse measure of the level of *corruption* of these services.[41] The Survey also provides a single

36 European Institute of Public Administration (EIPA), "Division of Powers between the European Union, the Member States and Regional and Local Authorities," December 2012, https://cor.europa.eu/en/engage/studies/Documents/division_of_powers/division_of_powers.pdf.

37 A comprehensive report on this issue can be consulted here: https://www.ifo.de/.

38 Charron, Dijkstra and Lapuente, "Regional Governance Matters,"; Quality of Government Institute of the University of Gothenborg, "Measuring the Quality of Government and Subnational Variation," 1–85.

39 Agnese Sacchi and Simone Salotti, "A Comprehensive Analysis of Expenditure Decentralization and of the Composition of Local Public Spending," *Regional Studies* 50, no. 1 (2014), 1–17, https://doi.org/10.1080/00343404.2014.893387.

40 Note that the authors call this index 'quality of government index' since they use the provision of local public goods as a proxy for the quality of regional government. Our focus here is instead on the quality of local public services themselves, exploiting the heterogeneity in their organisational structure across regions.

41 The complete questionnaire can be found in Quality of Government Institute of the University of Gothenborg, "Measuring the Quality of Government and Subnational Variation," appendix.

QoG index for each region obtained by averaging the three pillars – quality, impartiality and (lack of) corruption, each weighted one third. In our analysis we will use both the overall *qog index* performance as well as the three pillars.[42] The data have been standardised such that the EU regional mean is '0' and has a standard deviation of '1'. A series of extensive sensitivity tests were carried out to see whether changes in the model alter the final data. The results show that 'data constructed here are highly robust to multiple changes in weighting and aggregation schemes, the removal of individual questions or alterations in the demographic make-up of the respondents'.[43]

The Report suggests the presence of a significant within-country variation from country to country. As explained by Charron and Lapuente, the data show that the indicator of *QoG* is either equally or more important than a variation between EU countries themselves.[44] For example, some regions in Italy and Belgium perform like those in the best performing countries, while others rank similarly to low-performing regions in Hungary and Greece. This supports the case for an analysis at the regional level.

3.2 *The Degree of Regional Autonomy*

We employ a comprehensive measure of regional autonomy, the *Regional Authority Index* (*RAI*),[45] which includes fiscal, political, and administrative measures of the authority of a regional government. This index has been used in these types of studies replacing measures of fiscal expenditures as proxy of decentralisation.[46] The *RAI* measures the authority of regional governments in 42 democracies or quasi-democracies on an annual basis over the period 1950–2016. The countries included are twenty-nine OECD countries, the 27 countries that are members of the European Union, as well as Albania, Bosnia and Herzegovina, Croatia, Macedonia, Russia, and Serbia and Montenegro.

42 In the chapter we will refer to overall performance to refer to the overall index, and to quality to refer to the single pillar 'quality'.

43 Quality of Government Institute of the University of Gothenborg, "Measuring the Quality of Government and Subnational Variation,".

44 Charron and Lapuente, "Why Do Some Regions in Europe Have Higher Quality of Government?," 567–582.

45 Hooghe, Marks and Schakel, "Operationalizing Regional Authority," 123–142; Marks, Hooghe and Schakel, "Measuring Regional Authority," 111–121.

46 See for example Ezcurra and Rodríguez-Pose, "Political Decentralization, Economic Growth and Regional Disparities," 1–14.

The RAI is composed of two pillars, which respectively capture the degree of authority exerted by a regional government over its territory (*self-rule*) and over the whole country (*shared-rule*). Self-rule regards the degree of independence of the regional government from the influence of central authorities and the scope of regional decision-making. In turn, shared-rule measures the capacity of the regional government to determine central decision-making.[47] It is worth stressing that despite the name of the indicator, the RAI refers not only to administrative decentralisation but also encompasses measures of political and fiscal decentralisation. As such, it is possibly the most comprehensive indicator of regional autonomy that has been developed so far.

3.3 *A Measure of National Diversity*

We calculated our measure of diversity by taking data from the census of 2011,[48] which considers for each region the following categories of citizens: native citizens, foreign EU residents, and foreign non-EU residents (including stateless). A typical measure of diversity can be obtained by subtracting the *Herfindal index* of the variable of interest from 1. In our case, this becomes (1 – Herfindal index of nationality shares), an approach also followed by others, e.g. Ozgen et al.[49] A cursory look at the diversity indicators reveals a normal-shaped distribution with a tail on the right side that reflects the metropolitan areas of London, Brussels, and Vienna. Data are reported in Table 5.1.

47 Gary Marks, Liesbet Hooghe, and Arjan H. Schakel, "Patterns of Regional Authority," *Regional and Federal Studies* 18, no. 2–3 (2008), 167–181.

48 The data can be found here: https://ec.europa.eu/CensusHub2/query.do?step=selectHyperCube&qhc=false.

49 Ozgen, Nijkamp and Poot, "The Impact of Cultural Diversity on Firm Innovation,"; Ozgen et al., "Does Cultural Diversity of Migrant Employees Affect Innovation?," 377–416.

TABLE 5.1 List of the regions and the three indicators

Region	Index of public services	Diversity index	Regional authority index
AT_Burgenland	1.274	0.114	18
AT_Lower Austria	1.160	0.134	18
AT_Vienna	0.993	0.362	18
AT_Carinthia	0.880	0.136	18
AT_Styria	0.848	0.132	18
AT_Upper Austria	1.139	0.156	18
AT_Salzburg	0.907	0.228	18
AT_Tyrol	1.015	0.202	18
AT_Vorarlberg	1.069	0.238	18
BE_Brussels-Capital Region	-0.369	0.491	18
BE_Flemish Region	0.942	0.179	20
BE_Walloon Region	-0.008	0.175	18
BG_Severozapaden	-2.566	0.006	1
BG_Severen tsentralen	-2.061	0.009	1
BG_Severoiztochen	-0.915	0.013	1
BG_Yugoiztochen	-2.141	0.010	1
BG_Yugozapaden	-1.830	0.014	1
BG_Yuzhen tsentralen	-1.088	0.008	1
CZ_Prague	-0.903	0.256	7
CZ_Central Bohemian Region	-0.224	0.094	7
CZ_Jihozápad (Southwest)	-0.009	0.076	7
CZ_Severozápad (Northwest)	-0.909	0.091	7
CZ_Severovýchod (Northeast)	-0.110	0.063	7
CZ_Jihovchod (Southeast)	-0.441	0.059	7
CZ_Stední Morava (Central Moravia)	-0.534	0.031	7
CZ_Moravian-Silesian Region	-0.361	0.038	7
DK_Hovedstaden	1.306	0.176	10
DK_Sjlland	1.448	0.080	10
DK_Syddanmark	1.440	0.100	10
DK_Midtjylland	1.687	0.099	10
DK_Nordjylland	1.317	0.080	10
DE_Baden-Württemberg	0.981	0.205	21
DE_Bavaria	0.712	0.184	21
DE_Berlin	0.981	0.205	21

TABLE 5.1 List of the regions and the three indicators (*cont.*)

Region	Index of public services	Diversity index	Regional authority index
DE_Brandenburg	0.979	0.032	21
DE_Bremen	0.953	0.196	21
DE_Hamburg	0.961	0.219	21
DE_Hessen	0.630	0.202	21
DE_Mecklenburg-Vorpommern	0.937	0.174	21
DE_Lower Saxony	0.949	0.142	21
DE_North Rhine-Westphalia	0.714	0.037	21
DE_Rhineland-Palatinate	0.827	0.037	21
DE_Saarland	1.051	0.141	21
DE_Saxony	1.096	0.141	21
DE_Saxony-Anhalt	0.866	0.141	21
DE_Schleswig-Holstein	1.273	0.059	21
DE_Thuringia	1.336	0.051	21
FR_Île-de-France	0.547	0.226	8
FR_Champagne-Ardenne	0.185	0.074	8
FR_Picardie	0.471	0.064	8
FR_Haute-Normandie	0.123	0.056	8
FR_Centre	0.613	0.081	8
FR_Basse-Normandie	0.502	0.039	8
FR_Bourgogne	0.485	0.076	8
FR_Nord-Pas-de-Calais	0.544	0.063	8
FR_Lorraine	0.244	0.099	8
FR_Alsace	0.475	0.143	8
FR_Franche-Comté	0.494	0.086	8
FR_Pays de la Loire	0.357	0.040	8
FR_Bretagne	1.043	0.039	8
FR_Poitou-Charentes	0.768	0.054	8
FR_Aquitaine	0.820	0.083	8
FR_Midi-Pyrénées	0.394	0.089	8
FR_Limousin	0.727	0.085	8
FR_Rhine-Alpes	0.800	0.122	8
FR_Auvergne	0.563	0.063	8
FR_Languedoc-Roussillon	0.536	0.110	8
FR_Provence-Alpes-Cote d'Azur	0.215	0.119	8

TABLE 5.1 List of the regions and the three indicators (*cont.*)

Region	Index of public services	Diversity index	Regional authority index
FR_Corse	0.123	0.159	8
GR_Voreia Ellada	-1.389	0.118	10
GR_Kentriki Ellada	-1.069	0.118	10
GR_Attica	-0.261	0.193	10
GR_Nisia Aigaiou, Kriti	-0.912	0.208	10
HU_Central Hungary	-1.018	0.049	10
HU_Transdanubia	-0.320	0.025	10
HU_Great Plain and North	-0.439	0.017	10
IT_Piemonte	-0.118	0.154	13
IT_Valle d'Aosta	0.696	0.126	17
IT_Liguria	-0.507	0.133	13
IT_Lombardia	-0.638	0.179	13
IT_Trentino-Alto Adige (Bolzano)	0.832	0.147	17
IT_Trentino-Alto Adige (Trento)	0.538	0.162	15
IT_Veneto	-0.462	0.174	13
IT_Friuli-Venezia Giulia	0.199	0.149	17
IT_Emilia-Romagna	-0.341	0.190	13
IT_Toscana	-0.550	0.163	13
IT_Umbria	-0.190	0.183	13
IT_Marche	-0.460	0.161	13
IT_Lazio	-1.267	0.146	13
IT_Abruzzo	-0.908	0.100	13
IT_Molise	-1.236	0.050	13
IT_Campania	-2.318	0.050	13
IT_Puglia	-1.735	0.040	13
IT_Basilicata	-1.259	0.044	13
IT_Calabria	-2.189	0.065	13
IT_Sicilia	-1.828	0.049	17
IT_Sardegna	-0.887	0.037	17
NL_Northern Netherlands	1.625	0.075	15
NL_Eastern Netherlands	1.179	0.036	15
NL_Western Netherlands	1.273	0.053	15
NL_Southern Netherlands	1.077	0.123	15
PL_Lodzkie	-0.846	0.005	8

TABLE 5.1 List of the regions and the three indicators (*cont.*)

Region	Index of public services	Diversity index	Regional authority index
PL_Mazowieckie	-0.996	0.010	8
PL_Malopolskie	-0.875	0.004	8
PL_Slaskie	-1.115	0.003	8
PL_Lubelskie	-0.904	0.004	8
PL_Podkarpackie	-0.852	0.003	8
PL_Swietokrzyskie	-0.804	0.002	8
PL_Podlaskie	-0.962	0.006	8
PL_Wielkopolskie	-0.999	0.003	8
PL_Zachodniopomorskie	-0.867	0.005	8
PL_Lubuskie	-0.929	0.006	8
PL_Dolnoslaskie	-1.116	0.006	8
PL_Opolskie	-0.611	0.005	8
PL_Kujawsko-Pomorskie	-0.949	0.003	8
PL_Warminsko-Mazurskie	-0.668	0.003	8
PL_Pomorskie	-0.858	0.004	8
PT_Norte	-0.322	0.028	1
PT_Algarve	0.208	0.211	1
PT_Centro	-0.029	0.046	1
PT_Lisboa	0.141	0.135	1
PT_Alentejo	0.738	0.061	1
PT_Azores	0.512	0.027	16
PT_Madeira	0.280	0.041	16
RO_North-West	-1.135	0.004	4
RO_Centru	-1.581	0.002	4
RO_North-East	-2.014	0.003	4
RO_South-East	-2.035	0.002	4
RO_South-Muntenia	-1.774	0.001	4
RO_Bucharest-Ilfov	-2.964	0.011	4
RO_South-West Oltenia	-1.478	0.001	4
RO_West	-2.250	0.005	4
SK_Bratislava Region	-0.572	0.095	4
SK_Western Slovakia	-0.863	0.128	4
SK_Central Slovakia	-0.766	0.166	4
SK_Eastern Slovakia	-0.769	0.182	4

TABLE 5.1 List of the regions and the three indicators (*cont.*)

Region	Index of public services	Diversity index	Regional authority index
ES_Galicia	0.574	0.073	15
ES_Asturias	0.512	0.086	15
ES_Basque Community	0.665	0.123	16
ES_Navarre	0.173	0.188	16
ES_La Rioja	0.243	0.246	15
ES_Aragon	0.320	0.223	15
ES_Madrid	-0.098	0.261	15
ES_Castile-Leon	-0.055	0.122	15
ES_Castile-La Mancha	0.208	0.189	15
ES_Extremadura	0.416	0.068	15
ES_Catalonia	-0.464	0.264	15
ES_Valencian Community	0.154	0.268	15
ES_Balearic Islands	0.109	0.342	15
ES_Andalusia	0.284	0.148	15
ES_Region of Murcia	-0.036	0.270	15
ES_Canarias	0.272	0.239	15
SE_East Sweden	1.376	0.185	10
SE_South Sweden	1.453	0.114	10
SE_North Sweden	1.260	0.097	10
UK_North East. England	0.919	0.045	4
UK_North West. England	1.040	0.067	4
UK_Yorkshire and the Humber. Eng.	0.652	0.099	4
UK_East Midlands. England	1.245	0.131	4
UK_West Midlands. England	0.800	0.067	4
UK_East of England	0.763	0.075	4
UK_London. England	0.484	0.362	9
UK_South East. England	1.082	0.124	4
UK_South West. England	1.091	0.117	4
UK_Wales	0.806	0.067	12
UK_Scotland	1.277	0.090	17
UK_Northern Ireland	0.933	0.361	10

4 Analysis and Results

4.1 *Estimation Strategy*

In order to test our hypotheses, we estimate a cross-section model of 167 regions in Europe employing ordinary least squares (OLS) method, with standard errors clustered around the region (see Table 5.2 for pairwise correlations). The models look as follows:

$$Servicesi = \alpha + \beta_1\, diversityi + \beta_2\, controlsi + \varepsilon i \quad (1)$$

$$Servicesi = \alpha + \beta_1\, controlsi + \beta_2\, reg\_autonomyi + \beta_3\, diversityi + \beta_4\, reg\_autonomyi{*}diversityi + \varepsilon i \quad (2)$$

Eq. 1 tests the first hypothesis (coefficient β_1), while eq. 2, which includes an interaction effect between regional autonomy and diversity (coefficient β_4), tests the second hypothesis.

Several control variables at the region level are included, namely: income per capita (here measured in PPP); three dummy variables controlling for *i*) bilingual region; *ii*) autonomous region;[50] *iii*) capital region; the (log of) population. A customary variable which is taken into account in political economy studies is the presence of strong and independent media, since they are considered an important channel through which citizens can monitor the local policy makers. For this reason, we have included the variable *'independent media'* which reflects 'the strength and effectiveness of the media in the region to expose corruption' and is part of the same QoG Survey. We also employ the share of citizens with tertiary education, as an overall proxy of the level of education of the people living in the region. Finally, we introduce our measure of diversity – the *diversity index.* Eq. 2 includes the same control variables, but it further includes our measure of *regional autonomy* jointly with the *diversity index*.

4.2 *Local Public Services, Diversity and Regional Autonomy*

Table 5.3 reports the results of our estimates of the model above (1). Column (1) reports the results for the overall index of local services, while the others report the results for each of the indicators: impartiality (2), corruption (3) and quality of services (4). The coefficients of the control variables are in line with what was expected. Income per capita predicts high scores in the provision of local services. Autonomous regions seem to be negatively correlated with public services, although the coefficients are never significant. Being a

50 While this variable is clearly correlated with our measure of regional authority (rate of correlation equal to 0.20), autonomous regions often tend to receive considerable transfer from central states, thus it is important to control for this specific status.

TABLE 5.2 Pairwise correlation and descriptive statistics

		1	2	3	4	5	6	7	8	9	10	11	12	13
1	Quality of government	1									1			
2	Diversity index	0.36	1								1.63	2.27		
3	Income per capita (log)	0.72	0.62	1							1.06	1.19	1.33	
4	Bilingual region	0.14	0.31	0.18	1						1.01	1.26	1.50	1.74
5	Autonomous region	0.08	0.06	0.11	0.51	1					1.03	1.26	1.49	1.72
6	Capital region	-0.06	0.28	0.22	-0.03	-0.10	1				0.60	0.71	0.82	0.93
7	Population of the region (log)	-0.01	-0.04	0.06	-0.07	-0.21	0.15	1			0.57	0.68	0.80	0.91
8	Independent media	0.33	0.22	0.46	0.13	0.18	-0.04	-0.02	1		0.38	0.41	0.43	0.45
9	Share of population tertiary education	-0.04	0.12	0.06	0.05	0.13	0.12	-0.80	0.07	1	0.27	0.31	0.35	0.39

TABLE 5.3 Impartiality, regional autonomy and diversity

	(1)	(2)	(3)	(4)
	Overall	**Impartiality**	**Corruption**	**Quality**
Diversity index	-1.615**	1.559	-1.609*	-3.473***
	(0.799)	(1.186)	(0.929)	(0.842)
Income per capita	1.453***	0.522***	1.155***	0.865***
	(0.108)	(0.159)	(0.122)	(0.170)
Bilingual region	0.200	0.506	0.481***	0.326
	(0.188)	(0.314)	(0.170)	(0.265)
Autonomous region	-0.266	-0.149	-0.233	-0.121
	(0.230)	(0.227)	(0.177)	(0.259)
Capital region	-0.433*	-0.409	-0.516*	-0.130
	(0.220)	(0.259)	(0.276)	(0.187)
Population of the region	-0.414***	-0.211	-0.277**	-0.0911
	(0.129)	(0.157)	(0.120)	(0.148)
Independent media	-0.0402	0.216***	0.176***	0.483***
	(0.0602)	(0.0690)	(0.0662)	(0.0661)
Population with tertiary education	-0.409***	-0.246	-0.289**	-0.172
	(0.126)	(0.167)	(0.129)	(0.147)
Constant	-12.47***	-4.576**	-10.15***	-8.096***
	(1.154)	(1.768)	(1.220)	(1.842)
Observations	167	167	167	167
R^2	0.621	0.365	0.567	0.592

capital region, along with the size of the region (as measured by population), are negatively correlated with services; this might depend on the presence of congestion effects. The presence of independent media is positively correlated with services, while the level of education is instead negatively correlated with the dependent variable (we discuss this further below).

By focussing on the explanatory variable – our measure of diversity – the related coefficient is negative and significant for the overall provision of public services (significant at 5 %), corruption (significant at 10 %), and their quality (significant at 1 %). This supports our hypothesis no. 1.

In this second set of estimates we interact our measure of diversity with two variables, namely the *presence of independent media* and the *level of education*. Table 5.4 reports the same estimates as for Table 5.3, but with the inclusion of

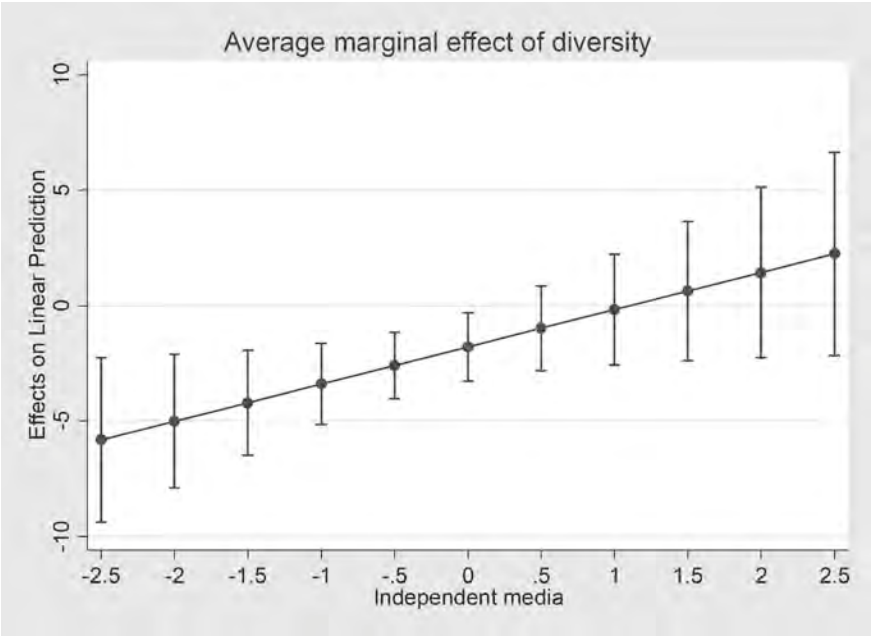

FIGURE 5.1 The effect of diversity on the provision of local services when independent media changes

the following interaction term: *presence of independent media#diversity* (column 1), and the *level of education#diversity* (column 2). The rationale is that both independent media and the level of education should mitigate the presence of bias in perception, if present. More independent media will provide more impartial information for citizens, whilst more educated people should be better equipped to process public information objectively. By looking at the results, only the presence of independent media seems to moderate the negative effect of diversity on services. As the chart in Figure 5.1 shows, the negative effect of diversity on services approaches zero and then turns positive (although not statistically significant) as long as the variable independent media grows. This suggests the presence of some misperception in the functioning of local public services which are attenuated when there are independent media in the region.

We now turn to our second hypothesis, which states that the presence of regional autonomy is expected to moderate between diversity and the performance of local public services. In order to test the moderating effect of regional authority we include the variable *diversity#regional autonomy*. Table 5.5 reports the estimate of the model as in eq. 2, for the main index of services and the three pillars – impartiality, corruption and quality. The coefficient of the joint effect of diversity and regional autonomy is positive and significant (at 5 %)

TABLE 5.4 Testing education and the presence of independent media

	(1)	(2)
	Quality of government	**Quality of government**
Diversity index # Population with tertiary education	***-0.315***	
	(0.701)	
Diversity index	-2.699	-1.786**
	(2.766)	(0.752)
Independent media	-0.0377	-0.236**
	(0.0604)	(0.115)
Population with tertiary education	-0.371**	-0.413***
	(0.172)	(0.123)
Diversity index # Independent media		***1.613****
		(0.752)
All controls included as for Table 1		
Constant	-12.29***	-12.94***
	(1.802)	(1.801)
Observations	167	167
R^2	0.622	0.632

limited to the case of the quality of services (column 4). By looking at Figure 5.2 reporting the average marginal effect of diversity along the levels of regional autonomy, it can be seen that the negative correlation of diversity with the quality of local public services moves closer to zero for high levels of regional autonomy. In regions in which regional autonomy is quite high (higher than 18.5), the marginal effect of diversity is still moderately negative but no longer significant. This suggests the presence of some moderating effect of regional autonomy on the relationship between diversity and the quality of local public services, although limited to their quality, in that the only significant coefficient regards the estimates of quality (column 4 of Table 5.5).

5 Discussion and Conclusion

Dealing with diversity in the European regions has become imperative in European and national policy agendas. Internal mobility is a cornerstone of

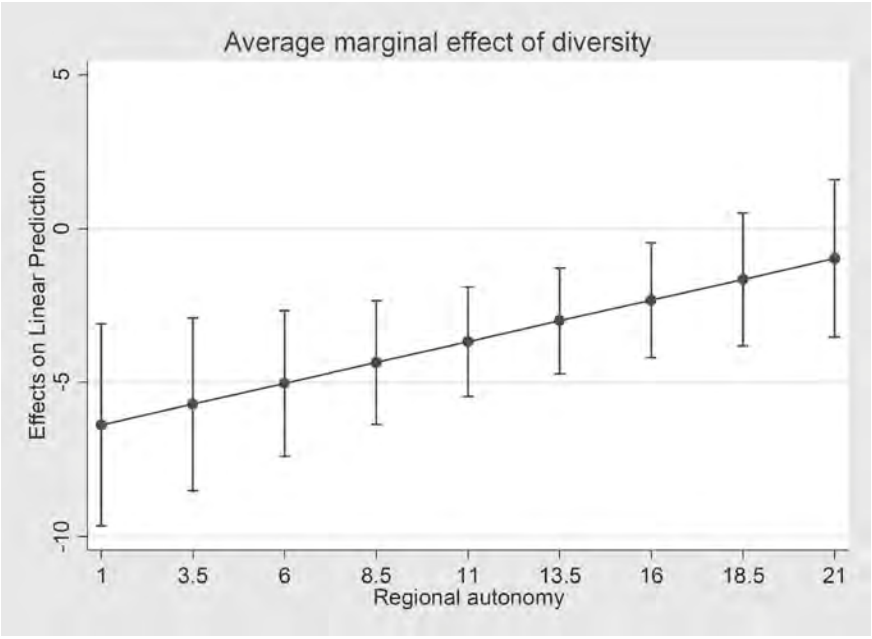

FIGURE 5.2 The effect of diversity on the provision of local services when regional autonomy changes

TABLE 5.5 Testing the moderating effect of regional authority

	(1)	(2)	(3)	(4)
	Overall	**Impartiality**	**Corruption**	**Quality**
Diversity index	-1.620	2.704	-2.605	-6.647***
	(1.832)	(2.457)	(2.301)	(1.765)
Regional autonomy	-0.00415	0.0785***	-0.00374	-0.0637***
	(0.0203)	(0.0267)	(0.0180)	(0.0166)
Diversity index # Regional autonomy	***0.0007***	***-0.141***	***0.0721***	***0.270****
	(*0.136*)	**(*0.192*)**	**(*0.140*)**	**(*0.118*)**
All controls included as Table 1				
Constant	-12.48***	-2.406	-10.26***	-9.872***
	(1.196)	(1.661)	(1.272)	(1.751)
Observations	167	167	167	167
R^2	0.621	0.446	0.568	0.621

the EU policy, and the more new members join the EU, the more migration within the EU is bound to grow. Additionally, migration from outside the EU borders is also expected to grow considerably. Empirical studies carried out mostly in the Unites States and in some developing countries have by and large found that when ethnic diversity grows, the welfare state, the provision of public goods, and income redistribution tend to become more problematic. For European countries and regions, this will be one of the most relevant issues to deal with in the coming years.

This chapter provides evidence that *i*) the presence of a heterogeneous composition of population in the European regions is associated to a relatively worse public perception of the provision of local public goods; and *ii*) regional autonomy (to some extent) can act as a moderating mechanism between diversity and local public services.

The first result is in line with theories about diversity and public policy, and with several empirical studies that detected a negative correlation between diversity and the provision of public goods. As a matter of fact, most of this research has been carried out in cities and countries with a high presence of ethnic heterogeneity, as for instance in some American cities, and in some developing countries; to our knowledge this is the first attempt carried out across a large sample of European regions.

Another difference of this study is that our measure of diversity does not take into account ethnicity or socio-economic status but is limited to nationality. On the one hand this has some clear limitations, in that ethnic diversity is a remarkable source of heterogeneity. However, our broader measure of diversity allows us to address one of the cornerstones of European integration, that of the internal mobility of the labour force. Internal mobility has often been identified by policy makers as a fundamental driver of reciprocal learning, a carrier of knowledge, as well as a great means to make the labour market work more efficiently, by reducing disparities in the rates of unemployment across European countries. As such, the internal mobility of citizens is regarded as a pillar of social cohesion in Europe. However, recent debates have redirected attention to a number of problems that internal migration can create on the sustainability of the welfare states of recipient countries. Within this context, our evidence raises an issue for policy makers. This will be further exacerbated by the fact that since our data refer to 2011, it is more than likely that diversity has increased since, both because of an increase in mobility within Europe since the financial crisis in 2008, and due to the recent surge in migration from outside the EU. This calls for future research with updated census data.

It is also possible that our data underestimates the pressure of illegal immigrants on the welfare state; they are not captured by data on foreign residents,

but can, however, benefit from some local public services, particularly public health. Finally, we do not take into account within-country mobility which can in some cases be an additional source of diversity and pressure on local welfare.

Our second piece of evidence shows that regional authority can have a moderating effect between diversity and the provision of local services. This partially confirms one of the main claims of fiscal federalism theory, according to which bringing political authority and administration closer to the people is effective, particularly when there are heterogeneous local communities which are likely to be reflected in heterogeneous preferences. In these cases, regional authority should be more effective than centralisation in making local public policies more responsive to the heterogeneous preferences. There are counter arguments that are worth mentioning. Firstly, local governments can be more easily captured, as well as corrupted, by local constituencies. Secondly, in times of crisis and budget constraints, regional governments can have fewer resources to devote to welfare. Hence, it is possible that central governments are more effective than regional governments in dealing with a swift increase in the demand for local public services, to the extent that they are able to mobilise a larger amount of resources. Further, more centralised governments can be better equipped in managing migration flows than more decentralised ones, for example by being better able to redistribute immigrants, thus avoiding excessive concentrations in some regions. These are open questions that remain to be explored at greater lengths and with more recent data.

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CHAPTER 6

Assuring Equality, Autonomy and Territorial Integrity in Sri Lanka

Jayampathy Wickramaratne

1 Introduction

On 9 March 2016, the Sri Lankan Parliament unanimously passed a resolution for setting up a Constitutional Assembly consisting of all 225 Members of Parliament tasked with preparing a draft of a Constitution Bill for the consideration of Parliament.[1] If a two-thirds majority of the Assembly had approved the constitutional draft proposal within one month, the same would have been submitted to the Cabinet of Ministers. Thereafter, the Cabinet would have presented the draft in the form of a Bill to Parliament. Under the present Constitution, an amendment of the Constitution ordinarily required a two-thirds majority in Parliament.[2] Article 83 of the Constitution provided that a Bill aiming at amending, repealing or replacing, or that was inconsistent with any of the provisions of Articles 1 (The State), 2 (Unitary State), 3 (Sovereignty of the People), 6 (National Flag), 7 (National Anthem), 8 (National Day), 9 (Buddhism), 10 (Freedom of thought, conscience and religion), 11 (Freedom from torture), Article 83 itself and also a Bill that sought to extend the term of office of the President or the duration of Parliament to over six years, would become law only if passed by a two-thirds majority in Parliament and approved by the people at a referendum. Thus, it necessarily followed that a new Constitution required passage in Parliament by a two-thirds majority followed by approval at a referendum.

A twenty-one-member Steering Committee containing all political parties represented in Parliament and chaired by the Prime Minister was appointed. Six all-party subcommittees were appointed to make proposals on fundamental and language rights, judiciary, law and order, public service, public finance and centre-periphery relations. Their reports were presented on

1 Parliament of Sri Lanka, "Resolution for the Appointment of the Constitutional Assembly," (9 March 2016), https://parliament.lk/uploads/documents/minutesofparliament/1509078170042858.pdf.

2 Article 82 (5) of the Constitution.

19 November 2016. The interim report of the Steering Committee was presented to the Constitutional Assembly on 21 September 2017.[3] It covered the following areas: nature of the state, nature of the executive, parliamentary electoral process, principles of devolution, religion and state land. While the report represented the dominant view in the Steering Committee, observations and comments by members of the Steering Committee on the principles and formulations contained in the report were also included in it.[4]

The next step should have been a general debate on the reports in the Constitutional Assembly. Thereafter, the Steering Committee might have considered views expressed during the debate and the public discussion that had already begun and then presented its final report along with the draft constitutional proposal envisaged in the parliamentary resolution. However, very little happened after the Steering Committee submitted its interim report except that the panel of experts submitted a 'legal draft' based on the interim report and the reports of the various sub-committees.

It will be helpful for readers to have some insight into the history of Sri Lanka's ethnic conflict, and the various attempts for a resolution. The Sri Lankan story is one of missed opportunities, by both the Sinhalese and Tamils. For Sri Lanka, the war is over, but the conflict is not. Only a settlement that offers all communities their due share of state power within a democratic framework can end the conflict – a truism for most observers but, sadly, not so for all Sri Lankans.[5]

2 Demography

Sri Lanka is a multi-cultural society with four major communities – Sinhalese, Tamils, Muslims and Hill Country Tamils. According to the 2012 census,[6] the

3 Steering Committee, "The Constitutional Assembly of Sri Lanka, The Interim Report of the Steering Committee," http://constitutionnet.org/sites/default/files/2017-09/Interim%20Report%20of%20the%20Steering%20Commmittee%20of%20the%20Constitutional%20Assembly%20of%20Sri%20Lanka_21%20September%202017.pdf, accessed on 12 August 2017.

4 Ibid 27–92.

5 For a detailed discussion see Jayampathy Wickramaratne, "Sri Lanka: Missed Opportunities and the Way Forward," in *Towards Democratic Governance in Sri Lanka: A Constitutional Miscellany*, ed. Jayampathy Wickramaratne (Rajagiriya: Institute for Constitutional Studies, 2014), 485–548.

6 Department of Census and Statistics of Sri Lanka, "Census of Population and Housing of Sri Lanka, 2012," http://www.statistics.gov.lk/PopHouSat/CPH2011/Pages/Activities/Reports/FinalReport/Population/Table%20A3.pdf, accessed 12 August 2020.

Sinhalese make up 74.9 % of the total population of a little over 20 million. They are concentrated in the densely populated south-west as well as the central parts of the country.[7] Sri Lankan Tamils constitute 11.2 % of the population and mainly live geographically concentrated in the Northern Province and in parts of the Eastern Province. Moors, descendants of Arabs who settled in Sri Lanka, represent 9.2 % of the total population. They live in substantial numbers in the east and are also found in other parts of the country, mostly concentrated in urban areas. In recent times, their identity has been more as Muslims rather than as Moors.[8] Hill Country Tamils are a distinct ethnic group and descend from those brought from India by the British in the nineteenth and twentieth centuries to work in the plantations. They are referred to as Indian Tamils in official records, but most prefer to call themselves Hill Country Tamils. They comprise 4.2 % of the population and live in significant numbers in the Central, Uva and Sabaragamuwa Provinces. In the Central Province, Hill Country Tamils dominate the Nuwara Eliya District (53.2 %). There are also small numbers of Malays, Burghers (descendants of Europeans) and indigenous Veddhas. The native language of the Sinhalese is Sinhala while that of Tamils, Muslims and Hill Country Tamils is Tamil.

The North and East have been the stage of ethno-political conflict in the country. Sri Lankan Tamils constitute almost 95 % of the population of the Northern Province. The issue is compounded by the population distribution in the Eastern Province. In the Trincomalee district, which is adjacent to the Northern Province, all three major communities constitute substantial percentages: 27 % Sinhalese, 30.6 % Tamils and 40.4 % Muslims. The Batticaloa district, south of Trincomalee, is predominantly Tamil (72.6 %) with 25.5 % Muslims, but has no boundary with the North. The Ampara district, further to the South, has 43.6 % Muslims, 38.7 % Sinhalese and 1.4 % Tamils. The Sinhalese live mainly in the Ampara electoral division, which is adjacent to the Sinhala-dominated Uva Province. The other three electoral divisions of the district, namely, Kalmunai, Sammanthurai and Pottuvil, together have a Muslim population of around 59 % with 27 % Tamils and 14 % Sinhalese.

Religion-wise, 70 % of the country's population is Buddhist, while Hindus represent 15 %, and Christians (the large majority of whom are Roman

7 For a political map, see https://www.mapsofworld.com/sri-lanka/sri-lanka-political-map.html, accessed on 24 June 2019.

8 For the purpose of Sri Lankan census and statistics, Moors are recognised as an ethnic group. Malays and people of Indian origin such as Memons, Bohras and Khojas are Muslims but have no Arab ancestry.

Catholics) and Muslims 7.5 % each. The large majority of Sinhalese are Buddhists, with 6.6 % being Christians; the large majority of Tamils and Hill Country Tamils are Hindus, with Christians amongst them being 19.2 % and 10.1 % respectively.[9]

The demography of Sri Lanka is thus complex, with both concentrated as well as dispersed communities. The challenge in such circumstances is to adopt a constitution that gives all communities their due share of state power.

3 Brief History of the Conflict

It was not the Tamils but Solomon W.R.D. Bandaranaike, who was later to form the pro-Sinhala Sri Lanka Freedom Party (SLFP) and become Prime Minister, who first proposed a federal Constitution for Sri Lanka. He did so in six articles he wrote for the *Ceylon Morning Leader*[10] and in a public lecture in Jaffna,[11] all in 1926.

In 1927, when the country was a British colony, a commission chaired by the Earl of Donoughmore was appointed to consider the revision of the Constitution. When the Donoughmore Commission visited the country, it was the Kandyan Sinhalese who proposed a federal arrangement, claiming that they were a separate 'nation'. They proposed a federation of three units corresponding to (1) the Sinhala-dominated areas of the maritime provinces that were conquered by the Portuguese in 1505 and that later came under Dutch and British rule, (2) the Kandyan Kingdom which was finally conquered by the British in 1815 and (3) the present Northern and Eastern provinces inhabited mainly by Tamils and Muslims. 'Ours is not a communal claim or a claim for the aggrandisement of a few: it is a claim of a nation to live its own life and realise its own destiny', the Kandyan National Assembly stated

9 Department of Census and Statistics of Sri Lanka, "Provisional Data from a 5 % Sample of the Census of Population and Statistics, 2012," provided by email (census@statistics.gov.lk) to the author on 23 December 2013.

10 Solomon W. R. D. Bandaranaike, *Ceylon Morning Leader*, 19 May, 27 May, 2 June, 9 June, 23 June, and 30 June, 1926, reproduced in *Power-sharing in Sri Lanka: Constitutional and Political Documents, 1926–2008*, eds. Rohan Edrisinha et al. (Colombo: Centre for Policy Alternatives, 2008), 28–53.

11 Solomon W. R. D. Bandaranaike, *Ceylon Morning Leader*, 26 July, 1926, reproduced in *Power-sharing in Sri Lanka: Constitutional and Political Documents, 1926–2008*, eds. Rohan Edrisinha et al. (Colombo: Centre for Policy Alternatives, 2008), 50.

in its memorandum.[12] While sympathising with the concerns of the Kandyan Sinhalese, the Commission rejected the federal arrangement.

Under the 'Donoughmore' Constitution,[13] which came into effect in 1931, communal representation was abolished. Franchise was granted to all men and women over 21 years old. The newly established State Council – the unicameral legislature – consisted of 61 members, 50 of whom were elected in territorial constituencies. The Chief Secretary, Legal Secretary and Financial Secretary were *ex officio* members but had no voting rights. Eight members were nominated by the Governor.

The Board of Ministers consisted of the three officials and seven Ceylonese Ministers who were the elected chairpersons of the respective executive committees. In the State Council elected at the 1931 elections, a Muslim and a Hill Country Tamil were represented in the Board of Ministers, the Tamils of the North having boycotted the elections.[14] After the 1936 elections,[15] which the Tamils contested, the Sinhalese majority in the State Council (apart from a few including N.M. Perera and Philip Gunawardena of the leftist Lanka Sama Samaja Party (LSSP)) manipulated the election of executive committees to ensure that all seven chairs went to the Sinhalese. This was probably the first lesson Tamils learned about who would control the state power once the country would become independent. The experience resulted in Tamils moving towards the demand for guaranteed representation.

The first political party in the country to propose Tamils be recognised as a distinct nation with the right to self-determination, including the right to form an independent state, was not a Tamil party but the Communist Party of Ceylon.[16] The memorandum submitted in October 1944 on behalf of the Party to the Ceylon National Congress, of which it was a constituent, made reference

12 Donoughmore Commission, "Report of the Donoughmore Commission," (1928) ch. VI, referred to in *Power-sharing in Sri Lanka: Constitutional and Political Documents, 1926–2008*, eds. Rohan Edrisinha et al. (Colombo: Centre for Policy Alternatives, 2008), 56.

13 Ceylon (State Council) Order in Council, 1931.

14 For election results see G.P.S. Harischandra De Silva, *A Statistical Survey of Elections to the Legislatures of Sri Lanka, 1911–1977* (Colombo: Marga Institute, 1979), 91.

15 De Silva, *A Statistical Survey*, 91.

16 Resolution adopted by the Communist Party-controlled Ceylon Trade Union Federation on September 23, 1944, reproduced in *Power-sharing in Sri Lanka: Constitutional and Political Documents, 1926–2008*, eds. Rohan Edrisinha et al. (Colombo: Centre for Policy Alternatives, 2008), 111; Resolution passed at the Party's rally in Colombo on October 15, 1944, reproduced in *Power-sharing in Sri Lanka: Constitutional and Political Documents, 1926–2008*, eds. Rohan Edrisinha et al. (Colombo: Centre for Policy Alternatives, 2008), 113.

to a 'federal Constitution' in its title but details of the proposed federal structure were not set out.[17]

When the Soulbury Commission on constitutional reform appointed by the British government visited Ceylon in 1944, no serious proposal was made to it by any organisation that the country should have a devolved structure, let alone a federal one. The Commission made no recommendations either for self-rule of any kind or for balanced representation.[18]

After the 1947 elections held a few months before independence under the British-given 'Soulbury' Constitution,[19] the Tamil Congress (TC), then the only party of the Tamils, joined the conservative United National Party (UNP) to form a coalition government. Hill Country Tamils won six out of the 95 seats and collaborated with the Left to ensure the victory of several leftists. This was not to the liking of the leaders of the ruling UNP and when the Citizenship Act was enacted, a citizen was defined in such a manner that the vast majority of Hill Country Tamils were excluded.[20] The law relating to elections was amended to provide that only citizens would be entitled to vote.[21] Hundreds of thousands of Hill Country Tamils who voted at the 1947 elections as British subjects were thus disenfranchised.

The adoption of the new laws was a defining moment in Tamil politics, with serious political consequences. Tamil leaders in the government were unable to prevent the disenfranchisement of their Hill Country Tamil cousins. It was at this point that S.J.V. Chelvanayakam broke away to form the Federal Party (FP). The lesson was clear, at least to him: the Sinhalese majority wielded state

17 Edrisinha et al., *Power-sharing in Sri Lanka*, 121–125.

18 Commission on Constitutional Reform, *Ceylon: Report of the Commission on Constitutional Reform* (London: Cmd 6677, 1945).

19 Ceylon (Constitution) Order in Council, 1946.

20 Section 4, Ceylon Citizenship Act No. 18 of 1948:

(1) Subject to the other provisions of this Part, a person born in Ceylon before the appointed date shall have the status of a citizen of Ceylon by descent, if -
  (a) his father was born in Ceylon, or
  (b) his paternal grandfather and paternal great grandfather were born in Ceylon.

(2) Subject to the other provisions of this Part, a person born outside Ceylon before the appointed date shall have the status of a citizen of Ceylon by descent, if -
  (a) his father and paternal grandfather were born in Ceylon, or
  (b) his paternal grandfather and paternal great grandfather were born in Ceylon.

21 Section 4 of the Ceylon (Parliamentary Elections) Order-in-Council as amended by section 3 of the Ceylon (Parliamentary Elections) Amendment Act No.48 of 1949, https://aceproject.org/regions-en/countries-and-territories/LK/case-studies/the-ceylon-parliamentary-elecions-order-in-council.pdf, accessed August 12, 2020.

power, and Tamils who thought they shared power in Colombo had in fact no say. For those who broke away, regional autonomy was the only salvation.

It is also important to note that the FP could only win two seats in the subsequent elections that followed in 1952. Chelvanayakam himself lost at Kankesanthurai, not to a candidate of the TC but to a candidate of the UNP. Despite the experiences of the late 1940s, the Tamils of the North and East decisively rejected federalism and mandated the TC to go back to Colombo and share power with the UNP. The year 1952 brought some changes in the South, as Bandaranaike, who had left the UNP in 1951 to form the SLFP, was able to become the Leader of Opposition.

In 1955, everything changed. Previously, the two main parties of the South, the UNP and the SLFP, had wanted Sinhala and Tamil to replace English as official languages. With another general election close at hand, both changed their position to 'Sinhala only'. This led to enhanced support for the FP and in the 1956 elections an SLFP-led coalition supported by the Left swept the South, while the FP swept the North and East. This time it was the TC's turn to be humiliated with two seats and it never recovered from the defeat. Sinhala was made the only official language in 1956. The Tamils and the Left opposed the move and Left leader Dr. Colvin R. De Silva prophetically stated – 'two languages – one country; one language – two countries' meaning that if both languages were not recognised as official languages at par, this might lead to a demand for separation.[22] The warning was not heeded. The majority again demonstrated as to who had state power, which further aggravated the conflict.

Prime Minister Bandaranaike soon realised that accommodation was the only solution and, in July 1957, entered into an agreement with Chelvanayakam to set up Regional Councils in the North and East, with much less power than what provincial councils had under the present Constitution. The B-C Pact,[23] as it came to be famously known, was fiercely opposed by extremist Buddhist monks and the UNP, and the Prime Minster was forced to abrogate it. The situation worsened, culminating in the 1958 communal riots, moving the two communities further apart.

After the elections of 1965, the UNP was again forced to share power with the Tamil parties. Premier Dudley Senanayake entered into a pact with Chelvanayakam (the 'D-C Pact').[24] Senanayake agreed to concessions on the use of Tamil and limited devolution of power to District Councils. In regard to colonisation, he agreed that in future colonisation schemes in the North and

22 *Hansard* (Parliamentary Debates), Vol 24, Col 1917, 1956.
23 Edrisinha et al., *Power-sharing in Sri Lanka*, 220.
24 Edrisinha et al., *Power-sharing in Sri Lanka*, 228.

East, priority would be given to the landless persons of the two provinces, followed by Tamils in the two provinces and then to people from other provinces, preference being given to Tamils. When a White Paper on District Councils was presented in Parliament in 1968, it was the SLFP's turn to oppose, joined by their coalition allies of the Left. The paper was withdrawn in the face of opposition and the FP soon left the government.

There were several other factors that worsened relations between the two communities in the 1950s and 1960s. It was a period of worldwide nationalist and anti-imperialist agitation. A number of radical measures were taken, such as the takeover of foreign oil companies and assisted schools and agricultural reform. Tamil parties were not enthusiastic about such measures, even opposing many of them. They were very conservative on most issues, behaving like the 'cousins' of the UNP. Another factor was the secessionist movement in South India at the time. There was talk of a 'greater Tamil Nadu' that would include the North and East of Sri Lanka.[25] This gave rise to deep suspicion and distrust. In addition, there was no shortage of communalists on either side, fanning hatred for political gain.

But with all these and the failure of the B-C Pact and the D-C Pact, there was still no serious talk of a separate state. In fact, even in 1970 the FP called upon the Tamil-speaking people in its election manifesto to vote against candidates who stood for the bifurcation of the country. This was an apparent reference to the first Tamil separatist party, the tiny '*Eelath Thamilar Otrumai Munnani*' (ETOM) led by C. Suntharalingam.

4 Majoritarian Constitution-Making

1972 was a golden opportunity that was missed. The people of Sri Lanka were making their own Constitution through a Constituent Assembly and the entire membership of Parliament joined the process, including all the representatives of the Tamils. V. Dharmalingam, speaking for the FP during the discussion on the Basic Resolution on the unitary nature of the Constitution, pleaded for federalism or at least the recognition of the federal principle in a unitary form of government. Stating that the party was only asking the federal principle to be accepted, he suggested that, as an interim measure, the ruling coalition of the SLFP and the Left parties should implement what they had promised in the

25 Ganapathy Palanithurai K. Mohanasundaram, *Dynamics of Tamil Nadu Politics in Sri Lankan Ethnicity* (New Dehli: Northern Book Centre 2003), 44.

election manifesto, namely that they would abolish Kachcheris[26] and replace them with elected bodies. This was rejected by all parties of the South. Tamil representatives continued to participate in the Constituent Assembly but only until the Basic Resolution declaring Sinhala to be the only official language was passed. There was no dramatic walk out. In addition to Sri Lanka being declared a unitary state and Sinhala being recognised as the official language, the first Republican Constitution also gave Buddhism the foremost place.[27]

The Tamil MPs nevertheless took their oaths under the new Constitution. Later attempts at an understanding proved unsuccessful and the Tamil parties soon united under the banner of the Tamil United Front (TUF) that later became the Tamil United Liberation Front (TULF). At the famous Vaddukoddai Conference held in 1976, the TULF embraced separatism and adopted a resolution for a separate state called 'Tamil Eelam' in the Northern and Eastern provinces that they claimed to be the historical homeland of the Tamils.[28] During the 1977 elections, the TULF contested on a separatist platform and swept the Tamil areas.

The 1977 elections were significant for another reason. For the first time, one of the two major parties of the South, the UNP, acknowledged in its manifesto, *'A Programme of Action to Create a Just and Free Society'*, that Tamils had grievances and that the non-resolution of their problems had driven the Tamils towards separatism. It promised to set up a round table conference to address Tamil issues. Tamils outside the North and East voted overwhelmingly for the UNP. The UNP obtained an unprecedented five sixth majority but its share of the popular vote was 50.9 %. However, no round table conference was ever organised.

The 1978 Constitution was another opportunity for a solution. But the UNP failed to respond and the Tamils refused to participate in making the Constitution. For the second time in Sri Lanka's history, a Constitution was adopted without the participation of the representatives of the Tamils, showing clearly that effective state power in Sri Lanka was with the Sinhalese. The

26 District administration headed by a government agent. *Kachcheri* is a Hindi word used for the Revenue Collector's Office during British rule. The system continued after independence. See S. S. Wickramanayake, "The Management of Official Records in Public Institutions in Sri Lanka: 1802–1990" (unpublished PhD diss., University of London, 1992), 28.

27 For a detailed discussion on the 1972 Constitution, see Jayampathy Wickramaratne, "The 1972 Constitution in Retrospect," in *Towards Democratic Governance in Sri Lanka: A Constitutional Miscellany*, ed. Jayampathy Wickramaratne (Rajagiriya: Institute for Constitutional Studies, 2014), 75–95.

28 Edrisinha et al., *Power-sharing in Sri Lanka*, 256.

1978 Constitution entrenched the unitary nature of the Sri Lankan state, as well as the foremost place of Buddhism, and provided for a strong presidential executive. Entrenchment meant that any change needed a two-thirds majority in Parliament and approval by the people at a referendum.

Attacks on Tamils in 1983 forced thousands of Tamils to flee the island and the entire conflictual situation became internationalised. The TULF, which was for a compromise despite its separatist rhetoric, withdrew from Parliament and, not surprisingly, was soon upstaged by the numerous Tamil militant groups that had sprung up. A fully-blown separatist war followed.

5 Devolution at Last: 13th Amendment to the Constitution, 1987

Forced by these realities, President Jayewardene entered into an accord with India in 1987. This was followed by the 13th Amendment to the Constitution, which established provincial councils and provided for limited devolution. All Tamil militant groups except the Liberation Tigers of Tamil Eelam (LTTE) accepted the Indo-Lanka Accord in principle. Provincial councils with limited legislative and executive powers were set up. Tamil was also made an official language. However, literally every comma and full stop in the 13th Amendment had been used by the subsequent governments without exception to thwart the process of devolution.[29]

The 13th Amendment established provincial councils with limited legislative and executive powers within a unitary state. There were three lists of subjects and functions: a reserved list, a provincial council list and a concurrent list. A provincial council had no power to make statutes on any matter set out in the reserved list. A provincial statute on a matter in the provincial council list made a pre-1987 parliamentary law on the same matter inoperative in the Province if the statute states in its long title that the statute was inconsistent with such law. However, the legislative power of a provincial council in regard to a matter in the provincial council list was not exclusive, as Parliament too could legislate on such matters. A parliamentary Bill on a provincial council matter had to be referred to all provincial councils for the expression of their views. If all agreed, Parliament could pass the Bill with a simple majority. If one or more provincial councils did not agree, and the Bill was passed by only a simple majority, then the Bill would become law applicable only to those

29 Jayampathy Wickramaratne, "Sri Lanka: Missed Opportunities and the Way Forward," in *Towards Democratic Governance in Sri Lanka: A Constitutional Miscellany, ed.* Jayampathy Wickramaratne (Rajagiriya: Institute for Constitutional Studies, 2014), 497–8.

Provinces that agreed. But if the Bill was passed by a two-thirds majority, then the law would also apply in the Provinces that did not agree.

As for matters in the concurrent list, Parliament had to consult provincial councils before it took up a Bill and, conversely, the same applied to a provincial council. In the event of inconsistency, the parliamentary law would prevail. However, a provincial council statute on such a matter would make a pre-1987 law on the subject inoperative unless Parliament decided otherwise.

A significant feature of the reserved list is its first item: national policy on all subjects and functions. This is a provision that was abused by the Centre under successive governments. It is reasonable to expect the provision to mean that Parliament may lay down national policy even relating to a matter in the Provincial list or the concurrent list by a simple majority and provincial councils should abide by such national policy in making statutes. In view of the express provision contained in Article 154G (3) of the Constitution of 1978 that a parliamentary law relating to a matter on the provincial list would apply in a Province only if that Province had adopted the law by a two-thirds majority, there can be little doubt that, on the pretext of establishing national policy, Parliament could not legislate by a simple majority on a matter from the provincial council list without the consent of the provincial council concerned. In other words, national policy on matters set out in the provincial council list and the concurrent list would be in the nature of framework legislation to which provincial councils should conform.

To take one example, under item 8 of the provincial council list, the regulation of road passenger carriage services and carriage of goods by motor vehicles within the Province and the provision of intra-provincial road transport services were provincial subjects. This clearly permitted a provincial council to set up its own transport services. The Colombo government, however, prohibited provincial councils from providing omnibus services, claiming to declare 'government policy' through the National Transport Commission Act of 1991. Although it is clear from a reading of the 13th Amendment that national policy could only be laid down by an Act of Parliament, successive governments purportedly laid down such policy by Cabinet decisions and ministry circulars.

In *Kamalawathie v. Provincial Public Service Commission of the North-Western Province*,[30] the petitioners alleged in the Supreme Court that a circular giving a national teacher transfer policy declared by the Cabinet of Ministers as national policy had not been followed by a provincial Public

30 *Kamalawathie v. Provincial Public Service Commission of the North-Western Province* [2001] 1 Sri LR 1.

Service Commission. Judge Mark Fernando, with Judge Wadugodapitiya and Judge Ismail agreeing, held that the circular sets out national policy on an important aspect of education. 'While powers in respect of education have been devolved to Provincial Councils, those powers must be exercised in conformity with national policy. Once national policy has been *duly formulated* in respect of any subject, there cannot be any conflicting provincial policy on the same subject.'[31]

It is submitted that the Supreme Court erred in holding that the Cabinet of Ministers' decision constituted a duly formulated national policy binding on the provincial councils. The scheme of the 13th Amendment allows no interpretation other than that national policy can only be determined by law.

In 1995, the Gunawardena Committee, appointed to study the functioning of provincial councils, had the following to say on how the national policy provision had been misused:

> There has been a tendency on the part of Government Ministries to interpret National Policy in operational terms, thereby extending their areas of administrative action in respect of provincial subjects. [...] National Policy being a reserved function brings into effect a role differentiation between the Government and the Province. Thus, whereas the Government performs a directive role the Province is relegated to an implementational role. Hence there is a tendency on the part of the Government to give policy directives, marginalizing the Province from the decision-making process. This leaves only a residual role which is largely operational. The tendency to view the Province in operational terms is reinforced by the nature and scope of Government-Province relations currently in place. It is a negation of the power sharing basis of devolution and does not constitute a relation for establishing a partnership between the Government and the Provinces.[32]

Under Article 154C of the Constitution, the executive power of a provincial council extends to matters with respect to which a provincial council has power to make statutes, namely matters in the provincial council list and the concurrent list. However, for provincial authorities to exercise executive

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31 *Kamalawathie v. Provincial Public Service Commission of the North-Western Province* [2001] 1 Sri LR 1, 5 (emphasis added).

32 Committee to Study the Operation of Provincial Councils in Sri Lanka, "Provincial Councils: Operational Experience of Devolution," *Report of the Committee to study the Operation of Provincial Councils in Sri Lanka* (1996, unpublished), 52.

power, they need statutory authority. In 1987, when the legal basis for the provincial councils was established, there were at least 300 pieces of legislation relating to matters included in the provincial council list and the concurrent list. References in such laws to the minister or a particular public officer could not be construed as references to the Governor, provincial minister or the corresponding provincial public officer unless the 13th Amendment contained an express provision to that effect. Provincial councils were thus faced with the impossible task of passing statutes corresponding to all such laws if they were to exercise executive power. They did not have their own draftsmen and had to rely on the central state for this as well. In the absence of a statute, the central state would continue to exercise executive power in respect to the subject in question.

As a result, provincial councils pressed the government to enact parliamentary legislation providing that all references in existing law with respect to matters included in the provincial and concurrent lists be construed as references to the corresponding provincial authorities. The government reluctantly agreed to make such a provision, which, however, only applies to the provincial list and also keeps the powers of the Centre intact. The Provincial Councils (Consequential Provisions) Act No. 12 of 1989 was accordingly passed. There remained an estimated 200 laws in respect to matters set out in the concurrent list that were not covered by the Act. Even to this day, only a few such statutes have been enacted by the various provincial councils, mainly due to lack of their own draftsmen, but also due to frustration resulting from the Centre's lack of support. The central government has not moved to prepare model statutes that could be used by provincial councils, unlike in some other countries. In the absence of their own statutes, provincial authorities are unable to exercise executive power, notwithstanding Article 154C of the Constitution.

Problems cropped up even regarding matters set out clearly in the provincial list. A pre-1987 parliamentary law on such a matter would be inoperative in a Province only if a statute was made. Although provincial authorities were able to exercise powers under a pre-1987 law to which the provincial councils (Consequential Provisions) Act applies, central authorities were also able to exercise powers if they wished to do so, unless and until a provincial statute was made. What happened in the case of the Ratnapura and Kegalle Base Hospitals that were administered by the Sabaragamuwa provincial council is illustrative: the Centre moved to take over the administration of the two hospitals in 1994 and the Attorney General advised the Centre that in the absence of a provincial statute which provides for the administration of the two hospitals, 'the control of these two hospitals legally remains with the Ministry of

Health.'[33] On being asked for advice on whether the minister at the Centre could exercise the power of supervision over local authorities if there was no provincial statute on the subject, the Attorney General stated: 'It should also be noted that the Provincial Councils (Consequential Provisions) Act does not take away from the Minister of the central government the powers which he has under any Act of Parliament, which can continue to be exercised by him as well.'[34] Clearly, the Centre was making use of the difficulties faced by provincial councils in making their own statutes to encroach on areas devolved on the provinces. With regard to interference by the Centre, the Gunawardena Committee stated:

> Most Government Ministries continue to conduct their operations on a pre-devolution basis. Thus Government Ministries routinely address guidelines and circular instructions direct to the respective provincial heads of departments by-passing the provincial Ministry. Further, there has been no restructuring at the centre in terms of roles and functions in the context of devolution. It would appear that there has been a failure on the part of most Government Ministries to formulate national policies in their sectoral subjects in partnership with provincial councils.[35]

It is instructive to examine in detail one significant case of a clash between the centre and provinces. The Agrarian Services (Amendment) Bill of 1991 sought to amend several sections of the original act that dealt with matters relating to landlords and tenant cultivators. The Bill was challenged in the Supreme Court on the ground that it dealt with matters set out in the provincial council list as well as the concurrent list and should have been referred to the provincial councils. The Bill made no reference, in the preamble or elsewhere, to national policy being made. The Centre did not claim even in Court that the Bill sought to lay down national policy. However, the Court held that '[it] is sufficient for present purposes that the matters dealt with in the Bill are all matters of national policy in regard to the rights and liabilities of owners and tenant-cultivators, and thus fall within [the reserved list]'.[36] How national policy could

33 Committee to Study the Operation of Provincial Councils in Sri Lanka, *Provincial Councils*, 57.

34 Committee to Study the Operation of Provincial Councils in Sri Lanka, *Provincial Councils*, 55.

35 Committee to Study the Operation of Provincial Councils in Sri Lanka, *Provincial Councils*, 7–8.

36 Decisions of the Supreme Court on Parliamentary Bills (1991–2003), Vol. VII, 9.

be laid down by amending an existing law in a matter of the provincial council was not explained.

With the establishment of provincial councils in 1988, agrarian services was considered a provincial subject and the councils had their own Departments of Agrarian Services; matters relating to landlords and tenant cultivators were handled by these departments. After the Supreme Court's aforesaid determination, an Additional Solicitor General informed the Centre that in view of the decision of the Supreme Court, the matters dealt with in the Bill were all matters of national policy in regard to the rights and liabilities of owners and tenant cultivators and thus fell within the reserved list; the Centre could proceed 'on the basis that Agrarian Services is not a devolved subject'.[37] Soon, the Centre took over the provincial departments. The advice was clearly wrong. Even if the Supreme Court was correct in saying that the matters covered by the Bill were all matters of national policy it does not follow that Agrarian Services necessarily be a subject in the reserved list. When national policy is declared in respect of a subject in either the provincial list or the concurrent list, this does not shift the subject to the reserved list.

In 2003, in *Madduma Banda v. Assistant Commissioner of Agrarian Services,*[38] the Supreme Court held that matters relating to tenant cultivators be included in the provincial list. Commenting on the earlier determination, the Court took the view that it would not be correct to say that the matters dealt with by the Bill were all matters of national policy. The judgment was certainly devolution-friendly. However, despite the clarification, the subject of agrarian services was not returned to the provincial councils.[39]

6 Later Attempts for a Constitutional Settlement

Chandrika Bandaranaike Kumaratunga became President in 1994. The Sri Lanka Freedom Party (SLFP) had vigorously opposed the 13th Amendment under the leadership of her mother, Sirimavo Bandaranaike, the world's first

37 Committee to Study the Operation of Provincial Councils in Sri Lanka, *Provincial Councils*, 52.

38 *Madduma Banda v. Assistant Commissioner of Agrarian Services* [2003] 2 Sri LR 80.

39 For a fuller discussion on the working of Provincial councils see Lakshman Marasinghe and Jayampathy Wickramaratne, *13th Amendment: Essays on Practice* (Pannipitiya: Stamford Lake, 2010); Ranjith Amarasinghe et al., *Thirty Years of Devolution: An Evaluation of the Working of Provincial councils in Sri Lanka* (Rajagiriya: Institute for Constitutional Studies, 2019).

woman Prime Minister. However, under Kumaratunga's leadership, the SLFP adopted a pro-devolution platform. Between 1994 and 2000, she led a dynamic campaign for a strong power-sharing arrangement as a solution to Sri Lanka's ethnic crisis. Surveys commissioned by her showed that while only 23 % of the Sinhala people were for a negotiated settlement in 1996, numbers had increased to 68 % by 1999. In August 2000, after several months of discussions with the UNP, the Kumaratunga Administration presented the Constitution of the Republic of Sri Lanka Bill. However, with the dissolution of Parliament for General Elections only a few weeks away, the UNP withdrew its agreement to support the Bill. The Bill was debated in Parliament but not put to a vote, as the necessary two-thirds majority was not forthcoming.

The 2000 Constitution Bill proposed a non-unitary framework. Rather than using a label to describe the nature of the State, the Bill stated: 'The Republic of Sri Lanka is one, free, sovereign and independent State consisting of the institutions of the Centre and of the Regions which shall exercise power as laid down in the Constitution' (Article 1). A clear-cut division of powers between the Centre and the Regions was proposed. The legislative power of the Regions would be exclusive and there would be no concurrent list. The subjects on which national policy could be made by the Central Legislature would be restricted.

At the parliamentary elections held in October 2000, the People's Alliance (PA) won with a slim majority which it soon lost due to defections. At the elections held in December 2001, the UNP secured a majority and Ranil Wickremasinghe formed a government under the Kumaratunga presidency. A ceasefire with the LTTE was agreed to and peace talks were held. The government and the LTTE agreed in Oslo in December 2002 to 'explore' a federal solution.

With Kumaratunga who introduced the 2000 Constitution Bill as President and Wickremasinghe as Premier, this was another opportunity for a Southern consensus, but Wickremasinghe did not get Kumaratunga on board the peace process, instead attempting to deal with her through intermediaries. This was not to the liking of the latter who was constitutionally empowered to 'declare war and peace' as President. While Wickremasinghe may have suspected that Kumaratunga would do a kind of tit for his tat of 2000, recent defectors from the SLFP to the UNP who held important positions in the Wickremasinghe administration are also said to have sabotaged any possibility of such rapprochement.

The Wickremasinghe government offered an interim administration dominated by the LTTE in the North-East[40] but the LTTE made a counter demand in October 2003 for an Interim Self-Governing Authority (ISGA) with 'plenary

40 Edrisinha et al., *Power-sharing in Sri Lanka*, 654–661.

power for the governance of the North-East' including powers in relation to resettlement, rehabilitation, reconstruction, development, raising revenue including imposition of taxes, revenue, levies and duties, law and order, and over land. It demanded that all government expenditures in or for the North-East should be subject to the control of the ISGA. According to the proposal, the ISGA would have had powers to borrow internally and externally, provide guarantees and indemnities, receive aid directly, and engage in or regulate internal and external trade. It would also have had direction and control over any and all administrative structures and personnel in the North-East and the power to alienate and determine the appropriate use of all land in the North-East that was not privately owned. Land occupied by Sri Lankan armed forces would have had to be immediately vacated and restored to the possession of the previous owners. The ISGA would have had control over the marine and offshore resources of the adjacent seas and the power to regulate access thereto. It would also have had control over the natural resources in the region.[41] However, some of the proposed powers of the ISGA would not have been possible under the existing unitary Constitution. Granting 'plenary power for the governance of the North-East' would have been permissible only in a confederal setting. While the people may have ultimately supported a federal structure as a part of a comprehensive peace agreement that would lead to the end of violence, the ISGA would have been hard to sell as an interim arrangement. Nevertheless, the ISGA proposal could have been a basis for further talks.

On 4 November 2003, a few days after the ISGA was proposed, Kumaratunga used her presidential powers to take over the ministries of defence, interior and media. Without the key Ministry of Defence, Wickremasinghe now had very few remaining options. The peace process was all but dead. On 7 February 2004 Parliament was dissolved. In the ensuing elections, the United People's Freedom Front (UPFA), led by Kumaratunga and joined by Janatha Vimukthi Peramuna (JVP), a left-wing party opposed to devolution, won a majority of seats. Was the LTTE sincere in agreeing to a ceasefire and talks about a political solution? Many observers take the view that it was only a tactical move and that the LTTE's commitment was to a separate state and nothing short of it. It was aware of the difficulties of the Southern polity to forge a consensus on a political solution. The LTTE appears to have been bent on gaining control of an interim administration that would have 'gelled' with time and with no constitutional solution. Its chief negotiator himself later disowned the LTTE's willingness to explore a solution to the Tamil problem within a federal framework.

41 Edrisinha et al., *Power-sharing in Sri Lanka*, 668.

7 War Over but No Peace

The LTTE's hard-line position in turn helped hardliners within the Sinhala majority. Mahinda Rajapakse ascended the presidency in 2005 with the support of Sinhala hardliners. Interestingly, the LTTE preferred a hardliner to a moderate and enforced a boycott of the poll in the areas it controlled, denying Wickremasinghe, who offered a high degree of devolution, several hundred thousand decisive votes. This only confirms that the LTTE was never interested in a political settlement and overestimated itself as a military force. Within four years, Rajapakse's military machine completely decimated the LTTE.

The LTTE also misread the post-9/11 international situation. Most international actors helped Rajapakse to defeat the LTTE, directly or indirectly, although some were not happy with what was happening during the last stages of the war. India also helped; notwithstanding the large Tamil population in Tamil Nadu, most of whom did not support a separate state but had great sympathy for Sri Lankan Tamils. The ruling Congress had another reason to see the end of the LTTE; the latter had assassinated Rajiv Gandhi, a former Indian Prime Minister and Congress leader. Gandhi's killing was another huge blunder on the part of the LTTE and its arrogant leader Prabhakaran.

While the war against the LTTE was on, President Rajapakse summoned an All Party Conference (APC) which in turn appointed an All Party Representative Committee (APRC) to make specific proposals for a constitutional settlement. He also appointed a 17-member panel of experts to assist the APRC. The panel of experts was divided. Eleven experts who included Sinhalese, Tamils and a Muslim proposed a strong power-sharing arrangement,[42] four Sinhalese experts proposed minimal devolution while two others presented their own reports.

The so-called 'majority report' recommended a double-pronged approach: extensive devolution on the one hand, so that communities could exercise their power and develop their own territories within the respective areas, and power-sharing at the centre on the other hand, which would integrate the various communities into the body and strengthen national integration. In other words, a clear-cut division of powers between the centre and the provinces was proposed. Subjects such as defence, national security, foreign affairs, immigration, communications, national transportation, international trade, maritime zones and shipping, which are necessary to ensure the

42 Edrisinha et al., *Power-sharing in Sri Lanka*, 784. The author of this chapter was a signatory to the 'majority report'.

sovereignty, territorial integrity and economic unity of Sri Lanka, would be reserved for the Centre, while other subjects would be devolved. The majority also recommended avoiding the use of distinctive expressions such as unitary, federal, or union of regions and describing the state in the Constitution as consisting of 'institutions of the Centre and of the Provinces which shall exercise power in the manner provided for in the Constitution', similar to the phrase used in the 2000 Constitution Bill.[43] The multi-ethnic, multi-lingual, multi-religious and multi-cultural character of Sri Lankan society was to be recognised, whilst safeguarding the unity and territorial integrity of the Republic. Another significant proposal was that the 'Peoples' of Sri Lanka were to be described in the Constitution as being composed of 'the constituent peoples of Sri Lanka' and that every constituent people would have the right, *inter alia*, to its due share of state power. This would be without in any way weakening the common Sri Lankan identity.

The majority report was welcomed by moderates among the majority Sinhalese and overwhelmingly by Tamils, Muslims and Hill Country Tamils. Not surprisingly, the LTTE chose not to comment on the contents, instead questioning the right of the Tamil experts to represent the community. The APRC process dragged on for three years. Sinhala nationalist parties withdrew at various stages, but the SLFP, the main party in the government, remained. Although no report was officially published, APRC Chairman Vitarana presented a summary of its proposals to the President in 2009. The proposals fell short of what the 'majority report' had recommended. Yet, extensive devolution within a unitary state was proposed with power-sharing at the centre and the proposals could form the basis for talks. Interestingly, the Presidential Secretariat denied that it had a copy of the proposals while Vitarana reiterated that he had submitted a summary to the President. Subsequently, Ramaiah Yogarajan and Nizam Kariapper, who represented the Ceylon Workers Congress and the Sri Lanka Muslim Congress respectively, released a summary of the decisions based on the minutes of the APRC[44] and Vitarana conceded that it was an accurate summary.

Dr. Colin Irwin of the University of Liverpool, with vast experience in conducting opinion polls in conflict zones including Northern Ireland, Kashmir,

43 Clause 1 of the Constitution of the Republic of Sri Lanka Bill, 2000, https://www.peaceagreements.org/viewmasterdocument/1007, accessed 30 January 2021.

44 Ramaiah Yogarajan and Nizam Kariapper, eds., "Proposals made by the All Party Representatives Committee to form the basis of a new Constitution," www.groundviews.org/wp-content/uploads/July-20-APRC-Final-Report.pdf?46986d, accessed on 8 May 2013.

the former Yugoslavia and Sudan, tested the preliminary proposals of the APRC against public opinion in March 2009, just three months before the end of the war. A year later, in March 2010, nine months after the end of the war, the same proposals were tested again, but with a larger sample that included people in the Northern Province.[45] A summary of the APRC proposals as they existed in February 2009 was listed as a series of 14 'show cards'. Those interviewed were asked what they thought of each item on a given card. Was it 'essential', 'desirable', 'acceptable', 'tolerable' or 'unacceptable'? They were then asked for their views on the 'package' as a whole, that is to say, whether they would support such a 'package' and under what circumstances.

Irwin reported that the percentages of Tamils, Muslims and Hill Country Tamils to whom the reform proposals taken together as a 'package' were 'essential', 'desirable' or 'acceptable' were as follows (Table 6.1):

TABLE 6.1 Support for reform proposals among Tamils, Muslims and Hill Country Tamils

	Tamils	**Muslims**	**Hill Country Tamils**
2009	82%	85%	90%
2010	83%	88%	90%

The above figures were not in any way surprising. What was surprising to many was the response of the Sinhalese (Table 6.2):

TABLE 6.2 Support for reform proposals among Sinhalese

2009	59% (essential – 13%, desirable – 21%, acceptable – 25%)
2010	80% (essential – 20%, desirable – 38%, acceptable – 22%)

Contrary to the myth propagated by opponents of devolution that the Sinhalese did not support devolution, 59 % of the respondents considered the

45 Colin Irwin, " 'War and Peace' and the APRC Proposals," *peacepolls.org* (2010), www.peacepolls.org/peacepolls/documents/001173.pdf, accessed on October 15, 2013.

APRC proposals at least 'acceptable' three months before the end of the war in May 2009. One year later, the figure had risen to as much as 80 %.

The Lessons Learnt and Reconciliation Commission (LLRC), appointed by the President in May 2010 and headed by a former Attorney-General, submitted its report in November 2011.[46] The Commission made a number of far-reaching recommendations. The LLRC report was well received both within Sri Lanka and abroad. In regard to a political solution, the LLRC stated that a political solution was imperative to address the causes of the conflict: 'Everybody speaks about it, though there is no agreement about the diagnosis and the prescription,' the Commission lamented. It said that the government had to take the initiative to have a serious and structured dialogue with all political parties, in particular those representing the minorities, based on a proposal containing the government's own thinking on the form and content of the dialogue process envisaged. That dialogue would have to take place at a high political level and with an adequate technical backstop. The onus of initiating and carrying forward a dialogue was thus placed squarely on the shoulders of the government. The LLRC also stated that any devolution or power-sharing mechanism would have to be implemented within the broad framework of a sovereign, politically independent and multi-ethnic Sri Lankan state. While the distribution of meaningful powers to the periphery was essential, there were powers that formed the core responsibilities of the state and that could not be so devolved – and therefore had to be retained and exercised by the government at the Centre. It was also important to ensure that any power-sharing arrangement had inbuilt mechanisms that would effectively address and discourage secessionist tendencies and safeguard the sovereignty and integrity of the state.

The LLRC's views were not new, yet they were of significance coming from a commission appointed by the government. The Rajapakse Administration repeatedly made promises to the international community and to neighbouring India that it was committed to a political solution,[47] but no meaningful steps were taken towards that end. On the contrary, efforts were made to dilute the 13th Amendment. Such moves were not successful due to the Indian factor as well as opposition from within the ruling coalition. Although another

46 Commission on Inquiry on Lessons Learnt and Reconciliation, "Report of the Commission on Inquiry on Lessons Learnt and Reconciliation" (November 2011), http://slembassyusa.org/downloads/LLRC-REPORT.pdf, accessed on 8 May 2013.

47 Dianne Silva, "Full Implementation of 13th Amendment Plus, MR Tells Krishna," *Daily Mirror*, 17 January 2012, http://www.dailymirror.lk/16141/full-implementation-of-13th-amendment-president-tells-krishna-, accessed on 24 june 2019.

Parliamentary Select Committee was appointed, the Tamil parties and the UNP held back and declared that the government had to first make known its position on a political solution.

In September 2013, the moderate Tamil Nationalist Alliance (TNA) won 30 out of 38 seats at the first elections to the Northern provincial council, making the new Council the only one controlled by the opposition. C.V. Wigneswaran, a former Judge of the Supreme Court, became the Chief Minister, raising hopes of pro-devolution forces in the country. But he soon joined Tamil hardliners and was accused of doing little for the cause of devolution.

The reports of the APRC, LLRC and the Panel of Experts appointed by him notwithstanding, Rajapakse did nothing towards settling the conflict. Clearly, he was accused of only paying lip service. Having passed the 18th Amendment to the Constitution to remove the few limitations on the executive presidency and the two-term limit, Rajapakse called elections in 2014 two years in advance. At the Presidential election held on 8 January 2015, Rajapakse lost to Maithripala Sirisena, the General Secretary of his own party (SLFP) who defected to become the 'common candidate' of the opposition. The main plank of Sirisena's platform was the abolition of the executive presidency and a return to a parliamentary form of government. Tamils, Muslims and Hill Country Tamils voted overwhelmingly for him. The Tamil Nationalist Alliance stated publicly that while it did not extract any promises from Sirisena on the resolution of the ethnic conflict, it had the fullest confidence in him that he would usher in a constitutional settlement. Wickremasinghe, the leader of the UNP, was appointed Prime Minister. After his victory, Sirisena was invited by the SLFP to lead the party in place of Rajapakse.

At the general elections that followed in August 2015, the United National Front for Good Governance (UNFGG) led by Wickremasinghe won 106 out of 225 seats and Wickremasinghe was again appointed Prime Minister. The SLFP-led United People's Freedom Front (UPFA) won ninety-six seats and the Tamil Nationalist Alliance won sixteen. The majority of Members of Parliament belonging to the UPFA supported Rajapakse and sat in the Opposition benches, calling themselves the Joint Opposition while over thirty supported Sirisena and sat in the government benches. A major problem for Sirisena was that most of the Members who supported him supported Rajapakse on 8 January 2015 and did not identify themselves with the wishes of the masses who voted for Sirisena as the 'common candidate'. Their support for the constitutional reform process was at best half-hearted. Some of them later joined the Opposition and finally, the SLFP too left the government.

8 The Unitary versus Federal Debate and the Issue of Secession

While power-sharing through devolution to the periphery has been a successful tool in meeting secessionist challenges in many countries, a large number of those who opposed devolution in Sri Lanka have spread fear among the people that devolution would lead to the secession of the Northern and Eastern Provinces. However, the author is not aware of a single example in which the governing authority of a regional unit has used the powers devolved on it for secession. If a majority in Scotland decided to leave the United Kingdom, secession would be despite devolution, not because of devolution. The same would apply in case of a secession of Catalonia from Spain. However, if there are people who genuinely believe that powers devolved may be used to secede, it is best that such fears be assuaged. Historical reasons too sometimes play a part: even an offer of the right to secede could not lure Eritrea to stay with Ethiopia, for example.

The description of the Sri Lankan state as 'unitary' in 1972 and its subsequent entrenchment have impeded efforts at meaningful power-sharing. In constitutional theory, a unitary state is one in which the central government is supreme and administrative divisions exercise only powers that the central government delegates. In short, there is only one ultimate source of state power. For many Sri Lankans, however, 'unitary' means 'oneness' or 'one country'. The Sinhala word for 'unitary' is 'ekeeya' and 'eka' is 'one'. Thus, changing the unitary nature of the state is seen by some as 'dividing' the country.

The issue has been complicated with the Federal Party's Tamil name being 'Illankai Thamil Arasu Kachchi' which translates as 'Lanka Tamil State Party'. While opponents say that the Tamil name makes it clear that the ultimate aim of the party is a separate state, party leaders deny this and point out that in India, the subnational unit is called a 'state'. They say that when the party was formed, it took inspiration from India and all it wished to achieve was a 'Tamil-majority state' as in quasi-federal India.

Article 157A (4) of the Sri Lankan Constitution states that '[w]here any political party or other association or organization has as one of its aims or objects the establishment of a separate State within the territory of Sri Lanka, any person may make an application to the Supreme Court for a declaration that such political party or other association or organization has as one of its aims or objects the establishment of a separate State within the territory of Sri Lanka'. One of the consequences of such a declaration is that the political party or other association or organisation concerned shall be deemed to be proscribed for all purposes, and that any member of the political party

or other association or organisation who is a Member of Parliament shall be deemed to have vacated their seat in Parliament with effect from the date of such declaration.[48]

In *Chandrasoma v. Senathirajah,*[49] the petitioner sought a declaration that the Federal Party was a political party which had as its aims and objects the establishment of a separate State within the territory of Sri Lanka. The Supreme Court, having reviewed the party constitution and affidavits submitted by party officials, found that the Federal Party supported or advocated the establishment of a federal State within a united Sri Lanka. It did not, however, support, espouse, promote, finance, encourage or advocate the establishment of a separate State within the territory of Sri Lanka. The Court observed that advocating a federal form of government within the existing state could not be considered as advocating separatism.

Federalism had become a 'dirty word' in Sri Lankan politics and much heat was generated when the People's Alliance Government's 1997 proposals sought to describe the state as a 'union of regions'. Constitution drafters therefore needed to be pragmatic and avoid language that could lead to confusion. This is precisely what the PA government was advised to do and accordingly, the 2000 Constitution Bill stated in proposed Article 1: 'The Republic of Sri Lanka is one, free, sovereign and independent state consisting of the institutions of the Centre and of the Regions which shall exercise power as laid down in the Constitution.' As the majority report of the Panel of Experts later stated in agreement, the use of distinctive expressions, such as unitary, federal, union of regions/provinces was to be avoided in describing the nature of the state.

The Public Representations Committee on Constitutional Reform appointed by the government in 2016 to receive public representations on constitutional reform to support the present constitutional reform process stated in its report:

> With regard to the nature of the State, there were many views expressed by people ranging from a federal to a unitary State, secular to non-secular with other in-between options between a federal and unitary State as well. Given the fact that the ideal of a federal State has been long mooted by Tamil politicians many of the representations from the Northern Province and also from the Tamil community in the Eastern Province, articulated the desire for a federal State. It should also be noted however, that some individuals and groups from other parts of the country and

48 Article 157A (5) of the Constitution.

49 *Chandrasoma v. Senathirajah,* SC Spl. 03/2014, SCM 04.08.2017.

> from among the other communities also proposed a federal State or a power sharing mechanism as the best means of responding to the grievances of the Tamil people.
>
> At the same time, there were many submissions from other parts of the country that strongly expressed the desire for a unitary State. What is clear is that the idea of a federal State is strongly linked to the notion of separatism by those who opposed federalism. At the same time, they also associate a unitary State with an indivisible country. On the other hand, a unitary State is viewed by those who favour greater devolution and a federal structure as a continuation of an undemocratic, centralized form of State control. The fear of a federal State especially among the Sinhalese, arises from the idea that a federal State will eventually lead to separation. Fears regarding a unitary State are based on the idea that it will lead to rule of the majority and the centralization of power.[50]

Does the recognition of a State as a 'unitary state' ensure its territorial integrity and indivisibility? This has been a major issue raised in the current discourse. The Steering Committee stated in its report:

> The President whilst speaking on the Resolution to set up the Constitutional Assembly, stated that whilst people in the south were fearful of the word 'federal', people in the north were fearful of the word 'unitary.' A constitution is not a document that people should fear. The classical definition of the English term 'unitary state' has undergone change. In the United Kingdom, it is now possible for Northern Ireland and Scotland to move away from the union. Therefore, the English term 'Unitary State' will not be appropriate for Sri Lanka. The Sinhala term '*aekiya raajyaya*' best describes an undivided and indivisible country. The Tamil language equivalent of this is '*orumiththa nadu*'.[51]

The United Kingdom referred to here, with only local government institutions below the national government, was long regarded as a proto-typical unitary state. According to the British doctrine of parliamentary sovereignty, Parliament is the supreme legal authority in the United Kingdom which can make or repeal any law. Any law can be changed by a future parliament and

50 Public Representations Committee on Constitutional Reform, *Report on Public Representations on Constitutional Reform* (Colombo: Public Representations Committee on Constitutional Reform, 2016), 20.

51 Steering Committee, "The Constitutional Assembly of Sri Lanka," 1.

courts cannot overrule parliamentary legislation. The United Kingdom does not have a written Constitution against which the validity of laws passed by Parliament could be tested, but unwritten constitutional principles which are respected. It also has many laws of constitutional importance. If a 'unitary state' means a state whose territorial integrity is assured, then the United Kingdom was not and is not a unitary state. The Parliament of the United Kingdom of Great Britain and Ireland passed the Irish Free State Constitution Act[52] in 1922 to allow Ireland (minus Northern Ireland) to become a dominion and with the exit of Ireland the remainder became the United Kingdom of Great Britain and Northern Ireland. Ireland became a Republic in 1949 and left the British Commonwealth.[53]

In an effort to end the violence in Northern Ireland, the governments of the United Kingdom and the Republic of Ireland agreed on Good Friday in 1998 that it was for the majority of the people of Northern Ireland to decide whether they preferred to continue to support the Union with Great Britain or a sovereign united Ireland. To put the 'Good Friday Agreement' into legal effect, the British Parliament passed the Northern Ireland Act 1998, which also repealed the Government of Ireland Act 1920. When a referendum on Scottish independence was to be held in Scotland, the UK government drafted an Order in Council granting the Scottish Parliament the necessary powers to hold an independence referendum. The draft Order was approved by resolutions of both Houses of Parliament of the United Kingdom. Under the powers thus temporarily transferred from Westminster, the Scottish Independence Referendum Act 2013 was passed by the Scottish Parliament. At the referendum held in 2014, a majority decided not to leave the United Kingdom. Thus, the UK Parliament itself provided for the secession of Ireland. It recognised that a majority of the people of Northern Ireland ought to be able to decide on the issue of secession from the UK and unification with Ireland. It also recognised that a majority of Scots ought to be able to decide if Scotland should leave the United Kingdom. The above shows that describing a state as 'unitary' is not, in and of itself, a barrier against secession.

Proponents of devolution argue that describing the Sri Lankan State as 'unitary' in the English version of the Constitution is undesirable for another reason: namely that there exists a certain 'unitary mindset' in Sri Lanka according to which any issue that arises between the Centre and a Province is decided

52 Constitution of the Irish Free State (Saorstát Eireann) Act, 1922, http://www.irishstatutebook.ie/eli/1922/act/1/enacted/en/print.html, accessed 12 August 2020.

53 Republic of Ireland Act, adopted on 24 November 1948, came into force on 18 April 1949.

in favour of the Centre. They argue that while 'unitary' in the classical sense means that powers devolved may be withdrawn by the Centre through constitutional amendment, there have been many instances of legislative, executive and even judicial power which in turn undermine devolution. Sadly, successive governments have used every conceivable provision to frustrate devolution. The situation has been worsened due to the lack of a devolution-friendly administration.[54] Examples of such a 'unitary mindset' are available in abundance and several were given in detail earlier in this chapter.

Taking into consideration the fears of pro-devolution forces as well as those who fear that devolution has the potential to lead to secession, the Steering Committee proposed to include the following in the new Constitution:

- In Sri Lanka, sovereignty will vest with the people and shall be inalienable and indivisible.
- Sri Lanka should remain one undivided and indivisible country.
- There shall be specific provisions included in the Constitution to prevent secession (division of the country).
- Maximum devolution should be granted.
- The Constitution shall be the Supreme Law of Sri Lanka.
- The power to amend the Constitution, or to repeal and replace the Constitution, shall remain with the Parliament and the People of Sri Lanka (where applicable), in the manner set out in the Constitution.[55]

In consequence, the following formulation was proposed for consideration:

> Sri Lanka (Ceylon) is a free, sovereign and independent Republic which is an *aekiya rajyaya /orumiththa nadu*, consisting of the institutions of the Centre and of the Provinces which shall exercise power as laid down in the Constitution.
>
> In this Article *aekiya rajyaya / orumiththa nadu* means a State which is undivided and indivisible, and in which the power to amend the Constitution, or to repeal and replace the Constitution, shall remain with the Parliament and the People of Sri Lanka as provided in this Constitution.

54 For the constitutional framework of devolution and important legal issues that arose see Jayampathy Wickramaratne, "Legal Aspects of Devolution in Sri Lanka," in *Towards Democratic Governance in Sri Lanka: A Constitutional Miscellany*, ed. Jayampathy Wickramaratne (Rajagiriya: Institute for Constitutional Studies, 2014), 137–233. For an in-depth study on the working of Provincial councils, see Amarasinghe et al., *Thirty Years of Devolution*.

55 Steering Committee, "The Constitutional Assembly of Sri Lanka," 2.

To assuage fears that a provincial council might use its powers to move towards secession, the Steering Committee proposed that the Centre should be constitutionally empowered to intervene in a province in case there is a 'clear and present danger' to the territorial integrity and sovereignty of the Republic. The following provisions were proposed:

> No Provincial Council or other authority may declare any part of the territory of Sri Lanka to be a separate State or advocate or take steps towards the secession of any Province or part thereof, from Sri Lanka.
>
> The President may, on the advice of the Prime Minister, where a situation has arisen in which a provincial administration is promoting armed rebellion or insurrection or engaging in an intentional violation of the Constitution which constitutes a clear and present danger to the territorial integrity and sovereignty of the Republic, by Proclamation-
>
> (a) assume to the President, all or any of the functions of the administration of the Province and all or any of the powers vested in, or exercisable by, the Governor, the Chief Minister, the Board of Ministers or any body or authority in the Province; and
>
> (b) where it is necessary for the effectual exercise of the powers under sub-paragraph (a) of this paragraph, dissolve the Provincial Council.
>
> (c) The proclamation shall include reasons for the making of such proclamation. Such a Proclamation shall be subject to Parliamentary approval and be subject to judicial review.[56]

A very sensitive issue is the extent of devolution in the North and East. The recognition of the North-East as the traditional homeland of the Tamils and the 'merger' of the two provinces has always been a key demand of the Tamil nationalist movement. Tamils live predominantly in the North and the East. In the North, according to the last census, they accounted for more than 95 % of the total population. In the East, they live mainly in the Trincomalee and Batticaloa districts as well as with a significant percentage in the Ampara district. In Batticaloa, the Tamil are the predominant community, but Batticaloa is not contiguous with the North: the Trincomalee district is in between them, and all three communities are found in roughly equal proportions there. The merger is fiercely opposed by the Sinhalese who claim that any 'amalgamation' of the districts would be a stepping stone to secession. Muslims in the East are also opposed to the idea fearing that they would be reduced to a small

56 Steering Committee, "The Constitutional Assembly of Sri Lanka," 26.

minority in a Tamil dominated North-East. Some Muslims, however, are prepared to consider a merger of the Tamil-dominated areas of the East with the North if the Muslim-majority areas of the East are recognised as a separate devolved unit.

Attempting to strike a balance, Article 154A (3) of the Constitution, introduced by the 13th Amendment, allowed Parliament to enact a law providing for the merger of two or three adjoining Provinces. The provincial councils Act, enacted along with the 13th Amendment, provided that the President could make an order on the 'merging' of two or three adjoining provinces, and that a poll would be held on or before 31 December 1988 in the provinces concerned, so that voters could decide whether or not a province should remain linked to the other specified province or provinces. There were two special provisions that applied to a merger of the Northern and Eastern Provinces. The President should not make a Proclamation of the merging of the said Provinces unless he was convinced that (a) arms, ammunition, weapons, explosives and other military equipment owned or controlled by terrorist, militant or other groups with a view to establishing a separate state on 29 July 1987 had been surrendered to the government or to designated authorities, and (b) the hostilities and other acts of violence by such groups in the said Provinces had ceased. Sub-section (3) states if the electors of the Eastern Province decide that such a Province should be linked to the Northern Province, a poll shall not be required in the Northern Province.

As a result, the Northern and Eastern provinces were 'merged' by an order of the President and elections held for the North-Eastern provincial council in 1988. While candidates of the Ealam People's Revolutionary Liberation Front (EPRLF) were undisputedly elected in the districts in the Northern Province, the elections held in the districts of the Eastern Province were more contested. The EPRLF, a separatist militant group that gave up separatism following the Indo-Lanka Accord, set up an administration. During a period of honeymoon talks between the government of President Premadasa and the LTTE, the Indian Peace Keeping Force invited by President Jayewardene as part of the Accord and trying to contain the LTTE's military was requested to withdraw from Sri Lanka. The LTTE soon began attacking the EPRLF and other groups which had accepted the Accord and the EPRLF made a rash 'unilateral declaration of independence' which was used by President Premadasa to dissolve the North-East provincial council. Since the 13th Amendment did not permit the premature dissolution of a provincial council except on the advice of the Chief Minister, Parliament hurriedly passed the provincial councils (Amendment) Act No. 27 of 1990. A new provision (Section 5A) was inserted whereby a provincial council would be dissolved if the Governor made a communication

to the President stating that more than half of the members of the Council expressly repudiated or manifestly disavowed obedience to the Constitution. The North-East provincial council was accordingly dissolved. Fresh elections to the North-East provincial council were repeatedly postponed by the use of Emergency Regulations. In 2007, the Supreme Court held that the merger of the two provinces was unconstitutional as the pre-conditions for the merger had not been satisfied.[57]

However, with regard to the abovementioned Article 154A (3) of the Constitution, the deadline for carrying out a poll expired on 31 December 1988 and there was no law in force on possible mergers of provinces. Yet, Tamil parties continued to insist on the merger of the North and the East. According to the interim report of the Steering Committee, three options were discussed: (1) the retention of Article 154A (3), but with the additional requirement that a referendum of the people of each of the provinces concerned was also required; (2) that the Constitution should not provide for mergers at all; and (3) that the Constitution recognise the Northern and Eastern Provinces as a single Province.[58] The first option appeared to be the dominant view, but even if the proposal had been included in the new Constitution, Parliament's chances of passing a law on the matter were remote.

9 Equality among Devolved Units

Although Kandyan Sinhala leaders were the first to demand a federal structure, that demand fizzled out after Independence was granted in 1948. Thereafter the demand came from the Tamils, as seen above. As Tamils dominate the Northern Province and live in substantial numbers in the East, the two provinces were at the centre of the conflict. The B-C Pact of 1957 referred to above was for the setting up of Regional Councils in the North and East. The D-C Pact of 1968 proposed District Councils for the whole of the country but made special reference to the use of Tamil as a language of administration and land settlement in the North and East. The secessionist movement that emerged in the 1980s also sought to set up a separate State in the two provinces.

In the above background, one would have expected Sri Lankan leaders to focus on devolution for the North and East rather than for the whole country, but they did just the opposite. A.C.S. Hameed, a senior Minister in

57 *Wijesekera v. Attorney-General* [2007] 1 Sri LR 38.

58 Steering Committee, "The Constitutional Assembly of Sri Lanka," 4.

the Jayewardene government that introduced the 13th Amendment, stated publicly that when some leaders suggested to Jayewardene that devolution should be limited to the North and East, he responded negatively. Jayewardene thought that devolution only to the North and East would be seen by many as a stepping stone to separation. The 13th Amendment accordingly provided for symmetrical devolution for all nine Provinces. Since then, there has been no serious demand for asymmetrical devolution.

Devolution soon became a demand of the Muslims and Hill Country Tamils as well. An issue raised by them was the dispersed nature of the two communities and their consequent underrepresentation. Recent amendments to the provincial councils Elections Act had addressed this issue to some extent. The interim report of the Steering Committee proposed setting up Community Councils to ensure that at various levels of government and in different geographical areas, the rights of communities which are minorities within such areas would be protected.[59] Recognition of local authorities as a third tier of government and an implementing agency for specified subjects both of the Centre and the Provinces would also provide dispersed communities more opportunities to take part in government.

10 Concluding Remarks: Devolution under the Proposed Constitution

Proponents of devolution were demanding that given the nearly thirty years of experience under the 13th Amendment, powers of the Centre and the Provinces finally be clearly defined. The best proposals in regard to devolution came from the Chief Ministers of the seven 'southern' provinces, all of which had a Sinhala majority. The Chief Ministers were all members of the SLFP. In fact, the Chief Ministers' Conference made similar proposals on several occasions.

The main recommendations of the report on the principles of devolution were as follows:

- Principle of subsidiarity: The principle of subsidiarity is accepted and should be a guide in deciding on the allocation of subjects and functions between the three tiers of government.
- Community councils: constitutional provisions shall be made to ensure that at various levels of government and in different geographical areas, the rights of communities which are minorities within such areas are protected.

59 Steering Committee, "The Constitutional Assembly of Sri Lanka," 5.

- Inter-Provincial cooperation: The Constitution should provide for the possibility of inter-provincial cooperation with regard to matters falling within the executive competence of such provinces.
- Local Authorities: Local Authorities should be recognised as a third tier of government functioning under the provincial councils. While Local Authorities would not exercise legislative power, they would be an implementing agency for specified subjects both of the Centre and the Provinces as prescribed by law.
- Division of powers between the several tiers of government shall be clear and unambiguous: There is general consensus, including among the Chief Ministers who made submissions before the Steering Committee, that powers must be clearly and unambiguously divided and that the present concurrent list should be abolished. This was also suggested in the Report of the ad hoc Sub-Committee on the relationship between Parliament and provincial councils. Parliament may by law provide for the implementation of functions on selected subjects in the reserved list by the Provinces. Parliament or provincial councils may by law or statute provide for the implementation of specified functions within their purview, to be carried out by the Local Authorities. Whether to retain a concurrent list and, if so, what specific subject areas should be included is to be further discussed.
- National Standards, National Policy and Framework Legislation:
  - In particular areas, there could be a necessity for the Centre to prescribe National Standards (e.g. healthcare, education, environment) or Framework Legislation (e.g. Local Authorities' constitution, powers, functions, elections). Therefore, the Constitution should identify and include specified items in respect of which the Centre can enact framework legislation or national standards.
  - In regard to National Standards, such minimum standards may be prescribed where it is necessary to ensure (a) the enjoyment by citizens of a reasonable minimum standard of living throughout the country; (b) the enjoyment by citizens of a reasonable minimum standard of state service delivery throughout the country; or (c) a reasonable minimum standard of environmental protection throughout the country.
  - The Centre may also prescribe national standards by way of regulations under authority of law, in the circumstances specified above. Such regulations shall not be valid unless approved by both Houses of Parliament. The substantive and procedural validity of such regulations may be challenged in the Constitutional Court.
  - National Policy should be a matter for the Cabinet of Ministers at the Centre. In formulating National Policy on matters contained in the

provincial list, the central government shall adopt a participatory process involving provincial councils. Formulation of National Policy on a provincial list matter would not have the effect of the Centre taking over executive or administrative powers with regard to the implementation of the said devolved power. National Policy shall not override statutes enacted by a provincial council in respect to matters on the provincial list. However, in the event that the Centre enacts legislation to give effect to such national policy, in accordance with the constitutional provisions relating to the enactment of legislation on devolved subjects, the relevant provincial council statutes shall be read subject to such national legislation.

- Existing Central legislation on devolved subjects: All existing Central legislation (on provincial list subjects) shall remain in force and shall be applicable to the Provinces until amended or repealed by legislation enacted by the Province, and accordingly, the powers of Ministers and officials exercisable under such legislation shall be exercisable by the corresponding provincial Minister or official.
- New Central legislation on devolved subjects: The Centre may enact legislation on any subject in the provincial list provided all provincial councils agree to such legislation. The Centre should not legislate on matters on the provincial council list with regard to any Province that does not agree to such legislation, without recourse to adequate constitutional safeguards to ensure that powers devolved should not be taken back unilaterally from the Provinces.
- A Second Chamber of Parliament:
  - There is general consensus that a Second Chamber should be established, which is largely representative of the Provinces.
  - It is suggested that the Second Chamber should consist of fifty-five Members; five from each of the nine provincial councils elected on the basis of a Single Transferable Vote (STV) and ten Members elected by Parliament again on the on the basis of STV.
  - The Second Chamber shall not have the power to veto ordinary legislation but may refer ordinary legislation back to Parliament for reconsideration. After Bills are placed on the Order Paper of Parliament, they shall be referred to the Second Chamber to obtain its views, if any, prior to the Second Reading.
  - No Constitutional Amendment shall be enacted into law unless passed by both Parliament and the Second Chamber, each by a two-thirds majority. If the referendum requirement is triggered, the Amendment shall not be enacted into law unless also approved by the people at a referendum.

  - Constitutional Amendments seeking to amend basic features of the Constitution including fundamental rights and devolution may not be passed except by way of additional constitutional safeguards.
- Governor: Several of the Chief Ministers who made submissions before the Steering Committee were of the view that executive power should be vested in the Board of Ministers, with the Governor playing a largely ceremonial role, while one Chief Minister called for the complete abolition of the position of Governor.
- The Steering Committee is of the view that the Governor should act on the advice of the Board of Ministers other than where the Governor is specifically authorised by the Constitution. The Governor should be appointed by the President. Constitutional provision should be made to prohibit the Governor, while holding office, from engaging in party politics.
- Provincial Public Service: The appointment, promotion, transfer, disciplinary control and dismissal of employees of the provincial Public Service should be matters for an independent provincial Public Service Commission consisting of members approved by the Constitutional Council (which makes recommendations for the appointment of independent Commissions at the Centre). Currently, the Governor may override decisions of the Commission, which is also appointed by him.
- Chief Minister's Conference: It is recommended that a Chief Ministers' Conference, comprising of the Prime Minister and the Chief Ministers of all Provinces be mandated to meet at regular intervals, in order to discuss issues of common concern, and to promote inter-provincial and Centre-Province cooperation. The Prime Minister shall preside at the Chief Ministers' Conference.

The interim report also contained observations and comments by Members of the Steering Committee on the principles and formulations contained in the Report. Prime Minister Wickremasinghe informed the Committee that his party (UNP) would go along with the entirety of the report. The SLFP led by President Sirisena was generally supportive of devolution but its own proposals did not go as far as those of its own Chief Ministers. The SLFP did not subscribe to the interim report. As expected, the Joint Opposition effectively led by former President Rajapakse was not supportive of further devolution, even wanting to decrease some of the present powers of provincial councils. The Tamil Nationalist Alliance (TNA), in which the FP was the dominant partner, while affirming its position that Sri Lanka should be a federal state within a united, undivided and indivisible country, nevertheless stated that in the interests of reaching an acceptable consensus, it was willing to consider agreement with the main principles articulated in the report if the same were acceptable

to the two main parties. The TNA's position was widely welcomed in the South although it was severely criticised by Tamil extremists.

As stated earlier, there has been little movement since the Steering Committee presented its interim report. The UNP and the SLFP as well as President Sirisena and Prime Minister Wickremasinghe moved away from each other. In October 2018, the President removed Wickremasinghe as Prime Minister, which he was not empowered to do. Indicative of a new alignment, he appointed Rajapakse as Prime Minister, hoping that cross-overs from the UNP and its allies would give the Sirisena-Rajapakse combination a majority in Parliament. When that did not materialise, Sirisena dissolved Parliament but the Supreme Court held that the dissolution was unconstitutional. Wickremesinghe was later re-appointed as Prime Minister. The October 2018 'constitutional coup' dashed all hopes of constitutional reform through the Constitutional Assembly process.

At the Presidential elections held in November 2019, Gotabhaya Rajapakse, Mahinda Rajapakse's younger brother, was elected as President; he is a former Army officer and Secretary, Ministry of Defence, and considered a stronger hardliner than Mahinda. He was enthusiastically supported by Sinhala extremists who were opposed to any devolution and who maintained that there was no 'ethnic problem' in Sri Lanka. Wickremesinghe resigned and the elder Rajapakse was appointed Prime Minister.

At the Parliamentary elections held in August 2020, the Rajapakses, together with allies, obtained a two-thirds majority. This time, their immediate target was to be the 19th Amendment to the Constitution of 2015 which reduced the powers of the President, thereby strengthening Parliament.

Hardliners might press upon the Rajapakses to abolish the provincial councils altogether, but this is unlikely because of the strong Indian factor. During a recent visit of Mahinda Rajapakse to India, Indian Prime Minister Modi urged that the 13th Amendment be implemented in full. What is most likely to happen under the Rajapakses is that provincial councils will stay but under the effective control of the Centre. This unfortunately means that the ethnic crisis will continue to simmer.

Yet another chance for a constitutional settlement has been missed and added to a history of missed opportunities.

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PART 3

Case Studies on Economic Equality

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CHAPTER 7

Equality and Advantage in Emerging Federations and the Dilemma of Non-Renewable Natural Resources

The Cases of the Solomon Islands and Trinidad and Tobago

Nico Steytler

1 Introduction

In many fragmented societies, where identifiable groups are clustered in distinct territorial areas, conflict often revolves around ownership, control and access to the benefits of non-renewable natural resources (NRNRs), particularly when it concerns the highly lucrative resources of oil and gas, which are usually very unevenly spread across a country. A World Bank report even claims that this is one of the most important causes of civil war.[1] In the case of South Sudan, the current civil war appears to be driven by the struggle for control of oil resources. The splitting up of provinces by the Kirr regime, in violation of a peace agreement, was to ensure that the oil-producing areas would not fall under the jurisdiction of the provinces controlled by ethnic groups other than his Dinka community.[2] The acquisitive urge of political elites to benefit from NRNRs is usually clothed in the garb of interests organised around language, culture, ethnicity, religion, clans, and so forth.

In many fragile countries, federalism is seen as the last resort to address conflict, as the centralised state is seen as the very reason for the conflict in the first place. The centralisation of power has led to inequality and the marginalisation of minority groups. The failure of the centralised state to be a redistributor of resources across the nation becomes most obvious when natural

1 Nicholas Haysom and Sean Kane, "Negotiating Natural Resources for Peace: Ownership, Control and Wealth Sharing," *Briefing Paper* (October 2009): 20 footnote 9, http://comparativeconstitutionsproject.org/files/resources_peace.pdf.

2 See Zemelak Ayitenew Ayele, "Constitutionalism: The Missing Element in South Sudan's Elusive Quest for Peace through Federalism?," in *Decentralisation and Constitutionalism in Africa*, eds. Charles Fombad and Nico Steytler (Oxford: Oxford University Press, 2019), 234–254.

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resources are monopolised by the elite (most often from a particular group) to the exclusion of the country as a whole, often exacerbating inequality and the marginalisation of producing regions.

As a conflict resolution mechanism, federal arrangements for such countries are confronted with two contradictory objectives: self-government for minority or marginalised groups, and at the same time, solidarity between subnational governments in the sense that there is an equality of citizenship, including access to equivalent public services, irrespective of their location.

When natural resources become part of the controversy (or are the controversy) the tension between self-government and solidarity intensifies. If the emphasis is on self-government, the control and benefits of NRNRs are claimed by the group on whose territory they are found; the claim is seen as an essential part of self-government and thus of federalism itself. Where solidarity is the more prominent impulse, NRNRs are deemed to be the patrimony of the country as a whole, the benefits of which are to be fairly shared by both the national and subnational governments alike. Whereas solidarity leads to more equal outcomes, a self-government approach to NRNRs may result in inequality.

The dilemma is then how this tension between self-government and solidarity is managed: is equality among subnational governments pursued or are producing regions allowed to keep the advantages of NRNRs? Where self-government (or a measure thereof) over NRNRs is accepted, possibly leading to inequality, how are regional claims to superior access to such resources justified? Conversely, how is such advantage or inequality tolerated by the regions less endowed or the polity in general?

In practice, management of the tension between self-government and solidarity hovers between two extremes. At the one end of the spectrum, NRNRs are seen as a component of self-government, the benefits of which accrue to subnational governments. At the other end, NRNRs, regarded as the nation's patrimony, fall under central government's control, but revenue derived from such resources is shared among all levels of government. Within this spectrum one finds the partial recognition of claims of oil producing subnational governments (SNGs), for a higher share of oil revenue than others which have no such bounty. The justifications for arrangements that lean towards self-government and giving the producing SNGs a greater share in natural resources wealth, include 'fend-for-yourself' federalism, corrective measures to compensate for damage caused by the extraction of the resource, and historical land owing regimes.

This chapter examines the question with reference to two countries on opposite sides of the globe – the Solomon Islands and Trinidad and Tobago. They have been chosen because both island states are currently debating a possible

non-centrist future: in the case of the Solomon Islands, a fully-fledged federation, while in Trinidad and Tobago an autonomy status for Tobago is being considered. In both countries, the discussions are grounded by draft constitutional texts. Furthermore, NRNRs are on the constitutional negotiating table with oil and gas a focal area. Although oil and gas are exploited in Trinidad and Tobago, the discovery of such riches is still but a hope in the Solomon Islands. However, in both cases the question of equality and advantage are firmly on the agenda.

The chapter is organised in three parts. Section 2 sets out the broad issues with regard to the drivers of self-government and solidarity, the ownership, control and benefit of NRNRs, and the approaches in practice to the question of equality and advantage. Section 3 examines the proposals for self-government and the management of NRNRs in the Solomon Islands and in Trinidad and Tobago. Section 4 contains concluding remarks.

2 Managing Non-Renewable Natural Resources

The management of NRNRs reveals an inherent tension in the federal system – tension between the objectives of self-government and solidarity. Where the emphasis falls on self-government, SNGs usually have a greater say over ownership, control and the financial benefits of NRNRs. Where the focus is on solidarity, NRNRs are seen as a national asset and the federal government must see to the equitable distribution of revenue through an equalisation system. Where the SNGs are in control of NRNRs (which are mostly unevenly spread), inequality among SNGs is more likely to prevail, while when the federal government is in charge, equalisation is the most likely outcome.

2.1 *Drivers of Self-Government and Solidarity*

In conflict ridden societies, the fight by territorially based groups for decentralisation is most often driven by the quest for equal citizenship (including equal access to public services) and self-government. The first seeks equitable access to the wealth of the nation, while the latter demands access to sufficient revenue resources to enable self-government.

Inequality between people living in one region compared to others can be measured by various indicators such as relative poverty levels, literacy rates, infant mortality rates, life expectancy, and so forth.[3] Often these indicators are proxies of state action or inaction. The per capita state expenditure across

3 See Peter Wanyande, "Devolution and Territorial Development Inequalities: The Kenyan Experience," *Working Paper Series*, no. 187 (2016).

regions can vary significantly, resulting in unequal levels of services (health, education, social development), economic development and infrastructure (roads, water, sanitation). Even if the per capita spending is the same across regions, historical backlogs in previously marginalised regions may prevent any catching up with other more well-off regions.

Inequality flows from various factors including political, social, economic and natural reasons. For narrow political reasons, a regime may marginalise regions that fall in an opposition camp.[4] Where economic development is concentrated around the capital, regions on the periphery suffer under-development. The unequal distribution of natural resources (water, arable land, minerals, and oil and gas) also affects levels of economic development and living standards.

In diverse societies such inter-regional inequality may be coloured by practices and perceptions of marginalisation and discrimination on the basis of identity markers, such as ethnicity, language, race, custom or religion. In many developing countries this sense of inequality often drives quests by territorially-based groups for autonomy; apart from sentiments for the preservation of language, custom or religion, the notion of being treated as equal citizens through equitable development often lies at the heart of the quest for decentralisation. The centralised government is seen as serving a narrow partisan group, which results in the lived experience of material inequality with regard to access to basic state services, government jobs, and overall development.[5] The quest for decentralisation is thus for equality of outcomes, shifting the focus to obtaining an equitable slice of the nationally raised revenue including that derived from NRNRs.

But the quest goes further; self-government is the other goal which seeks to control the territorial space occupied by the group. NRNRs are thus seen as assets of the region to be owned and controlled by the subnational government of the region, also enjoying the financial revenue flowing from such assets.

2.2 *Ownership, Control and Revenue of Non-Renewable Natural Resources*

The constitutional management of natural resources usually entails three dimensions: (1) who owns the resources; (2) who controls the resources; and (3) who benefits from the revenue generated by their exploitation.[6] These

4 Wanyade, "Devolution,".

5 Wanyade, "Devolution,".

6 See Forum of Federations, "Oil and Gas in Federal Systems," *forumfed.org* (2014), https://www.shareweb.ch/site/DDLGN/Documents/OIL%20_%20GAS%20in%20federal%20countries%20(2014)_G%20Anderson.pdf. This paper is based on George Anderson, *Oil and Gas in Federal Countries* (Oxford: Oxford University Press, 2013), which was the result

questions are mostly interlinked: 'ownership' often also entails management, but federal 'ownership' does not necessarily imply that producing regions do not benefit more from the revenue than the other regions.

The regulation of NRNRs has become so important that in more recent constitutions the sharing of revenue from such resources is dealt with separately from the other revenue sharing provisions.[7] As Haysom and Kane argue, where the conflict was driven by disputes of control and access to natural resources, these issues should lie at the heart of a peace-making constitution.[8]

As far as ownership is concerned, two trends are discernible. The first is that the federal government owns the resources on the basis that they are the national patrimony belonging to the nation as a whole. Examples of this trend are found in Brazil, Mexico, Venezuela, and Nigeria. The second trend is that the producing SNGs exercise 'ownership', with examples coming from Argentina, Australia, Canada and India. In the latter trend, the demarcation of a producing SNG's boundaries becomes important where the resource lies offshore. In most countries such resources belong to the federal government,[9] but subnational boundaries may be drawn differently. A country's territorial waters of up to 12 nautical miles from the low water mark could be placed under the jurisdiction of the coastal SNGs (as in Argentina) or a lesser area (as in the USA – mostly three nautical miles). Anderson reports that in the Exclusive Economic Zone (EEZ; up to 200 nautical miles) the federal government has control over all economic resources, such as the exploitation of marine life, minerals, and oil and gas.[10]

'Ownership' usually also means the management of the resource, but not always.[11] Management includes the issuing of licences for exploration and the extraction of the resource, and the taxing of such activities.[12] However, the issuing of mining or exploration licences by, say, the federal government may have to contend with a SNG's powers, including those relating to land use and environmental protection.

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of a 3-year comparative knowledge exchange project run by the Forum of Federations as part of its sectoral work.

7 Haysom and Kane, "Negotiating Natural Resources," 5.

8 Haysom and Kane, "Negotiating Natural Resources," 7.

9 Giorgio Brosio and Raju Jan Singh, "Raising and Sharing Revenues from Natural Resources: A Review of Country Practices," *Discussion Paper, MFM Global Practice*, no. 5 (August 2015): 11.

10 Forum of Federations, "Oil and Gas," 5.

11 Forum of Federations, "Oil and Gas", 2.

12 Forum of Federations, "Oil and Gas", 2.

Separate from, but related to, the questions of who 'owns' or manages a resource, is the sharing of revenue that accrues from taxation and other fiscal instruments. Revenue is raised by either the federal government or SNGs (or both) through licences, royalties, corporate income tax, land use fees, etc. Both ownership and access to revenue are matters often regulated in a constitution. Where the federal government owns the resource, and raises revenue through different fiscal instruments, a number of approaches to sharing that revenue are observed in practice. First, such revenue may become part of the federal consolidated fund from which equitable transfers are made to each SNG. This is usually the case with revenue generated offshore. Secondly, in terms of a derivation principle, an additional amount is allocated to the producing SNG in terms of an agreed upon formula.[13] For example, in Nigeria 13 % of oil revenue goes to the producing states, while in Brazil that percentage differs according to the type of revenue source. Brazil is also an exception in that revenues accruing from off shore natural resources are reserved for the federal government.[14] Where the SNG is the 'owner' or manager of the resource, revenue may accrue to the SNG or be shared with other SNGs, but also take into account the derivative principle.

2.3 *Approaches to Resource-Rich SNGs*

As the uneven distribution of NRNRs may lead to inequality among SNGs, various approaches are evident in dealing with the matter. These approaches reflect the interest of the different parties; the federal government may view all NRNRs as the patrimony of the nation, a view shared by non-producing SNGs. The resource-rich SNGs may, on the other hand, emphasise their ownership of such resources and entitlement to the revenue flowing from such resources.

2.3.1 Shared Resources – Equalisation

The argument advanced by federal governments (and non-producing SNGs) is that natural resources must be seen as part of 'a national heritage', the proceeds of which are 'important in the financing of equal services and development nationwide, rather than [being] regional resources'.[15] This argument is the strongest when the resource extraction takes place off-shore; no SNG has a direct link to such resources.[16]

13 Andrew Bauer et al., *Natural Resource Revenue Sharing* (Natural Resource Governance Institute (NRGI) and the United Nations Development Programme (UNDP), 2016).

14 Brosio and Singh, "Raising and Sharing Revenues,".

15 Haysom and Kane, "Negotiating Natural Resources," 5.

16 Brosio and Singh, "Raising and Sharing Revenues," 11.

However, despite this intention, the sharing of resource revenue is often not equitable. Inequality persists because the marginalised communities in producing SNGs do not benefit from the natural resources derived from the area in which they are settled.[17] The revenue so collected is at best distributed equitably among all the regions, at worst (and most often) to the political dominant elites or regions.[18] However, where the object is total equality (and is achieved), Ahmad and Brosio remind us, that this may lead to the evaporation of the very purpose of having a decentralised system.[19]

In response, marginalised regions demand greater control of and benefit from the natural resources in their areas. As noted above, where such marginalisation is based on discrimination on the basis of culture, language, custom, or religion (or a combination of these), conflicts most often follow. The quest is then for the region to own the natural resources, control their exploitation, and be the main beneficiary of revenue flowing from such exploitation.

The argument for this demand is two-fold: the first is that revenue should simply follow ownership, while the second argument is that the producing region must get a larger slice of the cake than others in order to compensate it or an indigenous community for the cost of exploitation, including environmental damage caused by it.[20]

2.3.2 Arguments for Sole Access

Producing SNGs argue for the retention of the benefits accruing from such resources even though this may lead to inequality. Two interlinked arguments are put forward in justification: the first is that the benefits of the resources follow 'ownership', and the second is that inequality is an inevitable consequence of federalism.

The demand for sole benefit is based, according to Haysom and Kane, on 'strong feelings of local community ownership over [natural resources] development and the resulting revenues'.[21] When it comes to ownership of natural resources, they observe that 'emotional concerns can override fiscal

17 Bauer et al., *Revenue Sharing*, 9.

18 Haysom and Kane, "Negotiating Natural Resources," 20.

19 Ehitisham Ahmad and Giorgio Brosio, "Can Lessons from Equalisation Transfers in Industrialised Countries be Applied to Reforms in Emerging-Market Countries?," in *Comparing Fiscal Federalism*, eds. Alice Valdesalici and Francsco Palermo (The Hague: Brill/Nijhoff, 2018), 169–189, 192.

20 Haysom and Kane, "Negotiating Natural Resources," 24.

21 Haysom and Kane, "Negotiating Natural Resources," 5.

rationality'. These concerns may be labelled as 'emotions', which turn into 'feelings', to culminate in 'desires', but they become politically significant; the communities expressing these concerns may become 'secessionist-prone areas' which then require special measures to prevent a secessionist conflict.[22]

The first and most profound cause of the conflict is then the contestation over 'ownership'. Often it is a case of a regional polity wanting to 'take back' resources that have been exploited by the centre. The sentiment that natural resources are 'theirs' are often bound up in strong sentiments of identity politics and the quest for autonomy. The 'emotions' are fuelled, first, by a historical sense of injustice of past financial marginalisation ('this is payback time'); and secondly, compensation for damages caused by exploitation from which they did not benefit. Above all, it would seem that the notion of the NRNRs being an incident of land ownership or occupation is a powerful driver, backed up by a community's view of itself being distinctive from the others (and the usual cleavages of ethnicity, race and religion which may apply). Such identity is tied with a sense of place, and attachment to land since time immemorial, where land and culture are intimately intertwined.

Linked to the notion of ownership, is a mode of federalism that has been described, with reference to the USA, as 'fend-for-yourself' federalism.[23] Based on a culture of 'rugged state-individualism', where no equalisation system applies, inequality between states is tolerated on the basis that each state, legally equal to the other, must look after its own well-being. If one state has the fortune to be better endowed resource-wise, leading to inequality among SNGs, that is merely a consequence of federal self-rule. The consequence has been that in the USA, oil and gas rich states, retaining a larger percentage of revenue, have been able to provide better services than lower income, resource-poor states.[24]

2.3.3 Compromises

Between the two positions compromises are often struck in practice, allowing some extra benefit for the producing SNGs. As Ahmad and Brosio argue, some trade-offs need to be made between keeping a country together through

22 Haysom and Kane, "Negotiating Natural Resources," 17.

23 Elizabeth Alber, "Intergovernmental Financial Relations: Institutions, Rules and Praxis," in *Comparing Fiscal Federalism*, eds. Alice Valdesalici and Francesco Palermo (The Hague: Brill/Nijhoff, 2018), 223–273, 233.

24 Bauer et al., *Revenue Sharing*, 15.

sharing natural resources but allowing some differences to meet self-rule impulses.[25] Haysom and Kane also remark that a high degree of autonomy can lead 'to concerns regarding the unequal provision of public services between provinces (as in Canada), disparate levels of development (as in the United Arab Emirates) or may even spark the resentments which could provoke new sources of conflicts in divided societies'.[26] They then ask '[h]ow will a minimum standard of public services be ensured across states and provinces, if resource wealth is trapped in one region only?'[27]

Compromises must be struck and as the matter goes to the heart of federal arrangements, it is best settled in the federal compact – the constitution. As Haysom and Kane write: '[C]onstitutions may be called upon to balance the competing feelings of community ownership over local resources against equally strong assertions that the wealth of the country belongs to all.'[28] A constitutional compromise is to entrench the derivation principle mentioned above; Nigeria is a clear example of providing 13 % of resource revenue allocated to producing states, although it has not yet resolved the conflict in the Niger delta.

The justification of the unequal benefit from NRNRs is that it serves as compensation for the environmental and social damage caused by the extractive industries. The latter may include loss of livelihoods, displacement of communities, and the attraction of migrants.[29] Economists such as Brosio and Singh would argue that the amount of the compensation should then reflect as closely as possible the extent of the damage.[30] The compensation rationale is thus no more than seeking to achieve equality among SNGs, making sure that a producing SNG is not prejudiced by the process of extraction. Arguments are also raised that the damage should be seen against a long-term horizon; in the case of NRNRs, the producing regions may be worse off after the depletion of the resource.[31]

25 Ahmad and Brosio, "Can Lessons from Equalisation Transfers be Applied?," 181.
26 Haysom and Kane, "Negotiating Natural Resources," 24.
27 Haysom and Kane, "Negotiating Natural Resources," 15.
28 Haysom and Kane, "Negotiating Natural Resources," 21.
29 Bauer et al., *Revenu Sharing*, 24.
30 Brosio and Singh, "Raising and Sharing Revenues," 3.
31 André Lecours and Daniel Béland, "Federalism and Fiscal Policy: The Politics of Equalization in Canada," *Publius: The Journal of Federalism* 40, no. 4 (Autumn 2010): 569–596, 585.

3 An 'Emerging' Federation and Autonomous Islands

The question of SNGs' relationship to NRNRs and inequality has come to the fore in two countries composed of islands – Solomon Islands and Trinidad and Tobago. In both countries, interest groups, speaking on behalf of the component islands (in the latter case, only from one), have put forward constitutional drafts that seek to establish a federal system in the Solomon Islands and an autonomy status for Tobago. Included in the proposals are provisions for the financing of the proposed SNGs, including access to NRNRs, which, if implemented, may lead to inequality among the SNGs. Although neither constitutional project has yet led to constitutional change, they are both indicative of the type of thinking that would justify a constitutional dispensation that may eventually lead to the advantage of a SNG(s) to the detriment of others. The questions posed in this section are: (a) what are the financial and fiscal measures proposed, including those relating to NRNRs that may result in inequality; (b) what would be the justification of inequality should that materialise; and (c) what may be the likely national responses to these proposals, and eventual constitutional reform outcomes?

3.1 *Solomon Islands*

3.1.1 History and Quest for Constitutional Reform

The Solomon Islands, located in the South Pacific, is a country comprising of nine archipelagos, each currently designated as a province. The population of nearly 600 000 is mainly Melanesian (95 %) and is scattered across the provinces, with the largest concentrations found on Guadalcanal (141 000) and Malaita (160 000) while six provinces have less than 50 000 inhabitants, with the smallest (Rennell and Bellona) comprising of just over 3 000 souls. There are over 63 distinct languages, but English is the official language and Solomon Pijin the lingua franca for most. The notion of one nation of Solomon Islanders has been questioned; some argue that they identify themselves more with their island, cultural groups and community than with the nation.[32] The Islanders are relatively poor, and are mostly involved in subsistence or cash crop farming and less than a third are in paid work.[33]

32 Gordon Nanau, "Unifying the Fragments: Solomon Islands Constitutional Reforms," *Development Bulletin – Australian Development Studies Network* 60 (January 2002): 4.

33 Solomon Islands Government (SIG), "Solomon Islands: Economic Development Documents – Medium-Term Development Plan, 2016–20," *IMF Country Report,* no. 16/91 (March 2016).

As a political entity, the country emerged first as a declared British protectorate of the southern Solomons in 1893, with further islands being added to the British Administration until 1900. In 1976, the country became self-governing and attained independence in 1978 within the British Commonwealth.[34] It currently has a centralised system with a very weak provincial system comprising the nine provinces. The main sources of revenue are based on natural resources: fishing, logging and mining, with logging contributing about half of the government's export earnings. Foreign aid is significant, some of which is keenly provided by Taiwan on condition that the government recognises it as a country.

In 1998, tensions arose between residents indigenous to Guadalcanal (which also hosts the capital city of Honiara) and persons hailing from the other islands.[35] In particular, the inflow of persons from Malaita irked the Gaudalcanalians who claimed that the former dominated the civil service and economy in Honiara. Tensions erupted in 1999 in communal violence on Guadalcanal when persons from Malaita had to flee Guadalcanal. Following a state of emergency, an Australian-led peace-making and -keeping intervention force was invited in 2003 and restored order. Ever since then a solution has been sought to the 'communal tensions' between the different island populations. Federalism has been chief among them.[36]

After the Federal Constitution of Solomon Islands Bill of 2004 found no traction,[37] a slow process of constitutional reform commenced in 2007, when a Constitutional Reform Unit was established in the Prime Minister's Office, which spearheaded a constitutional review body. The body comprised the Constitutional Review Congress, which was composed mainly of representatives from the nine provinces, and the Eminent Persons Group, which was appointed by the Prime Minister composed of eminent elders including a former Governor-General. The body worked for ten years and produced a Draft Federal Constitution by June 2018.[38] At the time of writing, the draft has not yet been debated in Parliament.

34 Nanau, "Unifying the Fragments,".

35 Nanau, "Unifying the Fragments," 11.

36 Nanau, "Unifying the Fragments," 15; Jennifer Corrin, "Breaking the Mould: Constitutional Review in Solomon Islands," *Revue Juridique Polynésienne* 13 (2007): 143, 167 et seq.

37 For a discussion of the Bill see Corrin, "Breaking the Mould."

38 Milton Ragaruma, "Final Plenary on Draft Federal Constitution Underway," *The Island Sun*, 31 May 2018, http://theislandsun.com.sb/final-plenary-on-draft-federal-constitution-underway/.

3.1.2 *Constitutional Proposals*

The federal project of the draft constitution is animated by two key goals: the first is to ensure equality between the different archipelago states (the former provinces) – equality in services provided by the states themselves. The second goal is to secure significant autonomy of the states, including the maximum possible control by each state over the natural resources of that archipelago and the revenue they may generate. The two goals often prove to be in conflict: the quest for equalisation is based on the notion of the oneness of the nation – the equality of citizenship – which emphasises the sharing of wealth. The goal of autonomy and the quest for control over natural resources (and the inevitable consequence of inequality) sets the interests of individual states and its customary communities before the nation.

On the face of it, then, the quest for a federal Solomon Islands was, in part, driven by the goal of equal outcomes. The debates in the constitution-drafting process were informed by repeated statements about the marginalisation of the islands other than Guadalcanal; the main centre of development has been the capital of Honiara. Not surprisingly for such a small population, all the main state facilities are located in the capital. When the debate came about whether each province should have a High Court, the provincial voices were clear: 'we want our own courts because we are not served by the central High Court'. The underlying premise of the federal compact is thus a common citizenship of a constructed 'nation' with no second-class citizens in geographically located communities. At the same time, the autonomy of each island state is to be secured by strongly entrenched powers in general and fiscal arrangements in particular.

In line with modern constitutional trends, the country is to have three levels of government: federal, state, and community governments. Power is to be divided between the three levels in terms of an extensive list of exclusive federal power, a short list of exclusive state powers, and a broad list of concurrent powers. Key items on the concurrent list fall under federal paramountcy, while the remainder fall under state paramountcy. There is also an extensive list of powers shared by the states and the community governments, the precise division of which is to be regulated by state constitutions.

In neither the exclusive federal list nor in the exclusive state list is mention made of land or natural resources.[39] In the list of concurrent federal and state jurisdiction with state law paramountcy, the following items are to be found: 'land tenure and dealings', 'land planning, use, management and

39 Schedule 5, Lists I and II.

development', 'prospecting for, and mining of, minerals', 'exploration for, and extraction of, hydrocarbons and natural gasses', and 'fisheries'. In the list of state and community concurrent functional areas (with state paramountcy) fall: 'customary land', 'sea resources and other customary ownership rights', 'tabu sites', 'control and manage the boundaries and ownership of customary land and other resources', and 'logging and fishing'.[40] The clear inference is that ownership and control resorts under the subnational governments.

The financing of the states is foreseen to be based, in the main, by the sharing of revenue raised or collected by the federal government. The most buoyant taxes are allocated to the federal government; examples are company tax, personal income tax, and goods and sales taxes.[41] State government taxes include 'mining and prospecting fees', 'land rents', 'state land leases', gaming, liquor licenses, 'foreign investment applications and approval rights', and a bed tax.[42] Community governments have access to a local business tax and property taxes. With this division, the federal government would raise the bulk of revenue, which must then be shared with the states and community governments in terms of a 'public finance system' which 'must promote a just society', including that 'expenditures must promote the fair and balanced development of the country, including by making special provision for Community Governments and remote areas'.[43]

The envisaged system of revenue sharing is fairly rigid; specific percentages and a formula are provided for various types of revenue sources. For general revenue, the split is 50 % to the federal government and the rest goes to the states. In the case of personal income tax and sales taxes, the states receive 55 %. The split between the nine states is made according to a fix formula: 20 % on an equal basis, 50 % on population size, and 30 % in proportion to the land and sea area of each state.[44]

To address past marginalisation, the revenue necessary for equalisation comes from the federal government's share of the revenue raised nationally. The federal government must ensure, 'in accordance with the recommendations from the National Finance Commission' that:

(a) Each state has the resources to provide *comparable levels of services* at comparable levels of state taxation; and

40 Schedule 5, list v.
41 Schedule 6, part A.
42 Schedule 6, part B, items 1 and 5.
43 Clause 176 (1) (b) (ii) Draft Federal Constitution.
44 Schedule 7, item 1.

(b) State disparities in development and living standards are minimised taking into account the following factors:
  (i) Distance from the closest economic hub;
  (ii) Existing levels of infrastructure;
  (iii) Levels of development according to social indicators;
  (iv) Vulnerability to natural disasters including effects of climate change; and
  (v) Own capacity to raise revenue.[45]

The reference to '*comparable levels of services at comparable levels of state taxation*' combines the principles of equivalence of services, but also the need for state tax effort. It should also be noted that the word 'comparable' is not necessarily the same as 'equal'. Tax capacity refers to states' own efforts to use their taxing powers, not what they may receive from transfers.

Quite separate from the above described financial framework is the regime pertaining to the revenue produced by natural resources. First, '[a]ll revenue derived from natural resource royalties, land lease and those customary in nature are to be paid directly to the resource owners'.[46] The resource owners are defined in terms of customary law, the state (federal, state, or community), or private. The territorial domain of ownership is thus important when it comes to offshore resources. The draft Constitution provides very extensive boundaries for states; the entire sea domain of the Solomon Islands state (12 nautical mile territorial waters, and 200 nautical mile Exclusive Economic Zone) is carved up between the nine states, where international boundaries are also those of the island states. The extent of the revenue would then be dependent on definitions of the various types of revenue sources listed.

Secondly, the revenue the federal government may raise from corporate tax, import and export duties, as well as excise duties 'arising from the exploitation of forestry, mining, petroleum, oil, natural gas, agricultural products, marine and non-migratory fisheries, air space and other natural resources' must be shared between the three levels of government as well as with resource owners. The federal government receives 40 %, and the rest goes to the State Governments and Community Governments in whose territory the natural resources are located, and 'the tribe, clan, group, family or individual who owns the land or other natural resources, from which the revenue arises'.[47] The sharing between the state, community governments and resource owners is to be done in accordance with a formula determined in each State Constitution.

45 Schedule 7, part A, item 3, emphasis added.
46 Schedule 7, part B, item 7.
47 Schedule 7, part B, item 8.

The implications of these provisions are clear: first, as customary ownership of territorial waters would be limited to recognised reefs, the vast expanse of the carved up EEZ would fall within the jurisdiction of the states, and they would be the main beneficiaries of off-shore mining and oil and gas exploitation. Secondly, the revenue derived from natural resources are not to be shared equitably among the states. While a state in which an exploitable natural resource is located should tax such revenue source within its taxing competency (exploration fees, royalties), the major revenue source (corporate and export taxes) would be shared between the federal government and specific oil and gas producing states. When such largesse, such as oil and gas, is discovered and exploited, a high level of inequality may arise between states. The question is then what would politically justify such unevenness in outcomes.

3.1.3 Inequality and Justification

The draft Constitution is largely driven by the quest for a recognition of and a return to customary values and practices. In the preamble, the new system will 'recognise the sovereignty of the people and protect the autonomy and interdependence of tribes, clans, lineages, natural family and communities'. Also, first among the values listed in clause 1(2) of the draft Constitution is 'respect for our indigenous political units, wisdom, customs, societal values, traditions and governing practices'. The bond between a community and the land they occupy is very strong. Indirectly, when a resource owner seeks to develop a resource on customary land, impact studies must be conducted to 'assess the potential social, spiritual, cultural and environmental impact' of the envisaged development or activity.[48] The linkage is thus more than seeing a resource in commercial terms, but also that the land fulfils certain social and spiritual functions that define the tribe, clan or community.

The claim to property rights has two legs: the first is restoring the ownership to the indigenous communities, and the second is that it also includes all natural resources found on land. The draft thus provides that '[i]n Solomon Islands, land is to be held, used and managed according with the following principles: (a) recognition and enforcement of customary law in relation to the ownership use of land and natural resources [… and] (c) as far as possible, land is to be restored to the community to which it belonged under the relevant customary law'.[49] The meaning of land is extensive: 'all land includes everything

48 Clause 56 (2) (a) Draft Federal Constitution.

49 Clause 52 (1) (a) Draft Federal Constitution.

on, or below the surface of the land down to the centre of the earth, including, in particular, water, petroleum, oil, other minerals and natural gas.'[50]

For the islanders, the concept of land is not merely terra firma; the sea adjacent to the island is seen as part of the land. This linkage is commonly expressed as 'the sea is our farm, the reefs and lagoons are our gardens and fields from whence our sustenance comes'. Living off marine resources (narrowly defined) has been an integral part of the communities' way of life. This view of territorial waters, however, undergoes an extension in the draft in two ways. First, the focus is no longer on marine resources, but what lies beneath the seabed, and secondly, the claims of contiguous territorial waters now stretches to the deep sea up to the international borders of the country.

The draft Constitution reflects the views from the various island communities, and the debate with the central government and centrists has yet to commence. Parliament must still debate the draft and holds the key to any constitutional reform. A high level of agreement is required as the 1978 Constitution requires the support of at least three-quarters of the MPs to support the amendment of key provisions (of which the replacement of the Constitution would be one).[51] Whether sitting MPs would be interested in effecting radical change is debatable particularly as an important provision in the draft is the abolishment of Constituency Development Funds (CDF) which are doled out to MPs, and have such funds reallocated to the future states. The total CDF budget is currently more than what provinces receive in transfers, and it is the life blood of the Solomon Islands' politics of patronage.

A more important issue would be the agreement among all parties to the establishment of a strong federal system and the possibility of inequality that may flow from the financial arrangements. At the moment, with no real prospects of offshore riches on the horizon, the different island communities may be united in their demand for ownership of the vastly expanded territorial waters, as they all have an even chance to hit the jackpot. If there is a socio-political acceptance of the return to a more customary way of governance, a country comprising of mini-nations each on their own island, a measure of inequality may be seen as inevitable and even celebrated. However, when the riches of the deep emerge for one island and not others, it then becomes a question of the nature and extent of such inequality. Would the claim of the oil-producing state then be questioned as inimical to the national goal of equality, and not supported by customary law's more limited scope of landowners' property

50 Clause 53 (2) Draft Federal Constitution.

51 S 61 (2) of the Constitution of 1978.

rights? When that happens the debate on the importance of the unity of the Solomon Islands and the sharing of nature's bounty are bound to resurface.

3.2 *Trinidad and Tobago*

A major reform of the 1976 Trinidad and Tobago Constitution is proposed by Tobago, which would grant this island an elevated autonomy status. The governance of NRNRs would be a component of the new dispensation. Although the current constitutional debate is not about federalism, but about Tobago's autonomy status, the same 'federal question' of equality and inequality, as posed in the Solomon Islands, is present.

3.2.1 History and Quest for Constitutional Reform

Trinidad had a long history of various European nations occupying the island since it was sighted by Christopher Columbus in 1498, until the island finally fell under British control in 1801. Tobago became a British Crown Colony only in 1876 which was then joined ten years later with the larger island of Trinidad to form the colony of Trinidad and Tobago, the latter island being the 'ward' of the former. From 1958 to 1962 the nation was part of the West Indies Federation, but with the dissolution of the federation it became independent in August 1962, and a republic in 1976 in terms of the Constitution of that year.[52]

The differences between the two islands – Trinidad and Tobago – are stark. Trinidad has a land mass of 4828 km^2, while Tobago's is only 300 km^2 (4.8 % of the former). The latter's population reflects a similar proportion; of the country's 1.35 million people only 64 000 reside on Tobago (4.7 %).[53] The composition of the country's population reflects its colonial past: people of African origin, resulting from centuries of slave trade, comprise 34.2 % of the population, those from Indian origin (indentured labour during British rule) form a slightly higher proportion of 34.4 %, and those of mixed origins comprise 23 %. The indigenous Amerindians make up a fraction of the population (0.1 %).[54] On Tobago, the vast majority of the population (87 %) is of African origin.

The country is one of the wealthiest in the Caribbean because of its oil and gas reserves (mostly offshore), accounting for 40 % of its GDP and 80 % of

52 See Richard Drayton, "Whose Constitution? Law, Justice and History in the Caribbean," *Sixth Distinguished Jurist Lecture 2016* (Judicial Education Institute of Trinidad and Tobago, 2016).

53 See Government of Trinidad and Tobago's website: http://www.tntisland.com/tnt.html, accessed 1 March 2019.

54 Index Mundi 2018, "Trinidad and Tobago Demographigs Profile 2018", accessed 1 March 2019, https://www.indexmundi.com/trinidad_and_tobago/demographics_profile.html.

its exports. While Trinidad has the industries flowing from oil and gas, the Tobago economy is based on tourism (more than half of the country's hotel rooms),[55] fishing, and government spending. In the main, economic development and infrastructure are concentrated on Trinidad, giving rise to claims by Tobagonians of systemic marginalisation.

A year after independence, the first proposal for Tobago's internal self-government was submitted to Parliament.[56] In 1980 a Tobago House of Assembly was established by statute, granting this body some legislative powers. In 1996 the Constitution was amended to enshrine the Tobago House of Assembly, but its powers were still subject to the direction and control of the Trinidad and Tobago government, thus falling short of internal self-government.[57] The quest continued with the publication of a Green Paper on the topic in 2013. The process came to a head when Dr Keith Rowley, a Tobagonian, became Prime Minister after the election in 2015 and called upon the Tobagonians to come up with proposals. Leading the process on the island was the Forum of Political Parties of Tobago which conducted extensive consultations. Its proposals were adopted in 2017 by the Tobago House of Assembly, in the form of a Bill amending the 1976 Constitution.[58] The proposed autonomy status would appear to be a clear expression of Tobagonians' desire for self-government.

In March 2018 the Prime Minister laid the draft Bill – as it was adopted by the THA – before Parliament as the basis for discussion on the way forward. A Joint Standing Committee (JSC), comprising members of both the House of Representatives and the Senate, was tasked to examine the Bill and report back to Parliament by May 2019. By March 2019 the JSC had held three public hearings, receiving evidence and submissions from Tobagonians and government officials and institutions.

3.2.2 Proposals

The two objectives of the Bill – self-government and equalisation between the two islands – are pertinently set out upfront. The 1976 Constitution's

55 See Nations Encyclopedia, "Trinidad and Tobago – Overview of Economy," accessed February 1, 2019, https://www.nationsencyclopedia.com/economies/Americas/Trinidad-and-Tobago-OVERVIEW-OF-ECONOMY.html.

56 For an exposition of the quest for internal self-government see the statement to Parliament by Prime Minister Dr Keith Rowley, "The History, Evolution and Current Status of Internal Self-Government for Tobago," March 9, 2018, accessed 1 February 2019, https://www.opm.gov.tt/the-history-evolution-and-current-status-of-internal-self-government-for-tobago/.

57 In the view of Rowley, "The History, Evolution and Current Status."

58 Constitution (Amendment) (Tobago Self-Government) Bill, 2018.

preamble is to be amended with the following statement: the people of Trinidad and Tobago

> [...] recognise the right to self-determination of the people of Trinidad and Tobago including the right of the people of Tobago to determine in Tobago their political status and freely pursue their economic, social and cultural development.[59]

The second objective of equality is expressed as follows:

> There shall be equality of status between the Island of Trinidad and the Island of Tobago within the sovereign democratic State of Trinidad and Tobago and the Island of Tobago shall no longer carry the designation of a ward.[60]

Although within the proposed scheme Trinidad would have no separate status, being governed by the Trinidad and Tobago Government (TTG), the sentiment is clear: Tobago's marginalisation can only be measured and corrected with reference to the more prosperous Trinidad.

The question is then how these two objectives are to be pursued simultaneously; are trade-offs to be made to reconcile them? Or would the emphasis on self-government in the end not only ensure equality but also a better standard of living on Tobago? The financial provisions relating to own revenue, revenue derived from non-renewable natural resources, and transfers are key to answering these questions.

While no taxing powers are specifically allocated to Tobago, such powers are located in the general division of powers. Reflecting self-government, the Bill provides for wide legislative powers for the Tobago House of Assembly (THA). On the face of it, the THA has an extensive legislative competence over all matters, bar one short list of exclusive TTG functions which includes the following substantive areas: civil aviation, immigration, foreign affairs, judiciary, meteorology, 'National Security (except that internal policing shall be under the jurisdiction of the Tobago Island Government').[61] Although it is uncertain whether all matters not mentioned on the list are concurrent powers of both the TTG and Tobago Island Government (TIG), the latter thus has competence over all taxing sources.

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59 Clause 4 of the Bill.

60 Clause 5 of the Bill.

61 Clause 20 of the Bill, amending Schedule 4 of the Constitution.

Despite the dependence of the economy on oil and gas, these revenue sources are addressed only in a roundabout way. Given the expansive scope of TIG's powers, it would certainly include both the control, management and revenue raising from NRNRs. While there is no reference of taxing or other revenue-raising measures relating to oil and gas, the task of sharing the revenue accrued from 'marine resources' is bestowed on the Fiscal Revenue Commission (FRC). This body is envisaged to be an independent intergovernmental body; it has two members appointed by the Tobago Executive Council, and two members by the TTG Cabinet. The fifth member, the chairperson, is appointed by the President at their discretion after consulting the Prime Minister and the Leader of the Opposition.[62] Although its main task is the vertical division of revenue (discussed below), it must also 'develop a regime for sharing the revenue obtained from marine resources in the waters comprising each island and the maritime boundaries superjacent air space and telecommunications'.[63] Two elements are key to sharing in the revenue of NRNRs: the meaning of 'marine resources' and the jurisdictional area of Tobago. Given that Tobago has jurisdiction over 'such areas of the archipelagic waters of Trinidad and Tobago, including any islands, the seabed and the subsoil, that lies within eleven miles from the low watermark of Tobago',[64] it would follow that marine resources would include oil and gas. The other element is the area of jurisdiction. The Bill states '11 miles', which is slightly less than the 12 miles originally claimed.[65] As most of the current oil and gas fields lie outside the future Tobago's jurisdiction, the issue is not pertinently dealt with. Nevertheless, some Tobagonians still express the view that the Tobagonian territorial waters should stretch to the median line between Trinidad and Tobago, a distance of 42 nautical miles.[66]

Despite the prospect of wide taxing powers, including those relating to NRNRs, the emphasis of the financing model falls on revenue sharing and transfers. The Bill provides that the annual national budget must include an allocation of 'no less than 8 % of the total sum' of that budget.[67] The

62 Clause 141AD (1) of the Bill.

63 Clause 141AD (3) (c) of the Bill.

64 Clause 141A (11) of the Bill.

65 The JSC Chairperson, Camilla Robinson-Regis MP, stated that this was the only change made to the draft Bill on the advice of the Department of Foreign Affairs in the light of international law; Camilla Robinson, "First Public Meeting, JSC," filmed 19 June 2018, accessed 15 February 2019, video, 1 March 2019 https://www.youtube.com/watch?v=mFv7GpXjAY8&t=11366s.

66 Vanus James, "First Public Meeting, JSC," filmed 10 June 2018, accessed 15 February 2019, video, 1 March 2019, https://www.youtube.com/watch?v=mFv7GpXjAY8&t=11366s.

67 Clause 141AE of the Bill.

actual amount of the transfer could be higher, following the Fiscal Review Commission's recommendations.[68] This intergovernmental advisory body is tasked to ensure that, in the context of the 'financial and developmental needs of Tobago', the resources be allocated to the island 'as fairly as is practicable'. And in this endeavour, it is to be guided by the following considerations:

(i) physical separation of Tobago by sea from Trinidad;
(ii) isolation from the principal national growth centres;
(iii) absence of the multiplier effect of expenditures and investments (private and public) made in Trinidad;
(iv) restricted opportunities for employment and career fulfilment; and
(v) the impracticability of participation by residents of Tobago in the major educational, cultural and sporting facilities located in Trinidad.[69]

These factors not only explain the causes of inequality between the two islands, but indirectly set out an agenda that goes beyond the equalisation of government services. If Tobago is isolated from 'the principal national growth centres' then the FRC must consider additional transfers in order for the TIG to establish its own growth centres. The recognition of 'restricted opportunities for employment and career fulfilment' in Tobago, should lead to transfers enabling the TIG to develop job opportunities. The overall object is thus more than securing the equalisation of government services, but pointing towards equal economic opportunities and eventually living standards.

The Commission is also mandated to 'ensure that all revenues, fees and duties collected in Trinidad that are attributable to Tobago such as customs duties, import duties and stamp duties shall be held for the account of Tobago'.[70] If the open-ended phrase 'all revenues, fees and duties' also includes, as it does on the face of it, taxes such as personal income tax or value added tax, it means that the TTG cannot use any of the taxes raised in Tobago even for services it will provide in Tobago.

3.2.3 Inequality and Justification

The likely outcome of the financial provisions is that the TIG may in the future have more funds than would otherwise have been the case if equalisation was the only goal. The three sources of revenue – own taxes (unlimited), an entitlement to all tax revenue originating from Tobago but raised by the national government, and a minimum floor of 8 % of the national budget – should result in a financial position that favours Tobago. The likely amount of revenue to

68 Clause 141AD (3) (a) of the Bill.
69 Clause 14AD (3) (f) of the Bill.
70 Clause 14AD (3) (d) of the Bill.

be collected and received has not yet been calculated.[71] Similarly, the likely expenditure burden of the TIG as the responsibilities and functions to be performed is not settled at all. Whether there will be more funds flowing into the TIG coffers than are required to ensure equal outcomes (and the elimination of backlogs) in respect of government services, plus equalising living conditions, cannot be said with any measure of certainty. Also, the possible revenue flowing from oil and gas within the territorial jurisdiction of Tobago is to be brought into the equation.

In its public hearings, members of the JSC have raised the spectre of inequality, now with Tobago being better off. The focus of concern was the fixed minimum floor of 8 % of the national budget that should be transferred to the TIG.

JSC members quizzed representatives of Tobago on how 8 % was settled upon. The argument was also raised that Tobago should raise its own resources so that it could be 'economically independent'; the 8 % should simply be transitionary.[72] It was also pointed out that if the TIG had a surplus of revenue for its expenditure needs, the 8 % transfer would be superfluous; a sunset clause should thus be inserted. Another view was that the percentage should be regularly reviewed.[73] Although some arguments were put forward as to how the THA arrived at the 8 %, it was mostly based on historical patterns of transfers without any reference to the projected new responsibilities and tax sources. The rub of the matter was, as a JSC member pointed out, that TTG may in the future obtain revenue from Tobago if the latter flourishes.[74]

Should any inequality materialise in favour of Tobago, how would such a situation be justified in the union of Trinidad and Tobago? Two possibilities have been suggested: the first is that the goal of self-government is bounded up in past neglect and marginalisation, which requires compensation. The second, only tangentially argued, is that the Tobagonians are a separate nation. As such, the wealth of the island (and the territorial waters around) belong to them. In the public hearings, a Tobagonian argued for the 'need of a contract

71 The Deputy Governor of the Central Bank of Trinidad and Tobago, Sandra Sookram, conceded that such estimates have yet to be made; Sandra Sookram, "Third Public Meeting, JSC," filmed 8 February 2019, accessed 1 March 2019, video, https://www.youtube.com/watch?v=8kYjFcTSvoA.

72 "First Public Meeting, JSC," filmed 10 June 2018, accessed 15 February 2019, video, https://www.youtube.com/watch?v=mFv7GpXjAY8&t=11366s.

73 "Third Public Meeting, JSC," filmed 8 February 2019, accessed 1 March 2019, video, https://www.youtube.com/watch?v=8kYjFcTSvoA.

74 Terence Deyalsingh MP, "Third Public Meeting, JSC," filmed 8 February 2019, accessed 1 March 2019, video, https://www.youtube.com/watch?v=8kYjFcTSvoA.

between both nations [Trinidadians and Tobagonians]', calling the 1888 act of union 'a disaster'.[75] The JSC's chairperson immediately reacted, proclaiming that there is only one nation, that of Trinidad and Tobago. Moreover, there was no definition of a Tobagonian other than any person living on Tobago.[76] No claims to ancestral lands are made. Although the majority of the population on Tobago are of African heritage, no claims to the island based on origin have been made.

The demand for Tobago autonomy has not spilled over in conflict but is a slow process of increasing political pressure that is finding traction in the current political discourse of the country. Little direct attention is given to NRNRS in the autonomy claims, despite the fact that oil and gas are major resources. This is partially explained by the fact that the oil and gas fields fall mostly outside the claimed Tobago jurisdiction. Yet, with an expansive scope of powers, the TIG would have substantive control over oil and gas found in its claimed jurisdiction. The immediate Tobagonian concern is accessing the revenue raised nationally from these resources. Pinning the share of revenue at a fixed 8 % is likely to meet considerable opposition precisely because of a prospect of future inequality. Quite different from the island claims in the Solomon Islands, a preferential treatment of Tobago would likely be confined to rectifying past marginalisation and underdevelopment. The case for a possible economically elevated position for Tobago seems at present unlikely to be accepted by the majority of the population.

4 Concluding Remarks

In the Solomon Islands and Trinidad and Tobago, the quest for non-centralism has been a slow process, coming to some sort of fruition in the form of draft constitutions (or amendments) at more or less the same time. The proponents of self-government for island communities have produced remarkably similar constitutional proposals, although the political processes in the two countries bore no knowledge of one another. Although the ownership, control and revenue of NRNRS are approached differently, the results are uncannily similar. Whether the two sets of proposals will eventually find constitutional entrenchment, and if so, in what form, it is too early to say.

75 Anthony Hector, "First Public Meeting, JSC," filmed 10 June 2018, accessed 15 February 2019, video, https://www.youtube.com/watch?v=mFv7GpXjAY8&t=11366s.

76 Foster Cummings MP, "First Public Meeting, JSC," filmed 10 June 2018, accessed 15 February 2019, video, https://www.youtube.com/watch?v=mFv7GpXjAY8&t=11366s.

In both sets of constitutional proposals, the twin goals of self-government and solidarity are pursued. In both cases a sense of marginalisation is the wellspring for these goals. In the Solomon Islands the quest is also tied up with an attempt to return to custom and tradition of old. In both cases, the financial claims are likely to be to the advantage of some islands in the Solomon Islands and Tobago, with inequality the likely outcome.

Similarities in the claims relating to access to financial resources abound. First, taxing powers of the subnational governments are substantial. For Tobago, there are no constitutional limits to the range of taxing powers the island government would exercise. In the Solomon Islands the subnational taxing powers are clearly listed, but are still substantial.

Secondly, in both cases priority access to the wealth of NRNRs is assured. In the draft Solomon Constitution subnational claims are directly aimed at the control and benefit of NRNRs, which are bolstered by an expansive definition of the states' jurisdiction which goes beyond a narrow definition of territorial waters, to the country's exclusive economic zone. In the Tobago Bill, only indirect claims are made with regard to NRNRs; ownership, control and benefit of NRNRs would fall within the Tobago's almost unlimited powers. The claim to the seabed and the subsoil is more modest, stretching only to 11 nautical miles territorial waters.

Thirdly, the stated goal of equalisation in government services in both countries is pursued through substantial claims to revenue raised nationally. High percentages are set in the Solomon Islands, depending on the revenue source, which overall would be more than 50 % of the national budget. In the case of Trinidad, the percentage is eight.

In both countries the financial arrangements will more than likely lead to inequality; in the case of the Solomon Islands, among the future states, and in Tobago, greater per capita state expenditure than in Trinidad as well as on equal economic opportunities. The questions are then, first, how such inequality is to be justified by the claimants, and secondly, the acceptability in the broader body politic of such justifications.

The justification of any inequality among the island states of the Solomon Islands is closely tied to the unarticulated notion of separate 'nations', but expressed in terms of strong self-government. The 'nation' claims are expressed through the exultation of the custom and tradition of island communities and their return, recognising their historical claims to land and the adjacent sea. It highlights the artificial clumping together of the 'nation' of Solomon Islanders by the British in the 19th century for administrative convenience. Future inequality would thus simply be a consequence of ownership of land and sea which should be returned to the rightful owners in terms of customary

law. A level of inequality may thus be tolerated by the island polities based on a shared vision of communities owning resources, accepting the eventuality that only some islands may be resource-rich.

In contrast, the claims of the Tobagonians are based on past neglect and marginalisation, not ownership. Equality is the overall goal and claiming ownership rights by a 'nation' of Tobagonians is weak. There are no historical claims of indigenous people as Tobagonians are defined as such simply by reference to residency. While there seems to be acceptance in principle by Trinidadians that corrective action should be taken, any notion of a separate 'Tobago nation', with historical property rights, is not being entertained. The placing of Tobagonians in a better position than their compatriots in Trinidad is not likely to be accepted. Thus, the claim for a fixed 8 % of the national budget, which may result in such an advantage, is under close scrutiny.

How the contradiction between the need for equality and the demand for self-government which may result in advantage to producing regions vis-à-vis the others, can be sustained (or legitimated), lies in the particular political and social norms and culture of a country. Levels of inequality which would be unpalatable in one country, may be acceptable in another. The theoretical underpinning of the equalisation of service outcomes and economic opportunities is usually the assertion of the oneness of the nation; in a diverse society every citizen, no matter where they are located, should enjoy the benefits of equal citizenship. The reasoning behind the unequal benefit from NRNRs, is based on ownership claims where the oneness of the nation (or nation building) is not the primary goal, but the well-being of individual regions takes centre stage. There may also be other reasons for levels of inequality to be tolerated, such as a specific subnational government's perceived position of strength. There is no formula to determine the balance between self-government and national solidarity; achieving the right balance lies in the hands of the negotiating parties. At their disposal are the flexible tools in the federalism toolbox which one hopes they will use judiciously, by not allowing the manner in which NRNRs are dealt with to be the cause of future conflicts.

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CHAPTER 8

Equality, Development Equivalence and Federal Finance in Argentina

Miguel Angel Asensio

1 Introduction

Throughout history, when federal unions have been formed, inequality has characterised their development. Yet, liberty and regional equality have not followed a similar path, as they have been essential but also specific to each of the federate units. Holland in the United Provinces, Prussia in the Germanic Confederation, New York in relation to its counterparts among the US states are clear examples of this.[1] Unity with diversity or unity and diversity prevail.[2]

If we look back at its origins in the 19th century, the federal formation of Argentina, after some failed or provisional constitutional agreements, is also characterised by large differences between the regional units which signed the Federal Constitution.[3]

Given the ample differences between the federate states regarding aspects such as their respective economy, geography and demography, while the Federal Constitution achieved equality regarding competences and rights, it did not aim at ensuring a similar equivalence regarding the development and opportunities for each state. For instance, even if differences already existed before the independence from Spain in the early 19th century, the gap between the big 'Interior' and the region of the Rio de la Plata has been continually increasing since the Constitutional Agreement, which was achieved in the beginning of

1 Not to mention New South Wales and Victoria in Australia or Central Canada (Ontario and Quebec) vis-à-vis the rest of the country, among others.

2 See Michael Burgess and Alain C. Gagnon, *Comparative Federalism and Federation, Competing Traditions and Future Directions* (Toronto: University of Toronto Press, 1993); Michael Burgess and Alain C. Gagnon, *General Document Presented at the Montreal Meeting of IACFS on Unity and Diversity in Federal Systems* (Montreal, 2015). See also Preston King, *Federalism and Federation* (Maryland: The Johns Hopkins University Press, 1982).

3 The constitutional texts of 1819 and 1826 were rejected by the provinces, and the Federal Pact of 1831, being relevant as a precedent, had a fragile and incomplete existence previous to the Constitution framed in 1853.

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the 1850s.[4] At the present time, more than 160 years later and in spite of some significant variations, these important differences between regions remain. In fact, when the representatives gathered together to approve the last reform to the Argentine Constitution (1994), the personal Gross Domestic Product (GDP) in the wealthiest jurisdiction had reached nine times that of the poorest.[5] In such a context, the 'equivalent development' and 'equality in the living conditions' were outstanding goals set during the sessions and debates in the Reforming Constitutional Convention, finally incorporated in the accorded text of the Fundamental Law. These goals had to be reached by the revenue sharing regime, a mechanism that would be at the core of the federal fiscal system.

These objectives are explicitly set forth in the Constitutional Document, Art. 75, item 2, stating that 'the distribution among the Nation, the provinces and the city of Buenos Aires and among the latter [...] will be equitable, solidary and shall give priority to the achievement of an equivalent degree of development, quality of life and equal opportunities in the whole national territory'. Despite this, the process of uneven economic growth among regions and provinces has continued and, a quarter of a century after the sanction of the reform of the original Magna Charta, the new revenue sharing system has still not been enacted, except for particular modifications emerging from different Intergovernmental Agreements.[6]

In this chapter, we will produce an analysis in which we will review uneven regional and provincial development, have a closer look at the challenges and limits faced by the federal fiscal system, as well as examine the possibilities available that would make it possible to overcome this uneven development. Throughout this analysis, we will keep in mind the role and

4 See Alberto J. Figueras, "Enfoque regional de la economía argentina: Su estructuración histórica," in *El desafío del territorio, Un análisis de las economías regionales*, eds. Alberto J. Figueras and José L. Arrufat (Córdoba: Asociación Cooperadora de la Facultad de Ciencias Económicas de la Universidad Nacional de Córdoba, 2007), 37–50. See also Alejandro B. Rofman and Luis A. Romero, *Sistema socioeconómico y estructura regional en Argentina* (Buenos Aires: Amorrortu, 1974).

5 We refer to the per capita GDP. Alejandro B. Rofman, *Las economías regionales* (Buenos Aires: Centro Cultural de la Cooperación Floreal Gorini and Universidad Nacional de Quilmes, 2012).

6 The Complementary Clause Six to the Constitution stated that for the year 1996 (two after the sanction of the Reform) a new revenue sharing law should be enacted. The 'patchwork system' was the option instead and no general law for the distribution of taxes among Nation and Provinces was approved. Recently, another Intergovernmental Agreement, regulating partial issues of the multilevel fiscal relationship (the so-called Fiscal Consensus) was signed, the Federal Government and the provincial ones being part of it.

mission assigned to the federal-fiscal scheme and the complexity of achieving a 'magic formula' embedded in a new revenue sharing system, considering the ambitious objectives stated in the National Constitution. The aim of this chapter is to question the present situation in the Argentinian Federation and demonstrate that other mechanisms should be considered in addition to the sole fiscal formulas aiming at tackling the current uneven development. Concretely, after this brief introduction, we will address the origins of the regional divergences and their significance in the federal association (2). Next, we will consider some regional indicators in order to highlight the current differences and existing asymmetries (3). In doing so, we must bear in mind that the statistics available in Argentina are not up-to-date and this chapter should also be regarded as a call urging researchers and the federal administration to update them, in order to attain higher accuracy in the determination of territorial divergences. We will then look at what can be done to achieve 'equivalence in development' and will reflect on this contemptuous issue (4). Then, we will give a more detailed explanation of the previous legal norms that aim to solve the provincial-regional inequalities and the limited outcomes in such a field, as well as the current situation of uneven development (5). Finally, before closing this chapter with our concluding remarks, as an answer to the limitations that we unveiled in the previous sections, we address the need for designing and introducing other instruments of regional policy aimed at changing the unbalanced provincial and regional development of the country.

2 Growing and Great Divergence

From the 1820s onwards, hardly a decade after breaking off its ties with Spain and thus gaining its independence, Argentina began to operate as a loose confederation where the provinces claimed autonomy, with Buenos Aires in charge of international relations, the main seaport and customs. The union between the prosperous Buenos Aires and the poorer 'thirteen huts'[7] materialised under

7 We allude to the despective denomination given to the rest of the Provinces from centralist and unitarian politicians, media and thinkers of Buenos Aires, in an unequal Union of 14 members which represented in fact the two parts of Argentina in the middle of the 19th century, one rich and prosperous and the others suffering from scarcity of resources. Recently, the expression has been attributed to the famous poet José Mármol: see Julio Pinto and Fortunato Mallimaci, *La influencia de las religiones en el Estado y la Nación Argentina* (Buenos Aires: Editorial Universitaria de Buenos Aires – EUDEBA, 2013).

the 1853 Constitution was not only difficult but fragile. After renewed conflicts and some reforms, it was consolidated in 1860–1866.

However, these conflicts concealed the lagging situation of the inland and non-Atlantic regions, which were deprived of their export markets in the North due to the new border that emerged after some incidents and battles of war. The episodes were fuelled again by the divergent interest of Buenos Aires and the other provinces, which conditioned the final agreement. The financial issue, always decisive, implied as a condition the assurance of five years of budget support for the previous 'State of Buenos Aires'.[8] The supremacy of the National Government was accepted by the other provinces, because it allowed them to maintain the Federal Compact. This ensured the receipt of funds from the Customs Offices, which had been monopolised for decades by the Government of Buenos Aires.

From a territorial point of view, the development of Argentina as a country resulted in permanent loss of economic and demographic importance of the inland regions and a growing significance and power of the Littoral ones. In such a context, the Federal Constitution did not alter the natural competitive advantages of Buenos Aires and – despite a weaker participation of other parts of the Pampean Region – its domination continually increased, while other regions faced a slower economic progression and a demographic weakening. The result of this general tendency was that the main centres of the Interior, particularly Córdoba – located on the ancient trade route between Buenos Aires and the northwest – but also Salta, Tucumán and Mendoza, lost economic weight in the country. Research carried out a few years ago by economic historians analysing data on population, exports and other aspects, reveals the growing importance of the richer region compared to the rest of the country, namely the West, North and South. To illustrate this evolution, Table 8.1 shows the development of the Littoral and Interior until the first decade of the second half of the 19th century, right at the beginning of the Argentine 'golden age'.[9] From the last half of the 19th century onwards, the process continued and the prosperity of the Pampean Region[10] and its provinces spread throughout

8 The 'nationalisation' of the Customs Office implies that the taxation provided by foreign trade would be collected by the federal government and not by the Province of Buenos Aires. The Province of Buenos Aires reached a compromise with the Federal Government which must send an annual amount of money to support the budget of the Province for five years.

9 See Ricardo Salvatore and Carlos Newland, "Between Independence and the Golden Age: The Early Argentine Economy," in *A New Economic History of Argentina*, eds. Gerardo Della Paolera and Alan M. Taylor (New York: Cambridge University Press, 2007), 19–45.

10 In the literature, it is possible to find the words 'Littoral' and 'Pampean' sometimes utilised alternatively. Littoral alludes to coastal regions, maritime or fluvial. In Argentina, one could distinguish the Upper Littoral (to the North of present city of Santa Fe) on the

TABLE 8.1 Evolution of economic and demographic variables in Argentina in the 19th century

Variables	1820	1860
Population	477,238	1,736,923
Littoral	184,822	847,518
Interior	292,416	889,405
Urbanisation rate (%)	25.5	30.4
Littoral	36.8	45.7
Interior	18.4	15.9
Exports	3,082	27,049

the regions, while the Interior faced a situation of stagnating development. From 1860 to 1930 the country followed an export-led model of growth and in the year 1913 it reached the tenth position worldwide in per capita GDP. This period was called the 'golden age' or 'belle époque' by some authors due to the prosperity then achieved and was associated with a strong international insertion in a world economy lead by Great Britain.[11] In spite of this, the 'belle époque' considered as a whole was not a well-balanced process but rather an uneven one. In fact, the growth then achieved was largely concentrated in some specific regions due to the comparative advantages enjoyed by a part of the country, combined with the dynamic export economy well inserted in the international markets. Thus, provinces and regions that enjoyed such a process progressively improved their situation with regard to the other ones, which continued lagging behind.

coast of Parana River and the Lower Littoral (from Santa Fe to Buenos Aires) on the coast of the Parana River and the Rio de la Plata to Buenos Aires approximately. The Lower Littoral or 'Pampean Littoral' coincides with the North of the Pampean Region. This is why an interchangeable denomination appears to refer to that geographical portion of the country, which sometimes extends to the southern part of the present Entre Rios to the coast of the Rio Uruguay (both rivers Parana and Uruguay give existence to the very short and wide Rio de la Plata).

11 For such denomination see Carlos F. Díaz Alejandro, "No Less Than One Hundred Years of Argentine Economic History Plus Some Comparisons," in *Comparative Development Perspectives: Essays in Honor of Lloyd G. Reynolds*, eds Gustav Ranis, Robert L. West, Mark W. Leiserson and Cynthia Taft Morris (Boulder, Colorado: Westview Press, 1984) 328–361; Salvatore and Newland, "Between Independence and the Golden Age," 19.

This so-called 'outward-looking' model was followed after the 1930s by an 'inward-looking' or 'import-substitution model', reasserted after World War II. World War II, as well as the post-war era, was a period of time that deeply changed Argentina's demography and resulted in a concentration of its population in the prosperous Pampean area. While Argentina had to deal with important internal migration, it encountered massive immigration of foreigners, which increased the impact on the population's repartition inside the country. The society and its economy continued to grow concentrated in the same area, particularly in and around the city of Buenos Aires. There were nevertheless some moderate spill-overs from Buenos Aires to San Nicolás and Rosario, on the Paraná River, which made up the 'industrial belt', on the one hand, while on the other hand, the emergence of Córdoba in the centre of the country appeared as the base for a car-manufacturing hub (thanks to power facilities).[12]

3 Advanced and Backward Partners

While Argentina as a federation encompasses some more advanced partners, others appear to be in a more backward position. The facts and results mentioned above can be examined by analysing the temporal variations in the national and regional context using a quantitative approach. We will use the data of the provinces and aggregate them in order to obtain a better overview of the regions they form. It is possible to consider a period of more than half a century from the beginning of the 1950s to the first years of the present century. In this section, we will therefore look at the regions as aggregates of the provinces forming the Federal union, and compare Buenos Aires on its own with the rest of the regions, within the same period of time. What we expect to highlight is the importance of the gap between wealthy, or advanced, and

12 The stages and models for considering the economic development of Argentina in a historical perspective are ample. See Aldo Ferrer, *Economía argentina, Etapas de su desarrollo y principales problemas* (Buenos Aires: Fondo de Cultura Económica, 2009); Carlos F. Díaz Alejandro, *Ensayos sobre la historia económica argentina* (Buenos Aires: Amorrortu, 1983); Guido Di Tella and Manuel Zymmelman, *Las etapas del desarrollo económico argentino* (Buenos Aires: Paidós, 1973); Mario Rapoport, *Historia económica y social de la Argentina* (Buenos Aires: Ariel, 2008); Pablo Gerchunoff and Lucas Llach, *El ciclo de la ilusión y el desencanto* (Buenos Aires: Crítica, 2015); Eduardo Miguez, *Historia económica argentina* (Buenos Aires: Sudamericana, 2003); Jonathan Brown, *Historia socieconómica del Rio de la Plata* (Buenos Aires: Sudamericana, 1998); Gerardo Della Paolera and Alan M. Taylor, *A New Economic History of Argentina* (New York: Cambridge University Press, 2007).

poor, or backward, partners in the Federation, which is at the core of the proposal calling for a revenue sharing regime with a levelling profile to be adopted in the country (we will examine this proposal in further detail in section 6).

Before elaborating, we shall first emphasise two elements, namely, on the one hand, the meaning and significance of the regions and their relationship with the 'provinces' and, on the other hand, the statistical gaps and limits in the existing data. Regarding the regions, a distinction needs to be made between 'natural regions' and other types of regions. To understand this, we need to go back in time, some decades ago, when Jacques Boudeville offered a now well-known typology, where he classified regions into three categories: 'homogeneous', 'polar' and 'planning' regions.[13] This proposal influenced the division that was then adopted and that is today commonly used to refer to Argentina's different regions. While the 'homogeneous regions' are closer to the idea of being 'natural' or 'geographic' ones, it is the category of 'planning region' that is more frequently used when it comes to adopting development policies. In Argentina, as in other countries, the regions were originally designated on the basis of their topography, but were then altered for political and administrative reasons to create comparable units.[14] If we look at the provinces, unlike the regions, they are the original political units which made up the federal state and are not influenced by topographic considerations as they can include a wide range of different natural environments. A group of provinces forms a region; however, it is the region and not the province that is taken into account when adopting development policies and yet, it is the province and not the region that enjoys parliamentary representation on the federal level.

Regarding the statistical limitations we referred to, some of them originated in the past and affect the accuracy of regional economic data today. However, a major limitation that affects scholars from all fields of study analysing the Argentinian case, as well as the federal administration when it has to develop or implement its policies, is related to data on Argentina's GDP. As a matter of fact, there is to this day no up-to-date statistical data measuring the GDP of the provinces or regions. In the years 2006 and 2007, methodological changes were implemented without general technical consensus, weakening the data

13 See Jacques Boudeville, *Los espacios económicos* (Buenos Aires: EUDEBA, 1967).

14 The 'planning regions' have also been denominated *functional regions* in the sense that they exist linked to some political proposal. See Carlo Desideri, "Regionalism and Territorial Politics in Italy," in *Federalism, Regionalism and Territory*, ed. Stelio Mangiamelli (Milano: Giuffre, 2013), 149–196.

produced and affecting its quality for use as a tool for analysis and interpretation. The present situation resulted not only from methodological changes, but also from a lack of resources that would ensure a systematic collection and treatment of data. While alternative methods might be found by researchers to reach an approximation of the GDP of provinces and regions, there is no reliable and official data after the year 2005. Consequently, we shall take into account these limits – eventually addressing them – without, however, ignoring global trends.

In Table 8.2, we can observe the territorial GDP weight of a grouping of five regions in Argentina, namely, the North West region (NOA) (Jujuy, Salta, Catamarca, La Rioja and Santiago del Estero), the North East region (NEA) (Chaco, Formosa, Corrientes and Misiones), the Cuyo region (Mendoza, San Juan and San Luis), the Pampean region (Buenos Aires, Santa Fe, Córdoba, La Pampa and Entre Rios) and finally the Patagonia region (Rio Negro, Chubut, Santa Cruz, Tierra del Fuego). This classification is in principle the same as that used by the National Institute of Statistics and Censuses (INDEC).[15] What is striking in this figure is the enormous relative size of the Pampean aggregate of provinces, especially when considering that it additionally includes the CABA and its surrounding area, denominated AMBA. However, if we look at its evolution over time, we can see that the present territorial giant has actually reduced a little of its economic magnitude. In fact, over more than half a century, despite an increase in the 1970s, the Pampean Region has seen its weight in the Argentine economy slowly decline from four fifths of the global size of the national economy to three fourths.[16]

In the rest of the country, there are some compensatory steps toward progress such as the modest but visible ones of the NOA and Cuyo regions, partially counterbalanced by the decline of the NEA region. The clear winner, however, is the Southern Region of Patagonia, whose performance has been sustained, without setbacks. This measurement, however, depends on the importance of the provincial GDP, and does not capture the actual regional incomes absorbed by each jurisdiction. If that were the case, the relevance

15 We are incorporating the Metropolitan Area of Buenos Aires (AMBA), which consists of the Autonomous City of Buenos Aires (CABA) added to its surroundings, within the Pampean, as is frequently done.

16 In the following table we follow the data from Alberto J. Figueras and José L. Arrufat, "La regionalización como respuesta a los desafíos sociales y económicos del Siglo XXI," in *El desafío del territorio, Un análisis de las economías regionales*, eds. Alberto J. Figueras and José L. Arrufat (Córdoba: Asociación Cooperadora de la Facultad de Ciencias Económicas de la Universidad Nacional de Córdoba, 2007), 319.

TABLE 8.2 Economic role of the regions in Argentina (1953–2005, percentage of the national GDP)

Region	1953	1970	1980	1993	2001	2005
Pampean	81	81.6	78.3	77.2	76.7	74.6
Patagonia	2.9	3.5	5.3	6	6.8	8.4
NOA	6.1	5.6	6.6	6.3	6.2	6.9
Cuyo	5.5	5.6	5.8	6	5.8	6.2
NEA	4.5	3.7	4.1	4.7	4.4	4.1

of the highly urbanised CABA area and its surroundings, as well as the whole province of Buenos Aires, would probably be higher.[17]

Table 8.2, above, shows these results, which are the expression of the enormous territorial imbalance, with the Pampean region absorbing three quarters of the total GDP. Figure 8.1 below illustrates this. It shows, on the one hand, the large discrepancy that prevailed consistently in the second half of the last century and, on the other hand, how the correlation between the weaker regions has shifted.

4 Beyond the Geographic Contiguity: Advanced Provinces in a Different Context

While the above does not alter the 'geographic continuum', it is however possible to take an alternative regional approach. Since the beginning of the 1970s, Argentina has classified its provinces on the basis of certain main indicators. These criteria made it possible to group them within the whole country according to specific objectives, essentially aimed at supporting federal fiscal decisions and policy changes in intergovernmental finance. Such criteria led to a grouping comprising four types of provinces: a) advanced provinces, b) provinces of low demographic density, c) intermediate provinces and d) backward provinces.

17 It should also be mentioned that this provincial conformation of regions is closer to the idea of territorial 'homogeneity' and contiguity, without omitting polarisation in AMBA; see Francois Perroux, *Nota sobre la noción de polo de crecimiento* (Buenos Aires: Consejo Federal de Inversiones, 1956).

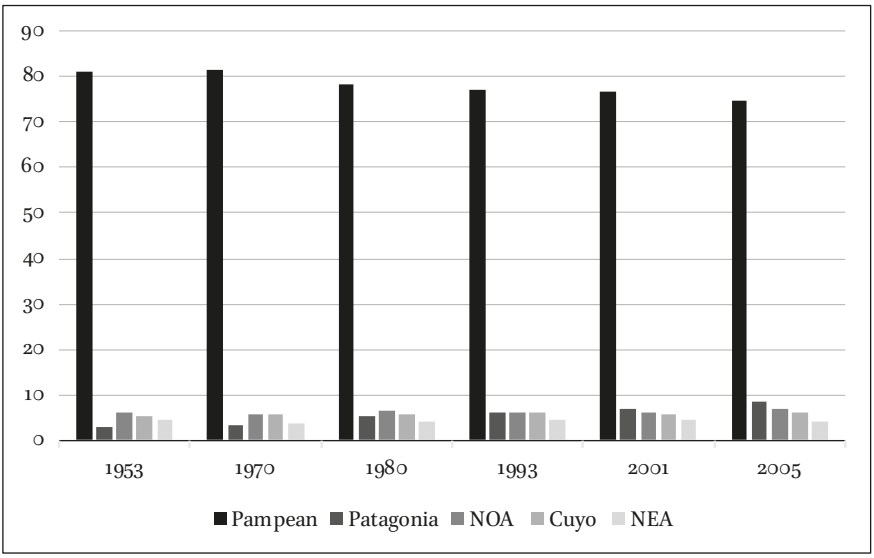

FIGURE 8.1 Weight of the regions in Argentina (1953–2005, percentage of the national GDP)

The so-called 'advanced' regions comprised the main Pampean jurisdictions, as well as the biggest province of the region of Cuyo, Mendoza. The group therefore included the City of Buenos Aires and the Provinces of Buenos Aires, Santa Fe, Córdoba and Mendoza. In view of the long-lasting economic dominance they had over the other provinces of the Argentinian Federation, they are today commonly referred to as the 'traditionally advanced' ones.

Table 8.3 gathers the main results derived from the previously mentioned grouping. Figure 8.2 below shows a non-equivalent but similar conclusion to the previous grouping included in Table 8.2 and Figure 8.1. Why are the results similar, even though we are following an alternative regional classification? This is because the regions considered as 'advanced' in this alternative typology are the bigger jurisdictions like CABA, Buenos Aires, Córdoba and Santa Fe, which are also mainly 'Pampean'. Nevertheless, this alternative classification enables us to highlight some trends in a more detailed way.

In fact, despite lacking more updated statistical information, this new approach makes it possible to highlight the slow but constant increase in importance of the Patagonian Region, or the so-called 'low density' provinces. It also shows the lasting dominance of the Pampean Region, or the most mixed combination of the 'advanced provinces', in spite of a slow reduction in its global weight in the federation.

TABLE 8.3 Regional development: traditionally advanced provinces and others (1953–2005, percentage of the national GDP)

Region	1953	1970	1980	1993	2001	2005
Advanced	**81.1**	**82.4**	**80.7**	**78.1**	**77.7**	**75.9**
CABA	31.5	33.6	30	34.4	33.7	33.7
Buenos Aires	30	29	28.2	24	25.2	21.8
Santa Fe	9.1	8.9	9.1	7.9	7.4	8.1
Córdoba	6.6	6.7	7.6	7.9	7.5	8.1
Mendoza	3.9	4.2	4.2	3.9	3.9	4.2
Low Density	**3.9**	**4.3**	**6.2**	**6.8**	**7.6**	**9.3**
Chubut	1	1.2	1.7	1.3	1.5	2
Santa Cruz	0.5	0.6	0.7	0.9	1.2	1.6
La Pampa	1	0.8	0.9	0.8	0.8	0.9
Rio Negro	0.9	1	1.3	1.4	1.4	1.3
Neuquén	0.4	0.7	1.4	1.7	2.1	2.8
T. del Fuego	0.1	0.1	0.3	0.7	0.6	0.7
Intermediate	**8**	**7.5**	**8.2**	**7.8**	**7.4**	**7.3**
San Juan	1.1	0.9	1	1.1	1	0.9
San Luis	0.5	0.6	0.6	1	0.9	1.1
Entre Ríos	2.8	2.6	2.5	2.2	2.1	2
Tucumán	2.5	2.2	2.7	2	1.9	1.7
Salta	1.1	1.3	1.4	1.5	1.5	1.6
Backward	**7**	**5.8**	**6.6**	**7.5**	**7.2**	**7.7**
La Rioja	0.3	0.2	0.3	0.5	0.5	0.5
Catamarca	0.3	0.3	0.4	0.5	0.7	1.4
Corrientes	1.4	1.4	1.5	1.4	1.3	1.2
Jujuy	0.8	0.8	1	0.9	0.8	0.8
Misiones	0.8	0.8	0.9	1.4	1.3	1.2
Chaco	1.8	1	1.3	1.3	1.2	1.2
S. del Estero	1.1	0.9	0.9	0.9	0.8	0.9
Formosa	0.5	0.5	0.4	0.6	0.6	0.5

In any case, this crude magnitude could not omit the existence of extreme measures which confront the *'have'* with the *'have not'* provinces and regions. It is very useful to compare the existing differences in the case of the United States of America (USA) with the case of Argentina, employing the 'maximum',

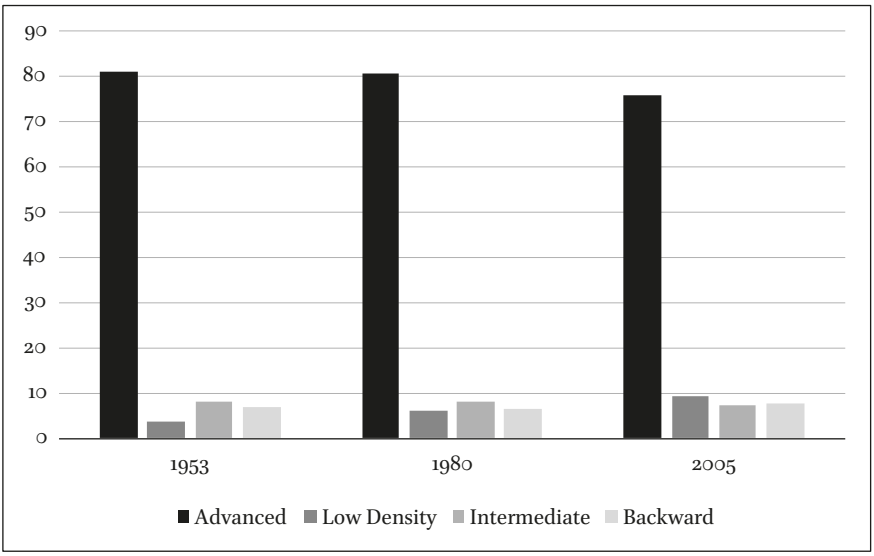

FIGURE 8.2 The 'advanced' jurisdictions and the others (1953–2005, percentage of the national GDP)

'minimum' and 'average' points in terms of personal territorial income among states or provinces (Table 8.4).[18]

Table 8.4 illustrates some striking differences. While the USA has clear regional and national differences, with a ratio of 1.6 times from better to worse, Argentina has more than 8 times the same ratio. In spite of a very modest reduction (9 times in the early 1990s to 8 times in the last estimation of per capita provincial GDP), the differences continue to be extensive, as the poorest territories have a long 'economic distance' to the richest territories.

5 Equivalence about What?

Although the idea of 'equivalence in development' is important in itself, it also poses difficulties, especially when it comes to sound and credible measures

18 Source of the following table: USA; BEA (Bureau of Economic Analysis, US Department of Commerce), Paper by Bettina Atten *et al,* August 2016. Argentina; Author, based on Miguel A. Asensio, "Political Unity and Economic Diversity in the Argentine Federation," in *Revisiting Unity and Diversity in Federal Countries: Changing Concepts, Reform Proposals and New Institutional Realities*, eds. Alain G. Gagnon and Michael Burgess (Leiden and Boston: Brill-Nijhoff, 2018), 199.

TABLE 8.4 Regional-provincial divergences: the USA and Argentina (Index numbers: average = 100)

USA states	*Per capita* income	Argentine provinces	*Per capita* income
Highest	132.6	Highest	317.8
Average	100	Average	100
Lowest	84.4	Lowest	39.3

capable of supporting and sustaining appropriate policy decisions and definitions. It encompasses problems of a technical nature, not to mention the complex issue of adopting a unified concept of 'development' as such, which frequently involves questions of normative dimensions. As we know, the definition of growth and development is subject to intense debates and an acceptable definition has yet to be established.

We have recently introduced some available indicators expressing differences, whose consideration confirms the above-mentioned observation.[19] The difficulties in defining policies and concepts increase when the gap appears between those that were based only on so-called 'crude' economic indicators and those that mobilise indicators that also contain or mix social components. Thus, when dealing with the problem of approaching equivalence in the level of development, GDP can be evaluated with the additional and parallel consideration of other alternative measures, such as the well-known Human Development Index (HDI) or the Coverage of Basic Needs Index (CBN). In addition, the benchmark could be some leading province or region, or even the national average. The first option could be to display something like 'guides and trailers', like an ideal blueprint that should then be adapted to the local reality, to its specific context and constraints. A second option could be to display the distance to the desired minimum. Hence, Table 8.5 shows the 'distance' of provincial indexes with respect to national averages.

Quite unexpectedly, the alternative indicators exhibited in Table 8.5 showed that, given the reduction in the differences detected by examining the jurisdictional outcomes obtained from employing CBN or HDI, any future reform would have to take care of 'something more' than only the per capita GDP as determinant of development.

19 Asensio, "Political Unity and Economic Diversity," 193–205.

TABLE 8.5 The search for equivalence: distance from the national averages in three indicators [National average = 100 (GDP 2005; CBN 2010; HDI 2006)]

Provinces	GDPpc	CBN	HDI
Buenos Aires	-10,7	+1,5	-1,5
CABA	+217,8	+6,3	+5,8
Catamarca	-30,0	-2,4	-1,2
Córdoba	-7,9	+4,3	+1,2
Corrientes	-52,5	-8,2	-3,3
Chaco	-56,2	-12,2	-4,5
Chubut	+19,2	+2,1	-0,3
Entre Ríos	-29,0	+1,0	-1,2
Formosa	-60,7	-14,5	-6,8
Jujuy	-49,8	-6,4	-2,5
La Pampa	-1,1	+7,8	+1,1
La Rioja	-38,8	-3,4	-1,5
Mendoza	-10,2	+2,5	+0,5
Misiones	-47,3	-7,5	-3,8
Neuquén	+32,7	+0,1	+2,2
Río Negro	-2,9	+0,9	-1,2
Salta	-52,2	-12,8	-4,1
San Juan	-43,1	-10,7	-2,8
San Luis	-6,4	+2,1	-1,7
Santa Cruz	+64,2	+3,2	+2,8
Santa Fe	-6,1	+3,4	+0,5
Sgo. del Estero	-58,5	-11,7	-5,4
Tierra del Fuego	+96,6	2,3	+4,4
Tucumán	-45,8	-4,5	-2,7

6 The Legal-Constitutional Way – From 'Gap of Development' to 'Equivalent Development'

The problem of uneven development raises questions with respect to equality between citizens living in different parts of the territory and the needed increase of equilibrium in the federal spectrum. In fact, regional imbalance impacts the 'federal balance'. This issue affects the design and objectives of the federal fiscal

system. In spite of its partial nature, such a fiscal system will endure pressure so that it increases its ability to reach the general objective of a larger regional balance, which is achievable if it is combined with a multiplicity of other political tools.

The last encompassing federal fiscal legislation was enacted half a century ago, regulating the revenue sharing system in Argentina, which explicitly enhanced the importance of redistribution. Thereby, not only proportional (devolutive) indicators were employed but also redistributive ones. It must be recalled that the revenue sharing mechanism operating with modifications since the 1930s[20] implies two types of distribution of the revenue collected from national taxes:[21] the first one, *primary distribution*, consists of a distribution between the Federal Government and the Provincial ones; the second one, *secondary distribution*, is the distribution among provinces of the provincial share. The focus was placed on secondary distribution, with the idea of balancing out inequalities of development on the territorial level, introducing redistributive mechanisms of *pro rata* sharing among provinces. This was done in order to address the notion of *brecha de desarrollo* ('development gap') and thus incorporated the formula in the law 20.221 (1973). In view of the indicators and coefficients then available, proportional and redistributive formulae were further considered and incorporated.[22]

Article 3 of the law stated that 'the distribution among the provinces […] shall be effectuated in accordance with the following criteria: a) Directly proportional to the population, sixty five per cent (65 %); b) In per capita proportion to the *gap of development* between each province and the more developed area of the country […] twenty five per cent (25 %); and c) To the provinces which do not have a population density higher than the average of the whole of the provinces, in proportion to the difference between the population density of each province and the mentioned average, ten per cent (10 %)'. Article 4 immediately solved the problem of clarifying the concept of 'gap of development' stating that '[…] it must be understood as *gap of development* of each

20 Since the constitutional agreement reached in 1853–60, different periods of evolution in the federal fiscal system have been highlighted: b) concurrency of sources until 1930s; c) revenue sharing from 1930s onwards; a) separation of sources until 1890. Horacio Núñez Miñana, *Finanzas Públicas* (Buenos Aires: Editorial Macchi, 1994).

21 We have exposed with more detail such a system in previous works. See Miguel A. Asensio, *Federalismo fiscal, Analisis. Fundamentos y caso argentino* (Buenos Aires: Ciudad Argentina, 2000); Miguel A. Asensio, *Local Government Finance in Argentina* (Washington: The World Bank, 2006); Miguel A. Asensio, "Subnational Tax Powers in Argentina," *Occasional Paper* N° 16 (Ottawa: Forum of Federations, 2015).

22 Law 20.221 (1973).

province the difference in percentage between its level of development and the pertaining to the area which embraces the Federal Capital and the Province of Buenos Aires. For the determination of the development level of each province, it will be applied the simple arithmetic average of the following indexes: a) Housing quality, following the last Housing National Census; b) Level of education of the human resources, following the last National Population Census; and c) Automobiles per inhabitant, belonging to the year in which the last National Population Census was conducted.' The legislator sought to remedy the lack of statistical data on the real personal income of the provinces or GDP per capita on a territorial basis by taking alternative measures aimed at quantitatively approximating the similarities and differences between the provinces. Considering that the differences related to the area of the Capital and Province of Buenos Aires, the redistributive fiscal impact was noticeable.

The need of 'closing the gap' with regards to provincial imbalances was related to another objective, namely the one of 'getting equality in the delivery of public services in the different provinces'.[23] This last objective is more pragmatic than the former.[24] The results, in terms of coefficients of secondary distribution among provinces, were favourable to the less advanced ones. The design which was then achieved reached a higher fiscal redistributive profile, reinforced by the creation of an additional institution, known as *Fondo de Desarrollo Regional* (*Regional Development Fund*), which reserved 3 % of the national taxation fund to be assigned to developmental projects in the whole country, aiming at the same objective of territorial-regional-provincial development for the underdeveloped regions.[25] However, while maintaining the

23 Alberto Porto, "Análisis comparado de las finanzas de los gobiernos provinciales en la Argentina," in *Finanzas Públicas y Desarollo Regional*, ed. Luis E. Di Marco (Córdoba: Dirección General de Publicaciones de la Universidad Nacional de Córdoba, 1989), 227.

24 Curiously, this is the constitutional axis for the definition of the equalisation fiscal system in Canada. See Porto, "Análisis comparado de las finanzas de los gobiernos provinciales en la Argentina," 227; Richard M. Bird, *Federal Finance in Comparative Perspective* (Toronto: University of Toronto Press, 1986); Bev Dahlby and Joanna Roberts, "Fiscal Federalism and Equalization in Canada," in *Federalismo fiscal, Experiencia nacional y comparada*, eds. Miguel A. Asensio and Pablo M. Garat (Santa Fe: Rubinzal y Culzoni, 2011), 295–320.

25 In stricter terms, *primary distribution*, which mainly divides the bourse between the Federal Governments and the Provinces, also devoted a minor part to the Fondo de Desarrollo Regional. Thus, the Law assigned 45 % to the Federal Level, 45 % to the Provinces and 3 % to the mentioned Fund. In such a way, the redistributive or equalising objective was pursued by redistributive coefficients in the *secondary distribution* and by specific developmental projects financed by the Fondo de Desarrollo Regional (FDR).

redistributive *pro rata* in secondary distribution, the primary distribution was weakened in the early 1980s by a 'puncture in the bourse' whose revenue was assigned to an unexpected partner: the social security system whose contributions, previously ensured by the business sector, had been eliminated for reasons of competition. This 'puncture in the bourse' that saw resources being redirected from the primary distribution into the social security system is now commonly referred to in Argentina as 'pre-coparticipation'. The direct consequence of this happening was that the core of the original system, which aimed at reducing the 'gap of development', was disrupted after only eight years.[26]

From 1988 on, the later known system of revenue sharing was introduced as a technical alternative, which was implemented in Argentina a decade and a half later than provided for by Law 20.221. As already mentioned, it maintained the revenue sharing regime and the classic profile of two main types of distributions, the *primary one* and the *secondary*. The difficulties arose when the last one was designed. In fact, when enacting the *secondary distribution*, in spite of establishing a new *pro rata* system among the provinces, the legal text did not show explicit indexes or coefficients of an objective nature supporting the *pro rata* method.[27] As Table 8.6 shows, the clear loser was the Province of Buenos Aires and the winners were the large majority of provinces. In that sense, one could say that there was a territorial redistribution of the 'fiscal pool', which later caused recriminations from the affected big province. In addition, another important modification occurred, namely the elimination of the *Fondo de Desarrollo Regional* and its replacement by another fund. It was denominated *Fondo de Aportes del Tesoro Nacional* (National Treasury Grants Fund), which supported different objectives, such as the need to provide aid to Provinces suffering or having been affected by financial or emergency circumstances.[28]

During the 1990s, the corrections made on that regime were imposed, like in the past, by the 'social security issue' and other key issues such as the Patagonian demands, the situation of the Buenos Aires conurbation, and a number of other, smaller conurbations. The problem of those issues underlying the corrections made to the regime, is that the corrections did not explicitly consider the regional imbalance as a very long-term and essential issue

26 Enacted by Law 22.293. The same legal instrument imposed an elevation of the VAT's compensatory tax rate which failed to achieve the full compensatory objective.

27 Enacted by Ley 23.548/88, called 'Regimen Transitorio de Distribución de Recursos Fiscales entre la Nación y las Provincias'.

28 The primary distribution assigned 56,66 % of tax revenues for Provinces, 42,34 % for the Federal Government and 1 % for the Fondo de Aportes del Tesoro Nacional.

TABLE 8.6 1988: A new attempt for Argentina's regional redistribution through the revenue sharing system

Provincial Jurisdictions	Law 20221/73	Law 23548/88	Differences
CABA	--	1.4	1.4
Buenos Aires	27.99	21.5	-6.49
Catamarca	1.93	2.86	0.93
Córdoba	8.9	9.22	0.32
Corrientes	3.79	3.86	0.07
Chaco	4.13	5.18	1.05
Chubut	1.86	1.52	-0.34
Entre Rios	4.56	5.07	0.51
Formosa	2.29	3.78	1.49
Jujuy	2.21	2.95	0.74
La Pampa	1.8	1.95	0.15
La Rioja	1.72	2.15	0.43
Mendoza	4.73	4.33	-0.4
Misiones	2.96	3.43	0.47
Neuquén	1.72	1.68	-0.04
Rio Negro	2.29	2.62	0.33
Salta	3.74	3.98	0.24
San Juan	2.55	3.51	0.96
San Luis	1.75	2.37	0.62
Santa Cruz	1.44	1.52	0.08
Santa Fe	9.06	9.28	0.22
Santiago del Estero	4.01	4.29	0.28
Tucuman	4.55	4.94	0.39
Tierra del Fuego	--	0.7	0.7
Total	100	100	---

to be addressed for the country's development and conformation.[29] This non-consideration for the regional imbalance question was confirmed when, in the

29 We have called the period between the last decade of the 20th century and the beginning of the 21st century the 'era of the Pacts', given that over the regime designed by Law 23.588 different modifications across Fiscal Pacts among Nation and Provinces were superimposed; see Miguel A. Asensio, *Descentralización fiscal en el Cono Sur y la experiencia internacional* (Buenos Aires: Buyatti, 2006).

early 1990s, the pre-coparticipation instruments for funding the social security system were reinstated, altering the operation of the territorial redistributive coefficients, which had been approved in the 1988 legislation for the secondary distribution in the revenue sharing scheme.[30] Shortly afterwards, in 1994, the National Convention approved the Reformed Constitutional Text, which again brought up the redistributive objective stating the need for a renewed revenue sharing regime which aimed at *equivalent development* and related goals as 'equivalence in the quality of life' and 'equality of opportunities' in the whole national territory.

Considering the time span elapsed from 1973 (Law 20.221) to 1994 (National Constitution), we can notice a change in the formulation used to refer to the fiscal regime's aspiration. In fact, while 'gap of development' was initially commonly used, 'equivalent development' was later imposed. Both wordings express the need and aspiration of transferring fiscal resources from rich regions and provinces to the less favoured ones. Art. 75 of the Constitution, as its reading reveals, clearly states that:

> [...] The sharing among the Nation, the provinces and the city of Buenos Aires, and in turn among the latter, will be effectuated [...] considering objective criteria for sharing, it will be equitable, solidary (supportive) and will give priority *to achieving an equivalent degree of development*, quality of life and equality of opportunities in the whole national territory.[31]

Unfortunately, following much economic turmoil, including the 2002 national insolvency, only provisional instruments were designed and adopted (Table 8.7), without complying with the constitutional mandate to enact a new revenue sharing arrangement that would take into account the redistributive goals imposed by the National Constitution as the supreme law and based on 'objective coefficients', as mentioned above.

Today, despite almost 25 years having passed since the approval of the 1994 constitutional mandate – which sanctioned a new regime aiming for objectives like equivalent development, quality of life and equality of opportunities – the whole system is still characterised by imperfect conformation and the implementation of its institutional framework undoubtedly needs to be improved. In any case, the question remains as to how such an ambitious goal like the achievement of an 'equivalent level of development' can be reached,

30 Intergovernmental Agreements of 1992 and 1993.

31 Emphasis added by the author.

TABLE 8.7 Closing the gap? The legal winding road to 'Equivalent Development'

Date	Normative body	Characteristics
1973	National Law 20221	Revenue Sharing considering explicit redistributive coefficients based on 'brecha de desarrollo' (development gap).
1980	National Law 22.293	Introduces detractions for Social Security.
1988	National Law 23.548	Revenue Sharing without objective coefficients for sharing and redistribution without technical sustain.
1990/94	National Law 23548 + Intergovernmental Agreements	Important pre-coparticipation detractions from the taxation bag for the Social Security System.
1994	National Constitution Reformed	Imposes the sanction of a new revenue sharing regime, based on objective sharing criteria aimed at 'equivalent development'.
1994/ 2017	Intergovernmental Agreements deferring Constitutional Mandate for new revenue sharing	Provisional system 'patchwork type' including the redistributive prorate from Ley 23548 applied on a reduced taxation base or 'tax bag'.

a question that is even more relevant if we consider the ability of the Federal Financial Regime, ineffective when it comes to revenue sharing. In other words, could the fiscal mechanism of revenue sharing on its own meet this objective?

7 Regional Policies Again, Fiscal and Non-Fiscal Ones[32]

The problems mentioned above reinforce the need to emphasise the importance of sound regional policies. Such regional policies must be understood

32 To have a deeper understanding of the importance of regional policies in a context of territorial imbalances, see Miguel A. Asensio, "Territorial Imbalances and Regional Disparities within a Federal Context: The Case of Argentina," in *Federalism, Regionalism and Territory*, ed. Stelio Mangiamelli (Milano: Giuffre, 2013), 93–105.

as a set of instruments going beyond only one fiscal instrument, in order to improve the reduction of asymmetries in the Argentine federal scheme's functioning. Regional-territorial policies are essential, not only in Argentina, but in any federal organisation. This is of particular importance when a concentration process[33] and economies of agglomeration – in other words, 'agglomeration effects' – have occurred over many decades,[34] based on mechanisms like the 'cumulative circular causation' which predominantly favours some portion of the territorial space of a country.[35]

In view of the above situation in which the Argentinian Federation finds itself, we will present in this section some relevant policies that could be implemented to support the overall effort of addressing the uneven development. We will allude to some relevant policies at the regional level, rather than those on the national level, because we consider the regional level as an environment close to the people, where policies can be tested and improved. Of course, it is possible to imagine new fiscal equalisation processes – or improve existing ones – on the national level. It is good and important to improve the fiscal regime and the revenue sharing mechanism, yet we consider that federal policies should be supported by regional policies. We strongly believe that mechanisms on the national level would profit from inputs, best-practices and knowledge gathered by regional authorities through locally implemented development mechanisms.

On the one hand, regarding fiscal measures, we propose two alternatives, which differ from the mere equalisation or revenue sharing with redistributive prorate. The first are the *budgetary spending and budgetary allocations,* which could acknowledge internal varieties from investment projects, public works, transfers or assignments. These allocations are aligned differently depending on the regions. The second, the so-called *tax expenditures* or *fiscal* stimulus, are aimed at promoting the development of the stagnant or less dynamic territorial areas. If these mechanisms have any limitations, they

33 Francois Perroux has reminded us that 'economic growth does not occur in all points and at the same moment, but the opposite', considering points as equivalent to industrial branches, sectors and regions; Perroux, *Nota sobre la noción de polo de crecimiento*.

34 Or more prolonged spaces of time, like in Europe, as is documented in Juán R. Cuadrado Roura and Tomás Mancha Navarro, "Política regional y de cohesión," in *Economía de la Unión Europea*, ed. Josep M. Jordán Galduf (Madrid: Thompson-Civitas, 2008), 465–514.

35 The theory of 'cumulative circular causation' was developed by Gunnar Myrdal to describe concentrated regional economic growth. See Gunnar Myrdal, *Teoría económica y regiones subdesarrolladas* (México: Fondo de Cultura Económica, 1957), with English Version as Gunnar Myrdal, *Economic Theory and Underdeveloped Regions* (London, Methuen Paperbacks, 1957).

are to be found in the relation between the revenue cost and the outcomes achieved.[36]

On the other hand, regarding *financial measures and credits*, we shall first highlight the fact that some have already been regulated by monetary authorities in order to support specific regions. In Argentina, the central bank established one monetary mechanism, which involved loans made by private and commercial banks and not by the central bank directly.[37] Those loans are however short term ones, while development needs to be planned on the long term. An alternative would be to implement financial measures and credits that would involve a variety of specific loans aiming at development. Such specific loans would need differential lapses for repayment in the long term, enabling more flexibility and avoiding the constraints imposed by the short term. They would also be characterised by differentiated rates of interest and frequently involve subsidies for the selected territorial areas. They would require the creation of specific institutions like development banks which are guided by such objectives. These institutions and corporations operate in national contexts, as well as in the international arena, the Brazilian *Banco Nacional do Desenvolvimento*, the World Bank and EUBI (European Bank for Investments) being outstanding examples. However, this kind of measures linked to the banking system, even if their objective is development, are not free from controversies. They need to be monitored and it has to be insured that political or private interests, among others, which could jeopardise the development of the targeted regions, do not bias them.

Furthermore, it is necessary to mention the importance of *regulations* for regional development policies. According to the definition given by the Economic Council of Canada 'regulation is defined as government imposition of rules and controls designed to direct, restrict or change the economic

36 The underlying culture that conditions the way economic and political problems are dealt with must also be taken into account when planning development policies. Regional problems are very difficult to deal with and overcoming them needs planning in the short term, middle term but most of all in the long term. For uneven development to eventually be overcome inside a Federation, the differences that can exist in the underlying problem-solving culture of the different federate states needs to be addressed. For an illustration of this argument, see Vittorio Marrama: *Política económica y países subdesarrollados*, (Madrid: Editorial Aguilar, 1961); Elena Rodríguez, "Commentary," *Desarrollo Económico*, Vol. I, N° 3 (October-December 1961): 217–219.

37 This mechanism had at its core the reduction of the Cash Deposit Ratio (CDR), which can be understood as an amount of minimum cash private banks must effectively possess. Being a percentage of the overall amount of money being lent, when the CDR is relaxed by the central bank, it allows the private banking system to lend more.

behaviour of individuals and business, and these rules and controls are supported by sanctions and penalties for non-compliance'.[38] In fact, regulations and controls, together with procedures, monitor the efficiency and *competitiveness* of such important activities as those of big business with extended territorial dimensions, public services, transport activities, natural monopolies and public utilities, and thus are bound to have a regional impact. Increased competitiveness of regions is perhaps one of the most important outcomes of policy decisions. Therefore, *regulation and deregulation* are not neutral in relation to the development of regions, provinces, districts and cities. If well designed they could improve and foster the economic and commercial position of such territorial areas, given a good institutional framework and practices of public bureaucracies and governance.[39]

Regarding the issue of competitiveness, a number of regional policies are linked to public and private capacity building and distribution. Such capacities need to be included in the concept of regional (or provincial) competitiveness. The regional imbalances could be overcome by improving the competitiveness of less advanced regions vis-à-vis the developed ones. In this way, it could be possible to foster a balanced federalism with regional balance across regional policy itself, and to combine fiscal and non-fiscal measures. Achieving this is not an easy task, as shown by continuous efforts in developed federal countries or the European Union.[40] But 'difficult' is not equivalent to 'impossible'. The Argentinean constitutional objective of achieving a more equal (or less unequal) territorial and provincial development in the sense of 'equivalence at the stage of development' must be included in such a broadened perspective.

As can be observed from the data mentioned above, Argentina has presented – since more than a century and a half – a very particular and unique case of demographic and economic concentration in the city of Buenos Aires and the surrounding area, which conditions and influences the unequal

38 John C. Strick, "Regulation and Deregulation," in *The Handbook of Canadian Public Administration*, ed. Christopher Dunn (Toronto: Oxford University Press, 2002), 263–278.

39 The creation of bodies or agencies to foster progress as institutional devices for territorial development has been mentioned as *third generation measures* for regional growth. See Bert A.H.J Helmsing, "Teorías del desarrollo industrial regional," *Revista eure,* Vol. XXV, N° 75 (September 1999): 5–39.

40 Here, we allude to the strategy based on the 'structural funds' and correlative measures, whose objective is the reduction of differences between the member States. For the case of Canada, see James P. Bickerton, "Regional Development in Canada: Fifty Years of Federal Policies and Agencies," *International Meeting on Economic and Institutional Trajectories in Federal Countries, March 30–31* (Santa Fe, Argentina: International Meeting on Economic and Institutional Trajectories in Federal Countries, 2016).

federation. This inequality does not only relate to development, but also to sociology, culture, political organisation, electoral weight and so on. This essential aspect has been addressed many times throughout history, including recently. As I have mentioned in previous works,[41] Buenos Aires was accused of 'macrocephaly' in the face of a nation with a huge and disproportionate head and a fragile and weak body. There is a quotation widely known among Argentinians, attributed to the French Minister of Culture André Malraux who visited Argentina in the 1960s, that says 'Buenos Aires is the Capital of an Empire that never existed'.[42] His compatriot, the famous French politician George Clemenceau had also eulogised the capital half a century earlier as he visited Argentina in 1910 for the country's centennial celebration and named Buenos Aires a 'great city', 'one like a great city of Europe'.[43] That was however in more prosperous times, when the level of personal income in the country corresponded to that of advanced nations.[44] Today the metropolitan city continues to be enormous, despite changed conditions and sluggish economic growth. Buenos Aires and its surroundings represent a weight of ten times the population of the next largest cities, Córdoba and Rosario. Attempts to limit the growth of the capital city by changing the location of the central administrative units (establishing a new capital for Argentina) have failed.[45]

Several of the regional policies mentioned above have been implemented with time: fiscal incentives,[46] national and provincial development

41 For further information, see Miguel A. Asensio, "Territorial Imbalances and Regional Disparities within a Federal Context: The Case of Argentina," in *Federalism, Regionalism and Territory*, ed. Stelio Mangiamelli (Milano: Giuffre, 2013); Miguel A. Asensio, *Local Government Finance in Argentina* (Washington: The World Bank, 2006); Miguel A. Asensio, "Subnational Tax Powers in Argentina," *Occasional Paper* N° 16 (Ottawa: Forum of Federations, 2015); Miguel A. Asensio, "Political Unity and Economic Diversity in the Argentine Federation," in *Revisiting Unity and Diversity in Federal Countries: Changing Concepts, Reform Proposals and New Institutional Realities*, eds. Alain G. Gagnon and Michael Burgess (Leiden and Boston: Brill-Nijhoff, 2018).

42 This expression is deeply rooted in Argentina's present memory. It inspired the title of book by Horacio Vázquez Rial, *Memoria de las ciudades. Buenos Aires 1880–1930. La capital de un imperio imaginario* (Madrid: Alianza Editorial, 1996).

43 For further information on Clemenceau and Argentina at the beginning of the 20th century, see Richard J. Walter, *Politics and Urban Growth in Buenos Aires: 1910–1942* (New York and Cambridge: Cambridge University Press, 1993).

44 For similar comments on this same issue, please consult the famous historian Félix Luna, who wrote *Buenos Aires y el país* (Buenos Aires: Sudamericana, 1978).

45 Such attempts already started in the 19th century, all without success.

46 The so called 'Leyes Nacionales de Promoción Industrial', during and after the 1950s targeted some specific territorial resources, such as the resources from the Province of Tierra del Fuego, in the extreme South of the country.

banks,[47] infrastructural projects, etc. Because those policies either have sometimes failed or had rather modest results, the Constitution reaffirmed the proposal of pursuing the objective of equalisation by means of the previously mentioned revenue sharing mechanism. Even an equalising task for the budget was considered, in its expenditure side, under the same philosophy.[48] In any case, however, the current outcomes do not look very strong and it seems that natural resources are the real force fuelling the changes such as those observed in the Patagonian evolution.[49]

Additionally, some studies have demonstrated existing divergences in provincial capacities, expressed in different indices showing a significant gap between the main geographical units and those that do less well when it comes to competitiveness. The global index for Santa Fe is in fact three times that of Chaco and the index for Buenos Aires is twice as high as that of Formosa.[50]

8 Concluding Remarks

In this chapter, we have tried to address the difficulties and challenges that emerged in Argentina when the country intended to meet the objectives that were stated in the modern constitutional text. These objectives, contained in the version approved in 1994, established the mechanism of revenue sharing as the axis of the fiscal federal system, and aimed at achieving equity and equivalent development in the Nation.[51] Given that these goals would be incorporated in the much delayed reform to the needed legislation, some considerations are revised as an enlarged analysis of previous contributions to the territorial divergences of the country. In the constitutional system of

47 On the national level, the 'Banco Nacional de Desarrollo', created in 1971 and closed in the 1990s under claims for inefficiency and corruption. In the Province of Santa Fe, the 'Banco Santafesino de Inversión y Desarrollo', also existed until the 1990s.

48 Art. 75, section 8, National Constitution.

49 On this topic also *Equality and Advantage in Emerging Federations and the Dilemma of Non-Renewable Natural Resources: the cases of the Solomon Islands and Trinidad and Tobago* by Nico Steytler (chapter 7).

50 See Alberto J. Figueras, "La competitividad de las economías provinciales," in *El desafío del territorio, Un análisis de las economías regionales*, eds. Alberto J. Figueras and José L. Arrufat (Córdoba: Asociación Cooperadora de la Facultad de Ciencias Económicas de la Universidad Nacional de Córdoba, 2007), 296.

51 The Federal Constitution established qualitative conditions not only for the legislation enacting the revenue sharing system as technical option, but also for the national budget, aiming at the two big tools interpreted as main instruments in the federal fiscal system of the country, for getting more balance in the regional development.

Argentina, in view of the clauses and Articles incorporated into the Supreme Law, 'the regulating laws must lay down (detail) its execution'. This is the task necessary to overcome the 'transitional legal patchwork' to achieve the constitutional objectives.

Considering the data for provincial *per capita* GDP, the differences among the highest level and the lowest is striking. As usual, the income of CABA exceeds that of the national average many times over, as well as that of the 'have not' jurisdictions. The information shown for the USA, bearing in mind that the USA also has problems of regional inequality, explains the calamitous imbalances registered for Argentina. Therefore, in order to reach a more balanced growth and development in Argentina, the federal fiscal system will need the help of other policies to yield more effective results in the process of achieving ambitious objectives such as 'equivalence of development'. The reduction of the horizontal economic imbalances or the accomplishment of a more even territorial development must result in expanded capacities induced by an increased competitiveness. In such a perspective, *systemic competitiveness* matters to attain more balanced growth and development.

Given the importance of a new redistribution scheme for revenue sharing, it would also be necessary to develop a new and improved package of coordinated policies, developed in time to achieve a more robust impact in terms of more even territorial development.

Finally, it seems necessary to adopt a combination of regional policy with the fiscal-federal policy presented for the revenue sharing system and its secondary distribution, taking into account redistributive coefficients in the functioning of the pro-rata mechanism.

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CHAPTER 9

The Swiss Tax System – Between Equality and Diversity

Peter Hänni

1 Introduction[1]

1.1 *The Tax System as a Measure of State Autonomy*

A central element of federal constitutional systems is their financial organisation. Anyone who wants to determine the degree of autonomy of the member states inevitably has to address the question of the financial autonomy of the various regional authorities.[2] In this chapter, we will first analyse the constitutional framework with regard to the margin left to the subnational units in Switzerland in the field of taxation. We will show that they hold a considerable degree of autonomy, which leads to a number of consequences, among them a remarkable disparity between the cantons in terms of individual charges for taxpayers. In the following step, we will examine the system that Switzerland has set up to alleviate these inequalities, i.e. the constitutional rights of individual taxpayers (illustrated with cases decided upon by the Swiss Federal Supreme Court) and other constitutional limits of cantonal tax autonomy on the one hand, and the system of fiscal equalisation on the other hand. While fiscal equalisation aims to correct the disparities on an institutional level, taxpayers can directly invoke the individual constitutional guarantees and principles provided in the constitution.

1.2 *Public Expenditure in Switzerland*

One of the most striking features of Swiss federalism is the competence of the cantons to levy income taxes and to set tax rates. This fact is reflected in the statistics on federal, cantonal and communal expenditure, amongst others. The allocation of expenditure in the three-tier Swiss system highlighted in Table 9.1

1 I would like to thank Géraldine Cattilaz (MLaw) for her precious support in the completion of this contribution; I particularly benefited from her excellent English language skills for the final version.

2 Peter Hänni, "Commentary on Art. 135 FedCst.," in *Basler Kommentar, Bundesverfassung*, eds. Bernhard Waldmann, Eva Maria Belser and Astrid Epiney (Basel: Helbing Lichtenhahn, 2015), marginal no. 1.

TABLE 9.1 Public expenditure in Switzerland 2016

Important figures according to the GFS Model

CHF mn		2012	2013	2014	2015	2016
General government	Revenue	203,941	208,762	210,864	219,115	220,177
	Expenditure	201,547	211,501	212,257	214,896	217,703
	Net lending/borrowing	**2,394**	**-2,739**	**-1,392**	**4,219**	**2,474**
	Tax-to-GDP ratio	27.0	27.1	26.9	27.6	27.8
	Debt ratio (Maastricht)[2]	30.6	30.3	30.6	30.0	29.0
Confederation[1]	Revenue	65,814	67,965	67,292	71,726	71,571
	Expenditure	64,737	67,039	67,294	69,138	70,600
	Net lending/borrowing	**1,077**	**926**	**-1**	**2,588**	**971**
	Tax-to-GDP ratio	9.5	9.6	9.4	9.9	9.8
	Debt ratio (Maastricht)[2]	16.8	16.4	15.8	15.0	14.0
Cantons	Revenue	82,728	84,303	85,762	89,190	90,320
	Expenditure	83,576	88,657	87,724	88,803	89,426
	Net lending/borrowing	**-848**	**-4,353**	**-1,962**	**387**	**894**
	Tax-to-GDP ratio	6.7	6.7	6.7	6.8	7.0
	Debt ratio (Maastricht)	7.3	7.5	8.3	8.4	8.4
Municipalities	Revenue	43,493	44,041	45,093	46,221	47,026
	Expenditure	44,238	45,407	46,714	46,631	47,160
	Net lending/borrowing	**-745**	**-1,367**	**-1,621**	**-410**	**-133**
	Tax-to-GDP ratio	4.1	4.1	4.1	4.2	4.3
	Debt ratio (Maastricht)[2]	6.5	6.6	6.7	6.8	6.7
Social security funds	Revenue	59,141	60,185	61,426	61,836	62,351
	Expenditure	56,230	58,131	59,233	60,181	61,609
	Net lending/borrowing	**2,911**	**2,055**	**2,192**	**1,654**	**742**
	Tax-to-GDP ratio	6.7	6.7	6.6	6.7	6.7
	Debt ratio (Maastricht)[2]	1.0	0.7	0.6	0.4	0.4

[1] incl. separate accounts
[2] according to the Maastricht definition

SOURCE: FEDERAL FINANCE ADMINISTRATION AND FEDERAL STATISTIC OFFICE

shows that in 2015, the Confederation spent roughly 26 % of the total public expenditure, the cantons 34 % and the municipalities[3] 17 %. The expenditure for social insurances (which lies in the hands of the Confederation) amounts to 23 %. Even the share of total public spending shows that the cantons have a strong financial position. Below, we will look at the constitutional reasons which enable the cantons to exercise such fiscal strength.

2 The Constitutional Framework

2.1 *The Power to Levy Direct Taxes: The Federal and the Cantonal Level*

The Swiss tax system is laid down in the Federal Constitution (FedCst). Given that the Swiss Constitution provides the so-called presumption of autonomy in favour of the cantons, any Federal competence needs a constitutional basis.[4] This is particularly true when we deal with the power to levy taxes. While value added taxes (VAT), special consumption taxes, the stamp duty, and withholding tax and customs duties are codified in the Federal Constitution as exclusive competences of the Federal state,[5] the situation is fundamentally different in the field of direct taxes. Indeed, the Confederation as well as the cantons hold the competence to levy direct taxes.[6] The relevant article in the FedCst reads as follows:

> Art. 128 FedCst.
> 1 The Confederation may levy a direct tax:
> a. of a maximum of 11.5 per cent on the income of private individuals;
> b. of a maximum of 8.5 per cent of the net profit of legal entities;
> c. […]

3 As there is no difference in Switzerland between municipalities and communes, both terms will be used in this chapter.

4 Cf. Art. 3 FedCst.: 'The Cantons are sovereign except to the extent that their sovereignty is limited by the Federal Constitution. They exercise all rights that are not vested in the Confederation'; see also, amongst others, for the context of taxation: Jean-François Aubert, "Commentary on Chapter 3 FedCst.," in *Petit Commentaire de la Constitution fédérale de la Confédération suisse*, eds. Jean-François Aubert and Pascal Mahon (Zurich, Basel, Geneva: Schulthess, 2003), marginal no. 2; Urs Behnisch, "Commentary on Art. 127 FedCst.," in *Basler Kommentar, Bundesverfassung*, eds. Bernhard Waldmann, Eva Maria Belser and Astrid Epiney (Basel: Helbing Lichtenhahn, 2015), marginal no. 4.

5 Cf. Art. 130-133 FedCst.

6 Giovanni Biaggini, *Kommentar zur Bundesverfassung der Schweizerischen Eidgenossenschaft* (Zurich: Orell Füssli, 2017), Art. 128 marginal no. 3.

2 The Confederation, in fixing the taxation rates, shall take account of the burden of direct taxation imposed by the Cantons and communes.
3 In relation to the tax on the income of private individuals, regular revisions shall be made to compensate for the consequences of an increased tax burden due to inflation.
4 The tax is assessed and collected by the Cantons. A minimum of 17 per cent of the gross revenue from taxation is allocated to the Cantons. This share may be reduced to 15 per cent if the consequences of financial equalisation so require.

The constitutional right of the Confederation to levy direct taxes on income or net income is not of a binding nature, either in principle or with regard to the exact extent of the taxes imposed.[7] However, the constitution sets binding limits as to the maximal burden imposed on tax payers by federal taxes.[8] These limits are set relatively low at 11.5 % for natural persons and 8.5 % for legal persons. The fact that the upper limits are enshrined in the Constitution in numerical terms means that the cantons' scope for tax planning is very effectively protected,[9] because if the Confederation wished to raise these upper limits, it would have to overcome the hurdle of a double majority of voters and cantons within the framework of the obligatory constitutional referendum – an almost insurmountable task. If these limits were not codified in the Federal Constitution, the federal legislator could be inclined to claim the tax substrate of the cantons – through a continuous increase in the direct federal tax – to such an extent that the financial autonomy of the cantons would ultimately be such in name only.[10]

These considerations (notwithstanding the constitutional provisions on tax harmonisation) show that the cantons are granted extensive autonomy in levying direct cantonal taxes.[11] This autonomy is further protected by Art. 129

7 Jean-François Aubert, "Commentary on Art. 128 FedCst.," in *Petit Commentaire de la Constitution fédérale de la Confédération suisse*, eds. Jean-François Aubert and Pascal Mahon (Zurich, Basel, Geneva: Schulthess, 2003), marginal no. 6; Biaggini, *Kommentar zur Bundesverfassung*, Art. 128 marginal no. 3.

8 Klaus A. Vallender and Ulrich Cavelti, "Commentary on Art. 128 FedCst.," in *Die schweizerische Bundesverfassung, St. Galler Kommentar*, eds. Bernhard Ehrenzeller et al. (Zurich, St. Gallen: Schulthess, 2014), Art. 128 marginal no. 2.

9 Biaggini, *Kommentar zur Bundesverfassung,* Art. 128 marginal no. 3; Madeleine Simonek, "Commentary on Art. 128 FedCst.," in *Basler Kommentar, Bundesverfassung*, eds. Bernhard Waldmann, Eva Maria Belser and Astrid Epiney (Basel: Helbing Lichtenhahn, 2015), marginal no. 7.

10 Hänni, "Commentary on Art. 135 FedCst.," marginal no. 1.

11 Biaggini, *Kommentar zur Bundesverfassung,* Art. 128 marginal no. 3; Hänni, "Commentary on Art. 135 FedCst.," marginal no. 1.

para. 2 FedCst., which explicitly excludes tax tariffs, tax rates and tax allowances from federal competence within the framework of tax harmonisation. Indirect protection of cantonal financial autonomy is also based on the constitutional regulation of value-added tax, because even in this area – which is reserved for the Confederation – the constitution contains, in comparison to international standards, a relatively low upper limit for the tax burden (cf. Art. 130 para. 1 FedCst.).

Due to the cantons' subsidiary general competence, *the tax competences of the cantons* can be described in simplified terms *as the sum of the competences not claimed by the Confederation in this area.*[12] In this regard, it is important to keep in mind the constitutional exclusion of cantonal and communal taxation codified in Art. 134 FedCst. This exclusion is made effective by federal legislation: insofar as federal legislation declares a taxable event to be subject to or exempt from VAT, special consumption taxes, stamp duty and withholding tax, the cantons may not burden such an event with similar taxes (Art. 134 FedCst.). Generally speaking, however, the cantons have considerable room for manoeuvre.[13] All cantons tax the income and assets of natural persons and levy taxes on profits and capital of legal entities. Inheritance and gift taxes, motor vehicle taxes, property gains and transfer taxes are also widespread. However, increased tax competition has recently led inheritance and gift taxes in particular to be questioned. In various cantons, these types of taxes have been abolished or their scope considerably restricted.

2.2 *Modalities for the Levying of Direct Federal Taxes*

Pursuant to para. 2 of Art. 128 FedCst., the Confederation must take into account the burden of the direct taxes of the cantons and municipalities when setting the tax rates.[14] However, this provision is more of an appeal to the federal legislator to keep a low profile. Legal consequences cannot be derived from it.[15]

The FedCst. outlines the need to adjust the burden to taxpayers caused by inflation as a result of the progressive structure of the tax rates, this is termed as cold progression and is outlined in Art. 128 FedCst.[16] If this compensation were not achieved and the tax rates for the income of natural persons remained

12 Markus Reich, *Steuerrecht* (Zurich: Schulthess, 2012), chapter 4 marginal no. 8.

13 Biaggini, *Kommentar zur Bundesverfassung,* Art. 128 marginal no. 3.

14 See also: Simonek, "Commentary on Art. 128 FedCst.," marginal no. 18; Vallender and Cavelti, "Commentary on Art. 128 FedCst.," marginal no. 25.

15 Aubert, "Commentary on Art. 128 FedCst.," marginal no. 11; Vallender and Cavelti, "Commentary on Art. 128 FedCst.," marginal no. 26.

16 Aubert, "Commentary on Art. 128 FedCst.," marginal no. 12; Vallender and Cavelti, "Commentary on Art. 128 FedCst.," marginal no. 18.

the same (cold progression), the tax burden would increase disproportionally compared to purchasing power.[17]

Direct federal tax is assessed (determination of the tax in individual cases by decree) and collected by the cantons (Art. 128 para. 4 sentence 1 FedCst.); enforcement is therefore the responsibility of the cantons. Accurate processing by the cantons is ensured by special federal supervisory and control powers provided for by law.[18]

17 % of the gross income from the direct federal tax is assigned to the cantons as a so-called cantonal share (Art. 128 para. 4 FedCst.). This cantonal share has historical roots, since the competence of the Confederation to levy direct federal taxes was only introduced in 1915 and against significant resistance from the cantons.[19] This historical context also explains the continuing temporal limits imposed on the Confederation's competence to levy direct federal taxes (Art. 196 para. 13 FedCst., the current period expired at the end of 2020 and needs to be renewed).[20]

2.3 *Municipal Taxes in the Swiss Federal State*

When comparing federal, cantonal and municipal budget expenditure (excluding social security contributions), we find that municipalities account for around 17 % of government expenditure (see Table 9.1 above). To cover these expenditures, municipalities have various kinds of revenues at their disposal, but municipal taxes in Switzerland are by far the main source of income for municipal spending.

The existence of municipalities is not mandatory under the Federal Constitution, nor is the way in which they are financed. The communes do not have any original taxing powers, but rather are granted such powers by the cantons.[21] Such a delegation of taxing powers to municipalities has taken place in all cantons, either at the (cantonal) constitutional level or (above all) through cantonal tax laws. The municipalities are therefore not authorised

17 Biaggini, *Kommentar zur Bundesverfassung,* Art. 128 marginal no. 8; Vallender and Cavelti, "Commentary on Art. 128 FedCst.," marginal no. 17.

18 See the provisions in the DBG (the federal law on direct federal taxes); see also: Biaggini, *Kommentar zur Bundesverfassung,* Art. 128 marginal no. 9; Simonek, "Commentary on Art. 128 FedCst.," marginal no. 23; Vallender and Cavelti, "Commentary on Art. 128 FedCst.," marginal no. 32.

19 Biaggini, *Kommentar zur Bundesverfassung,* Art. 128 marginal no. 10.

20 Vallender and Cavelti, "Commentary on Art. 128 FedCst.," marginal no. 34.

21 Urs Behnisch, "Commentary on Art. 129 FedCst.," in *Die schweizerische Bundesverfassung, St. Galler Kommentar*, eds. Bernhard Ehrenzeller et al. (Zurich, St. Gallen: Schulthess, 2014), marginal no. 6; Reich, *Steuerrecht*, chapter 4 marginal no. 11.

under federal constitutional law to levy taxes; this competence is regularly granted to them by cantonal law.[22] Nevertheless, the municipalities are bound by all federal law requirements without further specification.

3 Consequences for Individual Taxpayers: Large Differences in the Tax Burden

As explained above, in the three-tiered federal state (with a few exceptions), individual taxpayers have to pay taxes on their income and assets at three different levels: the federal, cantonal and municipal.[23] Since the Federal Constitution explicitly guarantees the canton the right to set tax rates,[24] there exists – in practice – considerable differences in the tax burden for the individual taxpayer, depending on the canton in which they are domiciled. Figures 9.1 and 9.2 show these differences in direct taxes at the cantonal level.

As explained above, due to the federalist structure of the Swiss tax systems, cantons and communes can have parallel competences to levy taxes. In addition to delegating taxing powers to communes, cantons can also delegate taxing powers to other entities, such as the church. Some churches therefore exercise their right to levy taxes, which is why this these graphs also take into account church taxes.[25]

4 Constitutional Measures in Favour of Equality

4.1 *Introduction*

As we have seen, the tax autonomy of the cantons (and the municipalities) leads to large disparities concerning the tax burden of individual taxpayers. In this context and to address the risk of incoherent and unjust situations for individuals as a consequence of their choice of canton or municipality in which to live, the federal constitutional law has set up a series of measures to protect taxpayers from extreme disparities. In this section, we will present and discuss these measures.

22 Reich, *Steuerrecht*, chapter 4 marginal nos. 11 et seq.

23 Chapter 3; see also: Behnisch, "Commentary on Art. 129 FedCst.," marginal no. 5.

24 See Art. 129 para. 2 of the Federal Constitution: 'Harmonisation shall extend to tax liability, the object of the tax and the tax period, procedural law and the law relating to tax offences. *Matters excluded from harmonisation shall include in particular tax scales, tax rates and tax allowances.*'

25 See for example Reich, *Steuerrecht*, chapter 4 marginal no. 11 et seq.

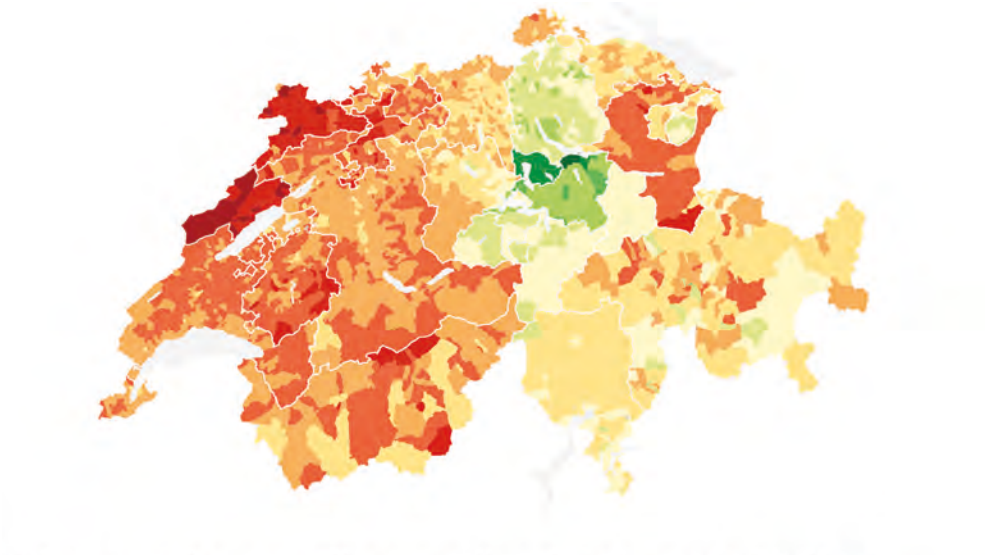

FIGURE 9.1 Tax burden for a single taxpayer without children (income: CHF 100'000) in 2015

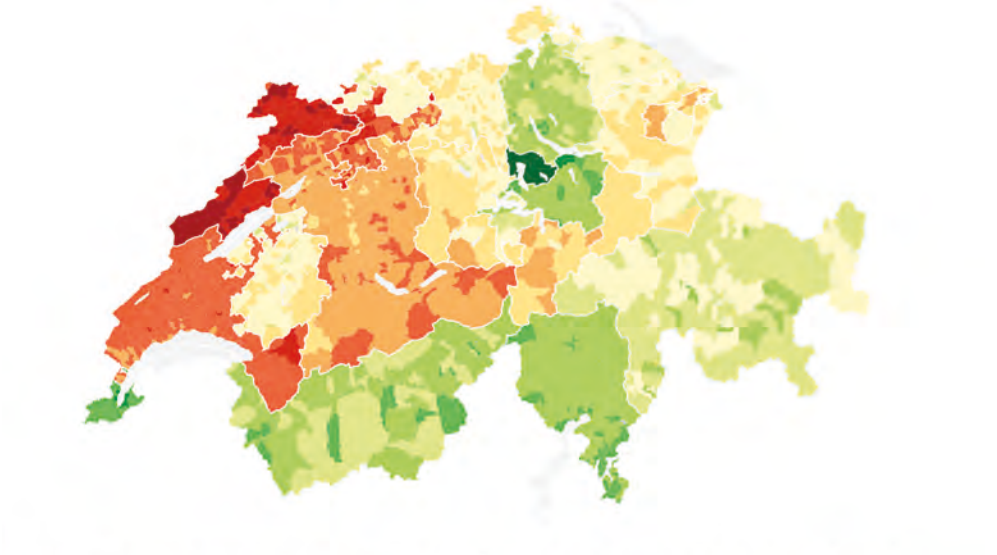

FIGURE 9.2 Tax burden for a married taxpayer with two children (income: CHF 100'000) in 2015

4.2 *Principles of Tax Law*

4.2.1 Meaning and Scope

The tax-law principles are, on the one hand, binding for the legislative authorities and represent guidelines for the content of tax-law enactments.[26] On the other hand, however, they are also of an individual-law nature, in that they confer (individual) constitutional rights (in the determination of public-law levies) to taxpayers.[27]

According to the Federal Constitution, these principles apply primarily to federal taxes and levies, but the case law of the Federal Supreme Court leaves no doubt that they are also applicable to cantonal taxes and levies, as they were developed by the Federal Supreme Court in the area of cantonal tax and levies legislation before they were anchored in the Federal Constitution.[28]

4.2.2 The Principles in Detail

(a) *The Principle of Legality*

The principle of legality in the context of tax law is enshrined in Art. 127 para. 1 FedCst. and requires that 'the basic features of the tax structure, in particular the group of taxpayers, the object of the tax and its assessment' must be regulated in the law itself. The validity of the principle of legality for taxes in general results from Art. 164 para. 1 lit. d FedCst.,[29] which stipulates that all important legislative provisions are to be enacted in the form of a federal law. These include, in particular, the basic provisions on the group of taxpayers and the object and assessment of levies. However, a certain attenuation of this principle is permissible in the case of causal levies.[30]

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26 Reich, *Steuerrecht*, chapter 4 marginal no. 122; Klaus A. Vallender and René Wiederkehr, "Commentary on Art. 127 FedCst.," in *Die schweizerische Bundesverfassung, St. Galler Kommentar*, eds. Bernhard Ehrenzeller et al. (Zurich, St. Gallen: Schulthess, 2014), marginal no. 4.

27 Instead of many: Biaggini, *Kommentar zur Bundesverfassung,* Art. 127 marginal no. 7; Reich, *Steuerrecht*, chapter 4 marginal no. 122.

28 Behnisch, "Commentary on Art. 127 FedCst.," marginal nos. 3 and 17; for a slightly different line of argument see: Jean-François Aubert, "Commentary on Art. 127 FedCst.," in *Petit Commentaire de la Constitution fédérale de la Confédération suisse*, eds. Jean-François Aubert and Pascal Mahon (Zurich, Basel, Geneva: Schulthess, 2003), marginal no. 4; *Kommentar zur Bundesverfassung,* Art. 127 marginal no. 8.

29 Aubert, "Commentary on Art. 127 FedCst.," marginal no. 5; Behnisch, "Commentary on Art. 127 FedCst.," marginal no. 3; Vallender and Wiederkehr, "Commentary on Art. 127 FedCst.," marginal no. 5.

30 The principle of legality was first developed in the American Revolution and became famous in the formulation of 'No taxation without representation'; see also: Behnisch, "Commentary on Art. 127 FedCst.," marginal no. 17; Biaggini, *Kommentar zur Bundesverfassung,* Art. 127 marginal no. 6.

The term 'law' refers to a law in the formal sense,[31] i.e. a general-abstract decree that was passed within the framework of the ordinary legislative procedure.[32] The law itself must therefore regulate the group of persons subject to tax or duty (subject of tax or duty), the object of the tax or duty (e.g. income, assets, turnover, consumption) and the assessment of taxes or duties (tax tariffs, tax rates, timing).[33] According to federal constitutional law, the executive branch must not legislate on these subject matters.[34]

In addition to these requirements, the fact that a law in the formal sense is necessary also leads to any tax law (be it federal, cantonal or communal) necessarily being subject to an optional or mandatory referendum.[35] One can easily imagine that any proposal by the government and/or the parliament for higher (or lower) taxes only passes in a popular vote if it is carefully designed and if it can be justified by an overriding public interest. It is not enough for powerful interest groups to support the project.

(b) *Principles of Taxation*

In addition to the principle of legality, the legislative authorities must comply with certain taxation principles when structuring taxes. Pursuant to Art. 127 para. 2 FedCst. 'in particular, the principles of generality and uniformity of taxation as well as the principle of taxation on the basis of economic capacity must be observed' – and this to the extent permitted by the nature of the tax.[36] The taxation principles, as explained above, represent enforceable constitutional individual rights, which the Federal Supreme Court had developed from the principle of equality of law in many years of jurisprudence prior to the entry into force of the now applicable FedCst. in 2000.[37]

(c) *The Principle of Universality*

The principle of universality of taxation is intended to prevent both unjustified privileges for and discrimination against individual taxpayers or certain

31 Instead of many: Aubert, "Commentary on Art. 127 FedCst.," marginal no. 5.

32 Instead of many: Pierre Tschannen, Ulrich Zimmerli and Markus Müller, *Allgemeines Verwaltungsrecht* (Bern: Stämpfli, 2014), chapter 13 marginal nos. 2 f.

33 Behnisch, "Commentary on Art. 127 FedCst.," marginal no. 6; Biaggini, *Kommentar zur Bundesverfassung,* Art. 127 marginal no. 6.

34 Biaggini, *Kommentar zur Bundesverfassung,* Art. 127 marginal no. 3; Vallender and Wiederkehr, "Commentary on Art. 127 FedCst.," marginal no. 7.

35 Vallender and Wiederkehr, "Commentary on Art. 127 FedCst.," marginal no. 9.

36 Biaggini, *Kommentar zur Bundesverfassung,* Art. 127 marginal no. 9.

37 Behnisch, "Commentary on Art. 127 FedCst.," marginal no. 18; Biaggini, *Kommentar zur Bundesverfassung,* Art. 127 marginal no. 7.

groups of persons.[38] However, the principle of universality only excludes exceptions for general taxes, but not for objectively justified special taxes (e.g. special excise duties).[39] Historically, tax privileges were widespread in Switzerland.[40]

(d) *The Principle of Uniformity*

The principle of uniformity of taxation ensures that identical or comparable situations are treated equally.[41]

(e) *The Principle of Taxation According to Economic Capacity*

The principle of taxation according to economic capacity is intended to take into account the fact that the same tax rate for all leads to proportionally unequal charges.[42] This makes progressive – i.e. disproportionately increasing – taxation of income taxes permissible, in complete contrast to digressively structured tax rates.[43] However, it must be borne in mind that the legislator has left considerable room for manoeuvre to the authorities applying the principle of taxation according to economic capacity, because this principle is a concept that requires a great deal of interpretation.

(f) *Prohibition of Inter-Cantonal Double Taxation*

Finally, another principle of taxation is the prohibition of inter-cantonal double taxation (Art. 127 para. 3 FedCst.). Such inter-cantonal double taxation would be possible in a federal state that grants the member states considerable tax powers for autonomous structuring (as is the case in Switzerland).[44] Double taxation occurs when the tax subject, tax object, tax period and tax

38 Reich, *Steuerrecht*, chapter 4 marginal no. 126; Vallender and Wiederkehr, "Commentary on Art. 127 FedCst.," marginal nos. 12 et seq.

39 Vallender and Wiederkehr, "Commentary on Art. 127 FedCst.," marginal no. 18.

40 For the whole paragraph see: Behnisch, "Commentary on Art. 127 FedCst.," marginal no. 24: Biaggini, *Kommentar zur Bundesverfassung,* Art. 127 marginal no. 10.

41 Aubert, "Commentary on Art. 127 FedCst.," marginal no. 9; Behnisch, "Commentary on Art. 127 FedCst.," marginal no. 27; Biaggini, *Kommentar zur Bundesverfassung,* Art. 127 marginal no. 11; Vallender and Wiederkehr, "Commentary on Art. 127 FedCst.," marginal no. 21.

42 Biaggini, *Kommentar zur Bundesverfassung,* Art. 127 marginal no. 12; Reich, *Steuerrecht*, chapter 4 marginal no. 139.

43 See the case law below.

44 Aubert, "Commentary on Art. 127 FedCst.," marginal no. 12; Behnisch, "Commentary on Art. 127 FedCst.," marginal no. 48; Biaggini, *Kommentar zur Bundesverfassung,* Art. 127 marginal no. 14; Reich, *Steuerrecht*, chapter 4 marginal no. 14.

type are identical.[45] In principle, only taxes are covered, but not so-called causal taxes (for example fees).[46] The double taxation prohibition constitutes an enforceable constitutional individual right as well.[47] At the same time, it obliges the Confederation to adopt the necessary measures.[48]

4.3 *Tax Harmonisation*

As mentioned above, due to the considerable autonomy of the cantons in the area of taxation, direct taxes are structured very differently according to the canton (or commune).[49] In order to place at least some aspects of taxation on a comparable footing, Article 129 para. 1 of the FedCst. confers on the Confederation the authority to lay down principles to harmonise direct taxes of the Confederation, the cantons and the communes. This competence is thus a mandate for so-called basic legislation, with the aim of harmonising rather than standardising.[50] The mandate covers only direct taxes, primarily income and wealth taxes or taxes on profits and capital.[51] Still, this formal tax harmonisation creates a basis for the comparability of the tax burden, which in the past was nearly impossible even in purely conceptual terms due to an almost incomprehensible diversity.

Art. 129 para. 2 FedCst. specifies the object of harmonisation. According to this provision, tax harmonisation extends 'to tax liability, subject matter and temporal assessment of taxes, procedural law and criminal tax law. Tax tariffs, tax rates and tax allowances in particular are exempt from harmonisation'.

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45 Behnisch, "Commentary on Art. 127 FedCst.," marginal no. 54; Biaggini, *Kommentar zur Bundesverfassung,* Art. 127 marginal no. 16; Vallender and Wiederkehr, "Commentary on Art. 127 FedCst.," marginal no. 71.

46 Behnisch, "Commentary on Art. 127 FedCst.," marginal no. 55; Biaggini, *Kommentar zur Bundesverfassung,* Art. 127 marginal no. 16.

47 Behnisch, "Commentary on Art. 127 FedCst.," marginal no. 52; Biaggini, *Kommentar zur Bundesverfassung,* Art. 127 marginal no. 14; Reich, *Steuerrecht*, chapter 4 marginal no. 17; Vallender and Wiederkehr, "Commentary on Art. 127 FedCst.," marginal no. 59.

48 Behnisch, "Commentary on Art. 127 FedCst.," marginal no. 53; Biaggini, *Kommentar zur Bundesverfassung,* Art. 127 marginal no. 15; Reich, *Steuerrecht*, chapter 4 marginal no. 17; Vallender and Wiederkehr, "Commentary on Art. 127 FedCst.," marginal no. 59.

49 Chapter 4; see also Jean-François Aubert, "Commentary on Art. 129 FedCst.," in *Petit Commentaire de la Constitution fédérale de la Confédération suisse*, eds. Jean-François Aubert and Pascal Mahon (Zurich, Basel, Geneva: Schulthess, 2003), marginal no. 2; Behnisch, "Commentary on Art. 129 FedCst.," marginal no. 7.

50 Biaggini, *Kommentar zur Bundesverfassung,* Art. 129 marginal no. 2; for a detailed discussion of different forms of harmonisation: Aubert, "Commentary on Art. 129 FedCst.," marginal nos. 2 et seq.

51 Behnisch, "Commentary on Art. 129 FedCst.," marginal no. 12; Biaggini, *Kommentar zur Bundesverfassung,* Art. 129 marginal no. 4.

This means that three fundamental areas remain excluded from harmonisation, which is why the autonomy of the cantons in (substantive) core areas of tax legislation is not affected by harmonisation measures and on the contrary even enjoys explicit constitutional protection.[52] However, there are reservations regarding compliance with the principles of taxation outlined above.

Finally, Art. 129 para. 3 FedCst. grants the Confederation a limited, non-binding legislative competence to enact regulations against unjustified tax advantages. However, the Confederation has not to date made use of the associated powers of intervention.[53]

In the following section, we will illustrate the individual rights of taxpayers explained above by analysing two recent cases decided by the Swiss Federal Supreme Court.

5 Case Law: The Constitutional Limits of Cantonal Tax Autonomy

5.1 *The Case of Regressive Tariffs in the Canton of Obwalden*

In a landmark decision that received much attention, the Federal Supreme Court dealt with the issue of regressive tax rates. These fundamental considerations were prompted by a new tax law of the Canton of Obwalden, which provided for the following tax burdens on income (Table 9.2, below).

TABLE 9.2 Provided tax burdens on income by the tax law of the Canton of Obwalden

Income	Simple tax	Tax burden in percentage
CHF	CHF	
5,000 –	0 –	0
10,000 –	45 –	0.45
20,000 –	183 –	0.915
30,000 –	385 –	1.2833
50,000 –	837 –	1.674

52 Biaggini, *Kommentar zur Bundesverfassung,* Art. 129 marginal no. 6; Madeleine Simonek, "Commentary on Art. 129 FedCst.," in *Basler Kommentar, Bundesverfassung*, eds. Bernhard Waldmann, Eva Maria Belser and Astrid Epiney (Basel: Helbing Lichtenhahn, 2015), marginal no. 11.

53 Biaggini, *Kommentar zur Bundesverfassung,* Art. 129 marginal no. 8.

TABLE 9.2 Provided tax burdens on income by the tax law of the Canton of Obwalden (*cont.*)

Income	Simple tax	Tax burden in percentage
100,000 –	2,002 –	2.002
200,000 –	4,352 –	2.176
300,000 –	6,702 –	2.234
400,000 –	8,342 –	2.0855
550,000 –	9,882 –	1.7967
1,000,000 –	16,882 –	1.6882
2,000,000 –	33,382 –	1.6691

The Federal Supreme Court ruled that this regressive tax burden does not conform to the constitution:

> 9.3 The new Obwalden tax rate is regressive only for taxable income of CHF 300,000 or more. Nevertheless, in some sections it causes burden differences that can no longer be described as insignificant. For example, the average tax burden on a taxable income of CHF 300,000 (2.2340) is 32.33 per cent higher than the average tax burden on an income of CHF 1,000,000 (1.6882). With a taxable income of CHF 200,000 (2.1760), the average tax rate is 28.89 per cent higher than with a taxable income of CHF 1,000,000. Even with an income of CHF 100,000 (2.0020), the average tax burden is still 18.58 per cent higher than with an income of CHF 1,000,000. In effect, the average tax burden for an income of CHF 1,000,000 (1.6882) is practically the same as for an income of CHF 51,200 (1.6887).
>
> The differences in tax burden shown do not stand up to the principle of equal taxation and the principle of taxation according to economic performance. These require that the burden of each income level within the system and in comparison with the other income levels be carried out according to the same rules, appear objectively justified and in a reasonable proportion [...]. The claim is central, especially since comparability in the vertical direction is made more difficult and equality of law and tax justice cannot be established in any other way.
>
> Moreover, the canton does not claim that the taxation according to the principle of efficiency requires a regressive tariff process. Rather, the reason for this tariff structure was other (fiscal or non-fiscal) motives, as can also be seen from the legal opinion of Prof. Reich on the question of

the constitutionality of the Obwalden income and wealth tax tariff of 18 April 2006 submitted by the cantonal Government [...]. The reference to the regressive tariff design merely compensating for the progression of the direct federal tax does not justify its unconstitutionality, especially as the cantonal tax must also comply with the principle of efficiency.

The contested income tax tariff therefore violates the principle of taxation according to economic capacity (Art. 127 para. 2 FedCst.) as well as the general principle of equality (Art. 8 para. 1 FedCst.) insofar as it provides for a lower average tax rate for higher incomes than for lower incomes.[54]

5.2 *Tax Amnesty in the Canton of Ticino*

5.2.1 The Factual Basis of the Case

On 25 November 2013, the Grand Council of the Canton of Ticino (Parliament) decided to introduce the following provisions into the transitional provisions of the Ticino tax law of 21 June 1994:

Art. 309e (new) Reduced rates in the case of self-disclosure without penalty

1 The rates applied to the recovery of uncollected tax in accordance with Article 236(1) in respect of exempt self-declarations submitted from 1 January of entry into force to 31 December of the year following entry into force shall be reduced by 70 per cent. On the elements already taxed, the reduction is applied to the increase in the marginal rate.
2 The reduction in rates shall be applied when the conditions of Article 258(3) (self-disclosure without penalty) are fulfilled.
3 Reduced rates are not allowed for the creation of untaxed hidden reserves.
4 The reduction in the rates referred to in paragraph 1 shall be permitted only in respect of deducted items which have not been declared to the tax authority by 31 December of the year preceding their entry into force.

Art. 314e (new) Reduced rates for self-disclosure without penalty.

1 The rates applied to the recovery of uncollected tax pursuant to Article 236 (1), in respect of exempt self-declarations submitted from 1 January of the entry into force to 31 December of the year following the entry into force, shall be reduced by 70 per cent.
2 The reduced rates are only applicable if the conditions of Article 265a (1) (self-disclosure without penalty) are met.

54 BGE 133 I 206, E. 9.3 (translation by the author of this chapter, emphasis added); see also: Vallender and Cavelti, "Commentary on Art. 128 FedCst.," marginal no. 13.

3 Reduced rates are not permitted in connection with the creation of untaxed hidden reserves.
4 The reduction in the rates referred to in paragraph 1 shall be permitted only in respect of stolen items which have not been declared to the tax authority by 31 December of the year preceding their entry into force.

The new law, which concerns natural persons (art. 309e LT) and legal persons (art. 314e LT), was published in the Cantonal Official Gazette on 29 November 2013 with an indication of the deadline for exercising the right of referendum. Accepted by the people of Ticino, after a successful referendum had been launched against it, the law was then published in the Official Bulletin of the laws and executive acts of the Canton of Ticino of 4 July 2014.

The plaintiffs addressed the Federal Supreme Court with regards to the new law, doing so for two separate reasons:

On the one hand, they claimed the violation of the principle of the primacy of federal law (Art. 49 FedCst.), questioning the compatibility of the contested provisions with those of the relevant federal law on tax harmonisation that was voted on by the Federal Assembly on 20 March 2008. They also challenged the exercise of powers by the Ticino legislature with regard to tariffs and tax rates (Art. 129 para. 2 FedCst.).

On the other hand, they claimed that the rules had an unlawful retroactive effect (Art. 5 para. 1 FedCst.) and that they were contrary to both the principle of legal equality (Art. 8 para. 1 FedCst.) and the principles of universality, uniformity and taxation according to economic capacity (Art. 127 para. 2 FedCst.), without there being sufficient grounds to justify such violations.

5.2.2 The Reasoning of the Court

With respect to the first argument invoked by the plaintiffs, the court shared their opinion that the cantonal law was inconsistent with the Federal law on Tax harmonisation and thus violated Art. 49 FedCst.

What is more interesting in the present context is the court's opinion on the second argument. The court found, in line with the plaintiffs' claims, that the cantonal law was also inconsistent with the general principles of tax law discussed above and that these are applicable not only to federal taxes but also to cantonal tax law. The judges dealt first with the meaning of these principles:

9.1 […] In the field of taxation, Art. 8 para. 1 of the Federal Constitution is implemented by the principles of universality and uniformity of taxation and by the principle of taxation according to economic

> power (Art. 127 para. 2 of the Federal Constitution [...]. These are tax principles which were originally derived from Article 4 of the Federal Constitution of 29 May 1874 and were then expressly incorporated into the Federal Constitution approved by the Swiss people and the cantons on 18 April 1999 [...].
>
> 9.2 The principle of general taxation requires that all persons and groups of persons be taxed in accordance with the same legal provision. It prohibits the exemption of certain persons or groups of persons from tax liability without objective reasons, since the financial burden on the Community of public tasks of a general nature must be borne by all citizens [...].
>
> The principles of uniformity of taxation and of taxation according to economic strength require taxpayers in the same economic situation to bear a similar tax burden according to their ability to pay; in different circumstances, the tax burden must also take this into account. At the same time, the tax burden must be proportionate to the economic substrate available to the individual who, taking into account their personal situation and in proportion to their resources, has to contribute to covering public expenditure [...]
>
> 9.3 Art. 127 FedCst. is not contained in the chapter on fundamental rights (Art. 7 et seq. FedCst.), but in the chapter on the federal financial system (Art. 126 et seq. FedCst.). This rule therefore applies primarily to taxes levied by the Confederation. As already mentioned, however, the taxation principles contained therein are conceived and serve to concretise the principle of equal treatment (Art. 8 FedCst.), which as such permeates the entire Swiss legal system [...]. The cantonal legislature is therefore also bound by these provisions and must take them into account when regulating its tax system [...].[55]

The court, in a second step, applied these principles on the present case and concluded that the Ticino tax law was also inconsistent in this regard:

> 9.4 In the present case, Articles 309e and 314e of the Income Tax Act aim to reduce by 70 % the tax recovery rates for all exempt voluntary declarations made during a period of two years following their entry into force. These are clear violations of Articles 8(1) and 127(2) of the Constitution.

55 BGE 141 I 78, Consid. 9.1-9.3 (translation by the author of this chapter).

Articles 309e and 314e of the Income Tax Act exempt self-incriminating persons from paying 70 % of the taxes originally due and are therefore contrary to the principle of the generality of taxation, as they provide for a different and much more favourable treatment for those who have deducted taxes from the tax authorities than for those who, as taxpayers, do not belong to this category of persons.

At the same time, they are contrary to the principles of uniformity of taxation and taxation according to economic strength, according to which taxpayers in the same economic situation have to bear a similar tax burden depending on their ability to pay, and different circumstances have to be regarded differently from the point of view of the tax burden (previous consideration 9.2 with reference to case-law and doctrine).

Taxpayers who have correctly declared their taxable amounts and paid 100 % of the amount due are treated differently to taxpayers who have not declared anything in the same case and who only declare their amounts in their self-declaration. The rules in question lead not only to a very different treatment of taxpayers with exactly the same economic power (violation of the so-called horizontal tax justice), but also to an unjustified unequal treatment of taxpayers with different economic power (violation of the so-called vertical tax justice). As the applications for interim measures have repeatedly pointed out, the application of Articles 309e and 314e LT also has consequences in this respect and, in particular, it cannot be excluded that – in view of the reduction introduced – taxpayers who have correctly declared their taxable amounts may have to pay even higher amounts compared to taxpayers who have failed to exist for higher taxable amounts and only do so when making their voluntary declaration.[56]

6 Strengthening the Weak: Finance and Burden Equalisation

6.1 *Unequal Financial Strength and Unequal Burdens as a Starting Point*

One of the downsides of the cantons' financial autonomy is that the financially weak cantons have to offset their unequal economic starting conditions with higher taxes, which in turn reduces their attractiveness for companies and

56 BGE 141 I 78, Consid. 9.4. (translation by the author of this chapter).

private individuals. On the other hand, the financially strong cantons become even more attractive, which allows them to further reduce their taxes.

A second element that affects the financial (and thus the tax) starting position of the different cantons is the unequal burdens that the different cantons have to bear:

These include, on the one hand, the geographical and topographical inequalities that lead to excessive burdens in certain cantons due to their location. Regions with an excessive burden in this sense are characterised by an above-average proportion of mountainous areas, dispersed settlement structures and low population density.

On the other hand, a specific population structure of a canton or its central functions can have a particular impact. This refers in particular to the core cities with large agglomerations (e.g. Zurich). These so-called sociodemographic specialties lead to disproportionate burdens for the affected cantons, while some other cantons benefit from their location in proximity to the affected cantons without carrying parts of the burden themselves (free-rider problem).

6.2 *Equalisation Mechanisms as a Means to Counter Those Inequalities*

This background led to the creation of Art. 135 FedCst. within the framework of the so-called New Financial Equalisation (NFA). The NFA formed an integral part of a very ambitious project to strengthen federalism and to unbundle tasks between the Confederation and the cantons.[57] In its message to Parliament, the Federal Council described financial equalisation as follows:

> Financial equalisation in the narrower sense between the cantons now distinguishes between equalisation of resources and equalisation of burdens. This makes the balance more targeted and effective. The balance between the resource-rich and the resource-weak cantons will be extended compared to the current system. In addition to the resource-rich cantons, the Confederation is now also contributing to their financing. It ensures that all cantons have sufficient resources. The current system, which is opaque and complicated – and transparent for only a few specialists – will be replaced by a transparent and comprehensible financial equilibrium. The federal parliament will be given the opportunity to set the parameters for equalisation of resources. This will make financial equalisation,

57 Biaggini, *Kommentar zur Bundesverfassung,* Art. 135 marginal no. 5; René Wiederkehr and August Mächler, "Commentary on Art. 135 FedCst.," in *Die schweizerische Bundesverfassung, St. Galler Kommentar*, eds. Bernhard Ehrenzeller et al. (Zurich, St. Gallen: Schulthess, 2014), marginal nos. 5 f.

> which is intended to reduce differences in the financial performance of the cantons, politically controllable. The resource index, which measures the financial performance of the cantons, cannot be manipulated in its concept and, in contrast to the current financial strength index, deliberately refrains from taking burden elements into account. In future, for example, the cantonal tax burden will no longer be used as a criterion for measuring the financial performance of a canton, but will instead be limited to the tax or resource potential of a canton that can be exhausted from a fiscal point of view. In this way, misguided incentives and conflicting objectives are to be avoided in future. The Confederation is to compensate the cantons for excessive and uninfluenceable burdens arising from geographical and topographical conditions or their specific population structure by means of a corresponding equalisation of burdens. This compensation will also be determined to its extent by the federal parliament and is therefore politically controllable.[58]

In 2004, vertical fiscal equalisation was put on a new constitutional basis, supplemented by horizontal equalisation between the cantons. The constitutional provision reads as follows:

> Art. 135 FedCst. Equalisation of financial resources and burdens
>
> 1 The Confederation shall issue regulations on the equitable equalisation of financial resources and burdens between the Confederation and the Cantons as well as among the Cantons.
> 2 The equalisation of financial resources and burdens is intended in particular to:
> a. reduce the differences in financial capacity among the Cantons;
> b. guarantee the Cantons a minimum level of financial resources;
> c. compensate for excessive financial burdens on individual Cantons due to geo-topographical or socio-demographic factors;
> d. encourage inter-cantonal cooperation on burden equalisation;
> e. maintain the tax competitiveness of the Cantons by national and international comparison.
> 3 The funds for the equalisation of financial resources shall be provided by those Cantons with a higher level of resources and by the Confederation. The payments made by those Cantons with a higher

58 Message of the Federal Council, BBl 2002, 2294 et seq. (translation by the author of this chapter); see also Hänni, "Commentary on Art. 135 FedCst.," marginal nos. 88 et seq.

level of resources shall amount to a minimum of two thirds and a maximum of 80 per cent of the payments made by the Confederation.

6.3 *The Provision* (*Regulating Equalisation Mechanisms*) *in Detail*

6.3.1 Legislative Mandate (para. 1)

Art. 135 para. 1 FedCst. mandates the Confederation to issue regulations on appropriate financial resources and burden equalisation between the Confederation and the cantons and between the cantons. Financial equalisation (in a narrow sense) means 'all financial transfers which serve the redistribution of resources between the cantons and the equalisation of excessive structural burdens';[59] whereas financial equalisation in the broader sense also includes transfers between the Confederation and the cantons which are related to the distribution of tasks and revenues.[60] The notion of load balancing was only introduced during parliamentary deliberations and is intended to distinguish the second branch of the financial equalisation mechanism, namely the equalisation of burdens, from the first branch of the financial equalisation mechanism, the equalisation of financial resources, a distinction which is also reflected in the terminology of the federal law on the financial and resource equalisation that resulted from the legislative mandate codified in Art. 135 para. 1 FedCst.[61]

A distinction must be made between vertical and horizontal financial equalisation. Transfer payments by the Confederation to the cantons are referred to as vertical equalisation, whereas those between the cantons fall under horizontal equalisation.[62] This is expressed in the wording of paragraph 1 'between the Confederation and the cantons' or 'between the cantons'. The legislative competence of the Confederation encompasses both forms.[63] However, the constitutional provision does not affect intra-cantonal finance and burden sharing.[64] Nevertheless, the federal state's equalisation has not remained

59 Message of the Federal Council, BBl 2002 2543 (translation by the author of this chapter).

60 Biaggini, *Kommentar zur Bundesverfassung,* Art. 135 marginal no. 7; Hänni, "Commentary on Art. 135 FedCst.," marginal no. 13.

61 Hänni, "Commentary on Art. 135 FedCst.," marginal no. 13.

62 Jean-François Aubert, "Commentary on Art. 135 FedCst.," in *Petit Commentaire de la Constitution fédérale de la Confédération suisse*, eds. Jean-François Aubert and Pascal Mahon (Zurich, Basel, Geneva: Schulthess, 2003), marginal no. 4; Biaggini, *Kommentar zur Bundesverfassung*, Art. 135 marginal no. 8; Hänni, "Commentary on Art. 135 FedCst.," marginal no. 14; Wiederkehr and Mächler, "Commentary on Art. 135 FedCst.," marginal no. 13.

63 Biaggini, *Kommentar zur Bundesverfassung,* Art. 135 marginal no. 8.

64 Biaggini, *Kommentar zur Bundesverfassung,* Art. 135 marginal no. 8; Hänni, "Commentary on Art. 135 FedCst.," marginal no. 14.

without consequences for the inner-cantonal level.[65] Indeed, the cantons have almost entirely reorganised their inner-cantonal equalisation systems between the communes at the same time as (or shortly after) the entry into force of the NFA.[66] This development is worth mentioning, since the federal government must take into account the possible effects on the municipalities when carrying out its legislative mandate according to Art. 50 para. 2 of the Federal Constitution.[67]

Concerning the scope of the federal competence, Art. 135 para. 1 FedCst. obliges the Confederation to issue regulations on appropriate vertical and horizontal financial and burden balancing. The new constitutional provision drawn up within the framework of the NFA thus differs significantly from its predecessor, which only explicitly mentioned a federal power to promote horizontal equalisation. With regard to vertical financial equalisation, the federal competence is exclusive; the cantons therefore would have no authority to oblige the Confederation to make transfer payments, even if the federal legislature failed to act. As far as horizontal financial equalisation is concerned, there is scope for cantonal regulations insofar as the implementing legislation of the Confederation does not contain conclusive provisions. However, the remaining cantonal regulations are likely to be of a more theoretical nature, with cantonal regulations in the area of horizontal inter-cantonal burden sharing most likely to be considered.[68]

The addressee of the constitutional obligation to enact regulations is the Confederation; the cantons are not addressed.[69] The constitutional provision does not prescribe any specific method for the legislator to achieve the objectives of financial and burden equalisation.[70] This means that the legislator has considerable room for manoeuvre. However, there can be no doubt that fiscal equalisation should (henceforth) be clearly distinguished from federal subsidies.[71] The constitutional text does not explicitly exclude this link, but the declarations of the different organs involved in the elaboration of the NFA are

65 Biaggini, *Kommentar zur Bundesverfassung,* Art. 135 marginal no. 8.

66 Hänni, "Commentary on Art. 135 FedCst.," marginal no. 14.

67 See also: Biaggini, *Kommentar zur Bundesverfassung,* Art. 135 marginal no. 8.

68 For the whole paragraph see: Biaggini, *Kommentar zur Bundesverfassung,* Art. 135 marginal no. 9; Hänni, "Commentary on Art. 135 FedCst.," marginal no. 15.

69 Biaggini, *Kommentar zur Bundesverfassung,* Art. 135 marginal no. 10; Hänni, "Commentary on Art. 135 FedCst.," marginal no. 16.

70 Biaggini, *Kommentar zur Bundesverfassung,* Art. 135 marginal no. 10; Hänni, "Commentary on Art. 135 FedCst.," marginal no. 16.

71 Biaggini, *Kommentar zur Bundesverfassung,* Art. 135 marginal no. 10; Hänni, "Commentary on Art. 135 FedCst.," marginal no. 16.

clear in this respect,[72] as one of the main objectives of the entire NFA reform project is to decouple federal subsidies from fiscal equalisation. Federal legislation has, moreover, been based on this implicit requirement, in that both the means for equalising resources and burdens are directed without any commitment to a specific purpose.[73]

Substantive limits are set to the Confederation in the fulfilment of its legislative mandate by the principle of proportionality: the equalisation of finances and burdens should be 'appropriate'. This indeterminate legal concept is intended to serve the legislature as a guideline for the implementation of the constitutional mandate: on the one hand, a merely symbolic legislation without recognisable and noticeable effects would not be compatible with the constitutional provision (lower minimum). On the other hand, the limits of solidarity must not be overstretched. What is needed are political decisions with a sense of proportion which, in particular, do not call into question the willingness of the resource-rich cantons to perform within the framework of horizontal financial equalisation. Further substantive provisions on the structure of financial equalisation and burden sharing are contained in paragraphs 2 and 3 of Art. 135 of the Federal Constitution.[74]

The Confederation has fulfilled its legislative mandate by enacting the Federal Law on the Equalisation of Finances and Burdens (FiLaG). The funds to be made available by the Confederation and (resource-rich) cantons for the equalisation of resources are determined by the Federal Assembly in a federal decree requiring a referendum for a period of four years (Art. 5 para. 1 FiLaG). The same applies to the basic contribution for geographical-topographical and sociodemographic burden sharing (Art. 9 para. 1 FiLaG). In the interest of transparency, both basic contributions are determined separately. Furthermore, the law expressly states that the funds are to be allocated to the cantons without earmarking.[75] The gradation of the federal subsidies on the basis of the so-called financial strength index, which was practised in the former financial equalisation system, became obsolete with the implementation of the legislative mandate of Art. 135 para. 1 of the Federal Constitution;[76] this also applies to the cantons' shares of federal revenue and of the Swiss National

72 Message of the Federal Council, BBl 2002 2291 et seq.

73 Hänni, "Commentary on Art. 135 FedCst.," marginal no. 16.

74 For this paragraph, see: Biaggini, *Kommentar zur Bundesverfassung,* Art. 135 marginal no. 11; Hänni, "Commentary on Art. 135 FedCst.," marginal no. 17.

75 Art. 6 para. 2 FiLaG and Art. 9 para. 4 FiLaG.

76 Biaggini, *Kommentar zur Bundesverfassung,* Art. 135 marginal no. 10.

Bank's profits. In a broader sense, the latter two federal transfers nevertheless have a certain compensatory effect.[77]

6.3.2 Objectives (para. 2)

Paragraph 2 lists five objectives of financial and burden equalisation, which have the effect of limiting the scope of the legislator.[78] In fact, it is hardly conceivable that the legislator could strive for further targets in addition to these relatively broad objectives, although the constitutional text would suggest this possibility by using the addition 'in particular'.[79]

Letter a deals with the first aim of financial and burden sharing, which is to reduce the differences in financial performance between the cantons. The aim is to reduce differences, but not to achieve full equality.[80] When determining financial performance, the so-called resource potential is the decisive criterion.[81] Resource potential is to be understood as the value of the resources of the canton concerned that can be exhausted from a fiscal point of view and not the actual tax revenues or the tax burdens.[82] The concrete determination of the resource potential is based on the taxable income and assets of natural persons and the taxable profits of legal entities.[83] The resource potential is determined annually by the Federal Council together with the cantons for each canton per capita of its inhabitants; the figures for the last three available years are decisive (Art. 3 para. 4 FiLaG). Art. 3 para. 5 FiLaG stipulates that cantons whose resource potential per capita is above the Swiss average (=100) are considered to have a strong resource base, while cantons whose potential per capita is below the average are considered to have a weak resource base.

These seemingly very technical regulations for the calculation of resource potentials have a significant influence on the question of the financing of

77 For this paragraph, see: Biaggini, *Kommentar zur Bundesverfassung,* Art. 135 marginal no. 12; Hänni, "Commentary on Art. 135 FedCst.," marginal no. 18.

78 Hänni, "Commentary on Art. 135 FedCst.," marginal no. 19.

79 Hänni, "Commentary on Art. 135 FedCst.," marginal no. 20.

80 Biaggini, *Kommentar zur Bundesverfassung,* Art. 135 marginal no. 14; Hänni, "Commentary on Art. 135 FedCst.," marginal no. 20; Wiederkehr and Mächler, "Commentary on Art. 135 FedCst.," marginal no. 22.

81 Art. 3 et seq. FiLaG; see also: Biaggini, *Kommentar zur Bundesverfassung,* Art. 135 marginal no. 14; Hänni, "Commentary on Art. 135 FedCst.," marginal no. 20.

82 Art. 3 para. 1 FiLaG; see also: Biaggini, *Kommentar zur Bundesverfassung,* Art. 135 marginal no. 14; Hänni, "Commentary on Art. 135 FedCst.," marginal no. 20.

83 Art. 3 et seq. FiLaG; Art. 1 FiLaV; see also: Biaggini, *Kommentar zur Bundesverfassung,* Art. 135 marginal no. 14; Hänni, "Commentary on Art. 135 FedCst.," marginal no. 20; Wiederkehr and Mächler, "Commentary on Art. 135 FedCst.," marginal no. 22.

resource compensation and on the determination of the recipient cantons: Art. 135 para. 3 FedCst. makes it clear that resource-rich cantons and the Confederation must provide the resources for resource compensation in favour of resource-weak cantons.[84] As explained above, the amount to be spent on resource equalisation is determined every four years by the Federal Assembly in a federal decree subject to mandatory referendum.

Letter b provides a further aim of financial and burden sharing i.e. to guarantee the cantons' minimum financial resources.[85] This is intended to enable the cantons to fulfil their tasks independently and at the same time to have a certain degree of freedom of choice.[86] Autonomy and personal responsibility become empty promises when a canton has to continuously fight for financial survival for structural reasons, without any prospect of improvement.[87] The open concept of 'minimal financial resources' must be concretised by the legislator and is closely related to *letter a*, where the reduction of differences in financial performance is addressed. Even the weakest cantons should have at their disposal a minimum of financial resources through resource equalisation.[88] The Federal Assembly has set this lower minimum at 85 % of the Swiss average in financial resources (Art. 6 para. 3 FiLaG). This requirement is met if the canton's own relevant resources, together with the services it receives from the resource equalisation scheme, reach the desired minimum.[89] At the same time, the equalisation of resources may not change the ranking of the cantons, which means that there is also an (indirect) upper limit of equalisation of resources.[90] The distribution of resources among the resource-weak cantons is carried out by the Federal Council and is redefined annually, with the particularly resource-weak cantons receiving

84 Art. 4 para. 1 FiLaG and Art. 6 para. 1 FiLaG; see also: Biaggini, *Kommentar zur Bundesverfassung,* Art. 135 marginal no. 14; Hänni, "Commentary on Art. 135 FedCst.," marginal no. 21.

85 The entire system was recently evaluated and is currently being revised based on experience gained. The aim of the planned adjustment is to relieve the financial burden on the strong cantons, but the total amount of funds invested in financial equalisation should remain the same. See: https://www.efv.admin.ch/efv/de/home/aktuell/nsb-news_list.msg-id-72354.html, last updated on 28 september 2018, accessed on 20 november 2018.

86 Hänni, "Commentary on Art. 135 FedCst.," marginal no. 22.

87 Hänni, "Commentary on Art. 135 FedCst.," marginal no. 22.

88 Biaggini, *Kommentar zur Bundesverfassung,* Art. 135 marginal no. 15; Hänni, "Commentary on Art. 135 FedCst.," marginal no. 22.

89 Art. 6 para. 3 FiLaG; see also: Hänni, "Commentary on Art. 135 FedCst.," marginal no. 22.

90 Art. 6 para. 1 sentence 3 FiLaG; see also: Biaggini, *Kommentar zur Bundesverfassung,* Art. 135 marginal no. 15; Hänni, "Commentary on Art. 135 FedCst.," marginal no. 22.

above-average benefits in the sense of the objective set out in Art. 135 para. 2 lit. b FedCst.

The so-called geographic-topographic and sociodemographic burden sharing is provided in *letter c.* Indeed, in addition to resource equalisation and strictly separate from it, the NFA reform project created a second equalisation vessel aimed at granting cantons compensation payments for excessive burdens. This second instrument of financial equalisation consists of a burden sharing scheme financed by the Confederation.[91] The compensation is not complete, but only partial and does take into account special burdens, most of which however cannot be changed.[92]

On the one hand, cantons under Art. 7 FiLaG are entitled to burden sharing if they are overburdened by their geographical and topographical situation. Indications for such excessive burdens are, in particular, an above-average proportion of high-lying settlement and productive areas as well as disperse settlement structures and a low population density (Art. 7 para. 2 FiLaG). The excessive burden results from the altitude (e.g. higher costs for winter road clearance, maintenance costs for infrastructure, etc.), from burdens resulting from the steepness of the terrain (forest management, avalanche barriers, etc.), and from the sparsity of the population (e.g. compulsory schooling, sewage supply, health care).[93] The special burdens of these three categories can be measured by sub-indicators such as the median altitude of the productive area, the proportion of inhabitants with a residential altitude of over 800 metres above sea level or the proportion of inhabitants in settlements with less than 200 inhabitants, which can be used to make plausible statements about the extent of these special burdens.[94]

On the other hand, cantons that are exposed to particular burdens due to socio-demographic conditions are entitled to burden sharing.[95] These sociodemographic burdens are special burdens that can be traced back to the population structure of a canton or to the importance of a certain canton due to its function as a socio-economic and infrastructural centre.[96]

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91 Art. 7 et seq. FiLaG; see also: Hänni, "Commentary on Art. 135 FedCst.," marginal no. 23; Wiederkehr and Mächler, "Commentary on Art. 135 FedCst.," marginal no. 25.

92 Biaggini, *Kommentar zur Bundesverfassung,* Art. 135 marginal no. 16; Hänni, "Commentary on Art. 135 FedCst.," marginal no. 23.

93 Hänni, "Commentary on Art. 135 FedCst.," marginal no. 24.

94 Art. 29 et seq. FiLaV (the FiLaV being the decree concretising certain provisions of the FiLaG).

95 Art. 7 et seq. FiLaG.

96 Biaggini, *Kommentar zur Bundesverfassung,* Art. 135 marginal no. 16; Hänni, "Commentary on Art. 135 FedCst.," marginal no. 25.

Such a situation, for which the abbreviation A-city problem is often used, is characterised by the fact that the core cities typically have an above-average proportion of older and poor people, single people, single parents, dependent people, trainees, unemployed people, outsiders and foreigners in their population structure.[97] What these A-groups have in common is that they cause relatively high burdens while at the same time generating little tax revenue. Not to be equated with sociodemographic burdens are the external effects associated with centre services, so-called spillovers.[98] In this context, spillovers are negative effects that occur when services provided by a canton or a city can also be claimed by residents of other local authorities without the latter being (financially) responsible for the services consumed (by their residents).[99] Centre services with spillover effects can be found, for example, in the areas of transport, health and culture. Such centre services are to be compensated by the inter-cantonal equalisation of burdens.[100]

As in the case of equalisation of resources, the Federal Assembly, in a federal decree subject to a referendum, determines a basic contribution for each of the four years for geographical-topographic and sociodemographic equalisation of burdens (Art. 9 para. 1 FiLaG). It is also obliged to take into account the results of the effectiveness report pursuant to Art. 18 FiLaG. The funds allocated to the cantons under this heading are not earmarked (Art. 9 para. 4 FiLaG). Unlike resource equalisation, burden equalisation is financed entirely by the Confederation.[101]

A further objective of financial and burden sharing is to use inter-cantonal burden sharing to compensate for services received by residents of one canton in another canton without paying the full cost (*letter d*). This provision is intended to prevent spillover effects and free-riding behaviour.[102] It should lead to public services being provided to an optimum extent and to a fair distribution of burdens based on actual usufruct.[103] Closely linked to the first

97 Biaggini, *Kommentar zur Bundesverfassung,* Art. 135 marginal no. 16; Hänni, "Commentary on Art. 135 FedCst.," marginal no. 25.

98 Hänni, "Commentary on Art. 135 FedCst.," marginal no. 25.

99 Hänni, "Commentary on Art. 135 FedCst.," marginal no. 25; Wiederkehr and Mächler, "Commentary on Art. 135 FedCst.," marginal no. 11.

100 Hänni, "Commentary on Art. 135 FedCst.," marginal no. 25; Wiederkehr and Mächler, "Commentary on Art. 135 FedCst.," marginal no. 11.

101 Biaggini, *Kommentar zur Bundesverfassung,* Art. 135 marginal no. 16.

102 Hänni, "Commentary on Art. 135 FedCst.," marginal no. 27.

103 Hänni, "Commentary on Art. 135 FedCst.," marginal no. 27.

objective is the intended improvement of efficiency due to the exploitation of economies of scale.[104] In this way, a significant advantage of an area reform is exploited without having to accept its disadvantages. In addition, intensified inter-cantonal cooperation should have a preventive effect against excessive centralisation.[105] Indeed, cross-cantonal tasks can be performed in a meaningful way without being transferred to the federal level. A typical example is the financial compensation of so-called 'centre services' (e.g. in the areas of transport, health and culture).[106]

The classic instrument for achieving these objectives is the inter-cantonal treaty (Art. 48 FedCst.).[107] The federal government's financial resource and burden equalisation must be structured and the legislative competence according to para. 1 exercised in such a way that inter-cantonal cooperation is promoted with regards to burden equalisation.[108] Art. 135 FedCst. does not comment on the instruments. At the legislative level, the Confederation obliges the cantons to draw up an inter-cantonal framework agreement in which the principles and certain modalities of inter-cantonal cooperation are laid down (Art. 13 FiLaG). This inter-cantonal framework agreement will then form the basis for the negotiation of specific cooperation agreements, which will thus be noticeably facilitated.[109] Such a framework agreement was drawn up under the auspices of the Conference of Cantonal Governments.[110] Art. 48a of the Federal Constitution then provides for instruments which, under certain conditions, make it possible to force unwilling cantons to cooperate horizontally in certain areas of responsibility.[111] These instruments go well beyond the promotion objective enshrined in Art. 135 para. 2 lit. d of the Federal Constitution but are

104 Hänni, "Commentary on Art. 135 FedCst.," marginal no. 27.

105 Message of the Federal Council, BBl 2002 2352; Hänni, "Commentary on Art. 135 FedCst.," marginal no. 27.

106 Biaggini, *Kommentar zur Bundesverfassung,* Art. 135 marginal no. 17; Hänni, "Commentary on Art. 135 FedCst.," marginal no. 27.

107 Biaggini, *Kommentar zur Bundesverfassung,* Art. 135 marginal no. 17.

108 Biaggini, *Kommentar zur Bundesverfassung,* Art. 135 marginal no. 17; Hänni, "Commentary on Art. 135 FedCst.," marginal no. 28.

109 Biaggini, *Kommentar zur Bundesverfassung,* Art. 135 marginal no. 17; Hänni, "Commentary on Art. 135 FedCst.," marginal no. 28.

110 See for more information and a link to the framework agreement: https://kdk.ch/de/themen/nfa-und-interkantonale-zusammenarbeit/interkantonale-zusammenarbeit-mit-lastenausgleich/, accessed on 29 November 2018.

111 See also Art. 10 FiLaG, which explicitly refers to Art. 48a FedCst; Biaggini, *Kommentar zur Bundesverfassung,* Art. 135 marginal no. 17.

likely to be covered by Art. 48a of the Federal Constitution as a constitutional basis.[112]

The fifth and last of the objectives explicitly mentioned in Article 135 para. 2 of the Federal Constitution (lit. e) is intended to ensure that the balancing of financial resources and burdens preserves the tax competitiveness of the cantons in national and international relations. While the first four objectives have been given clearer contours by the legislator in the FiLaG, specific provisions on tax competitiveness have been sought in vain.[113] On the one hand, it could be argued that the tax competitiveness of the resource-weak cantons is supported and promoted by the equalisation of resources.[114] On the other hand, the target could be seen as an unspecified limit to financial and burden equalisation that would allow resource-rich cantons to (continue to) pursue a low tax policy.[115] At the same time, the goal is that financial resources and burden sharing would not prevent resource-weak cantons from participating in inter-cantonal and international tax competition.[116] The provision, which only found its way into the constitution in the debates of the Councils (i.e. the National Council and the Council of the Cantons),[117] also has a referendum-political dimension in that there are fears that financial and burden balancing could ultimately lead to (undesirable) material tax harmonisation.[118]

6.3.3 Financing the Equalisation of Resources (para. 3)

The financing of the equalisation of resources is regulated in para. 3. The political significance of this issue justifies standardisation at constitutional level.[119] In contrast, the financing of burden sharing, which is borne solely

112 Biaggini, *Kommentar zur Bundesverfassung,* Art. 135 marginal no. 17; Hänni, "Commentary on Art. 135 FedCst.," marginal no. 28; Wiederkehr and Mächler, "Commentary on Art. 135 FedCst.," marginal no. 26.

113 Biaggini, *Kommentar zur Bundesverfassung,* Art. 135 marginal no. 18.

114 Hänni, "Commentary on Art. 135 FedCst.," marginal no. 29.

115 Hänni, "Commentary on Art. 135 FedCst.," marginal no. 29; Wiederkehr and Mächler, "Commentary on Art. 135 FedCst.," marginal no. 28.

116 Hänni, "Commentary on Art. 135 FedCst.," marginal no. 29; Wiederkehr and Mächler, "Commentary on Art. 135 FedCst.," marginal no. 28.

117 Wiederkehr and Mächler, "Commentary on Art. 135 FedCst.," marginal no. 28.

118 Biaggini, *Kommentar zur Bundesverfassung,* Art. 135 marginal no. 18; Hänni, "Commentary on Art. 135 FedCst.," marginal no. 29.

119 Biaggini, *Kommentar zur Bundesverfassung,* Art. 135 marginal no. 20; Hänni, "Commentary on Art. 135 FedCst.," marginal no. 30.

by the Confederation, appears less sensitive, which is why it is only regulated at the legislative level.[120] Paragraph 3 anchors the principle that the federal government and the resource-rich cantons are responsible for equalising resources (vertical and horizontal equalisation).[121] The share to be paid by the resource-rich cantons depends on the funds made available by the Confederation. In this respect, the constitutional legislator has set a lower minimum (two-thirds of the federal contribution) and an upper maximum (80 % of the federal contribution) for the cantonal share.[122] Since these limits do not yet say anything about the absolute amount of the funds made available by the Confederation, the protection of the resource-rich cantons is also provided by para. 1 ('appropriate' financial and burden equalisation) on the one hand and by lit. b of para. 2, according to which the financial equalisation in favour of the resource-weak cantons should only lead to a minimum endowment, on the other hand.[123] Should the resource-rich cantons be overused by the federal legislature despite these protection mechanisms, they would have to defend themselves against this 'exploitation' using political means.[124]

6.3.4 Compensation for Hardship

The transition to the NFA brought about considerable changes in financial flows both between the Confederation and the cantons and between the cantons. As a result of these changes, some resource-weak cantons, which benefited from the former equalisation system, now receive less financial compensation. For some of these cantons, the losses represented a major burden, especially since their income and expenditure structures had adapted strongly to the then existing equalisation system in recent decades.[125]

Without being obliged to do so by Article 135 of the Federal Constitution, the Federal legislator decided to give the cantons time to adapt their public finance structure to the NFA by means of a hardship

120 Biaggini, *Kommentar zur Bundesverfassung,* Art. 135 marginal no. 20; Hänni, "Commentary on Art. 135 FedCst.," marginal no. 30.

121 Biaggini, *Kommentar zur Bundesverfassung,* Art. 135 marginal no. 21.

122 Art. 135 para. 3 sentence 2 FedCst.

123 Biaggini, *Kommentar zur Bundesverfassung,* Art. 135 marginal no. 21; Hänni, "Commentary on Art. 135 FedCst.," marginal no. 30.

124 Hänni, "Commentary on Art. 135 FedCst.," marginal no. 30.

125 For the whole paragraph, see: Hänni, "Commentary on Art. 135 FedCst.," marginal no. 31; see also: Biaggini, *Kommentar zur Bundesverfassung,* Art. 135 marginal no. 19.

adjustment.[126] Article 19 of the FiLaG thus provides for a temporary hardship adjustment, the contributions of which are intended to cushion the transition from the old to the new system. Pursuant to Article 19 para. 3 FiLaG, the Federal Assembly shall determine the initial amount of the hardship adjustment in a federal decree requiring a referendum. According to the 2004/05 global balance sheet, CHF 430 million per year must be made available for the hardship adjustment. Two-thirds of the hardship compensation is financed by the Confederation and one third by the cantons (Art. 19 para. 2 FiLaG). The hardship compensation is conceived as a temporary transitional aid and is therefore not an integral part of the new compensation system.[127] It therefore also breaks through the limitations of budget neutrality in the transition to the NFA,[128] the former creating a close link between the unbundling of tasks, the abolition of the previous financial equalisation and the new equalisation system.[129]

The total annual volume of the hardship adjustment is definitively determined in a federal decree and stays in place for eight years.[130] Thereafter, this amount is reduced annually by 5 % of the initial amount. The basis for determining the initial amount is the 2004/05 global balance sheet. Every four years, the Federal Assembly can decide, on the basis of the effectiveness report, whether the hardship adjustment should be abolished in whole or in part. Contributions within the framework of the hardship adjustment are paid for a maximum of 28 years.[131]

7 Rules and Methods for Equalisation of Financial Resources – The Mechanism of Implementation

The technical implementation, which was decided by the Confederation together with the cantons, has been agreed on as a multi-stage procedure.

126 Biaggini, *Kommentar zur Bundesverfassung,* Art. 135 marginal no. 19; Hänni, "Commentary on Art. 135 FedCst.," marginal no. 32; Wiederkehr and Mächler, "Commentary on Art. 135 FedCst.," marginal no. 12.

127 Hänni, "Commentary on Art. 135 FedCst.," marginal no. 32; Wiederkehr and Mächler, "Commentary on Art. 135 FedCst.," marginal no. 12.

128 Biaggini, *Kommentar zur Bundesverfassung,* Art. 135 marginal no. 19.

129 Hänni, "Commentary on Art. 135 FedCst.," marginal no. 32.

130 Hänni, "Commentary on Art. 135 FedCst.," marginal no. 33.

131 Wiederkehr and Mächler, "Commentary on Art. 135 FedCst.," marginal no. 12; for the whole paragraph see: Biaggini, *Kommentar zur Bundesverfassung,* Art. 135 marginal no. 19; Hänni, "Commentary on Art. 135 FedCst.," marginal no. 33.

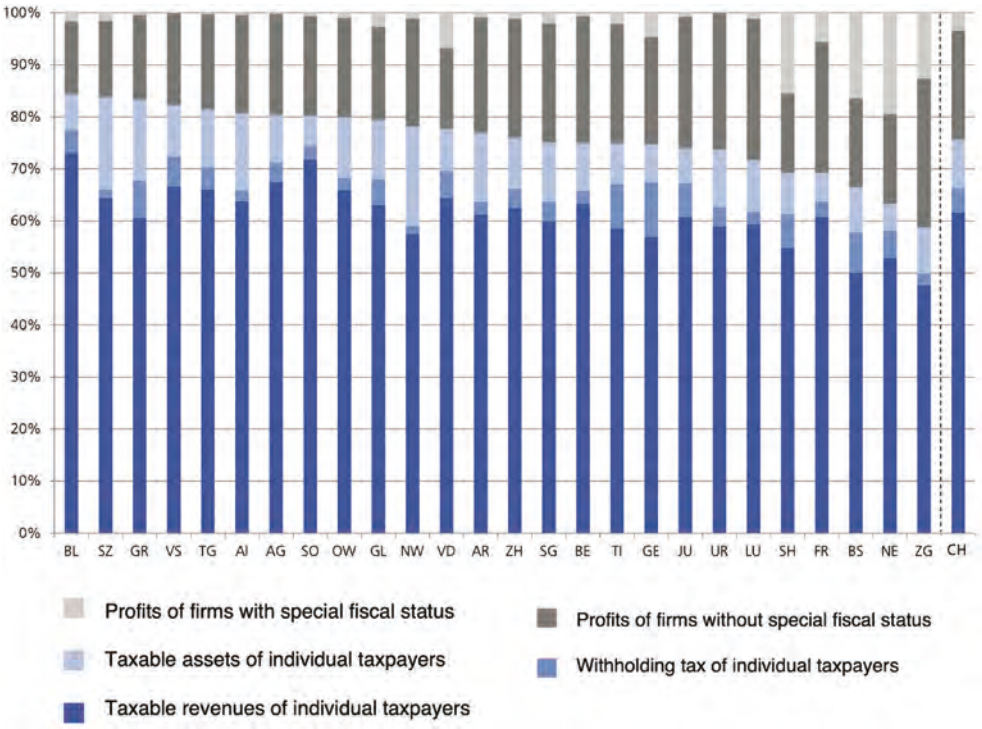

FIGURE 9.3 Different elements of the resource potential of the cantons in 2019
SOURCE: FEDERAL FINANCE ADMINISTRATION

Firstly, the taxable income of individual taxpayers in the cantons must be determined. In a second step, income from taxpayers' taxable assets in the cantons is added. In a third step, the taxable profits of companies are included, as shown in Figure 9.3.

This data can then be used to determine the standardised tax revenue per capita in each canton. On this basis, the cantonal average and 85 % of this average can be determined.

The fifth and final step ensures that all cantons reach at least 85 % (guaranteed minimum financing) of the cantonal average through resource equalisation, as shown in Figure 9.4.

The graph shows that resources are allocated from the resource-rich cantons to the resource-weak cantons so that after the equalisation, all the cantons dispose of at least 85 % of the Swiss average in resources.

The final practical results of the vertical and horizontal flows of resources and burden equalisation is as shown in Figure 9.5 (in million CHF).

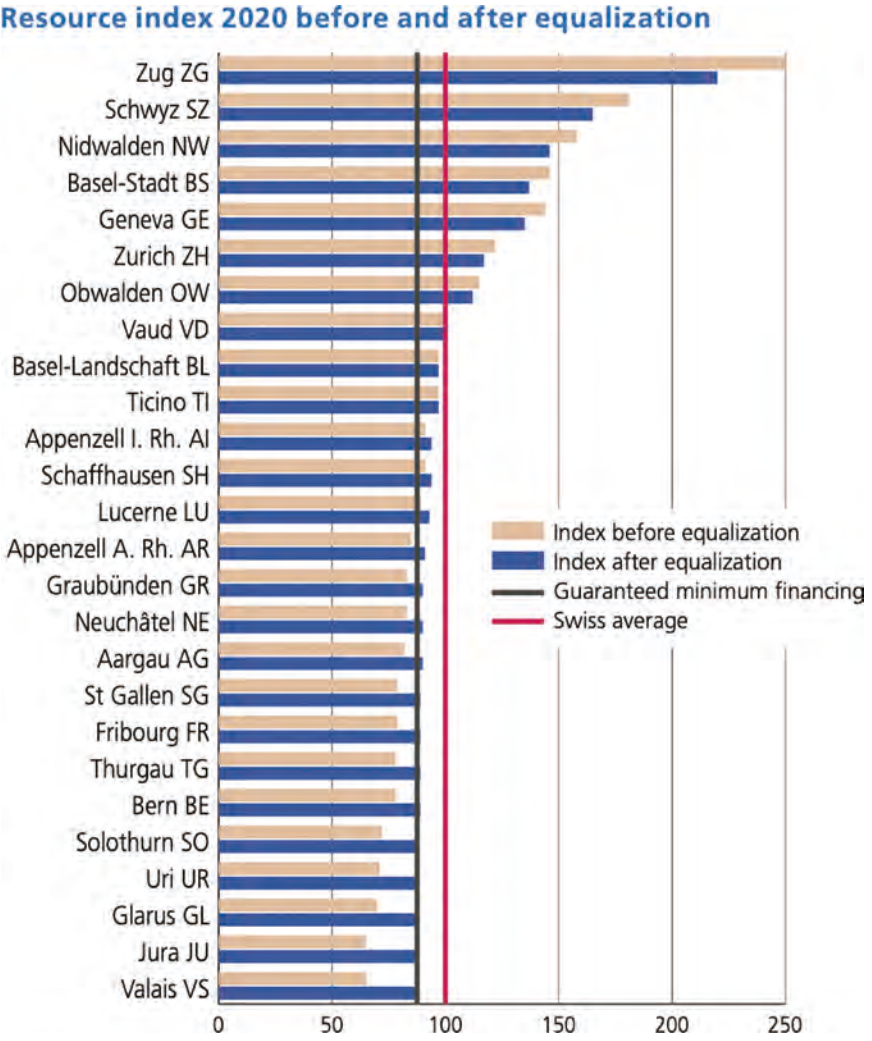

FIGURE 9.4 Standardised tax revenue and cantonal average in 2020
SOURCE: FEDERAL FINANCE ADMINISTRATION

Figure 9.6 shows the equalisation for 2019.

This graph shows that in the richest cantons, each taxpayer contributes (an average of) 2,727 CHF of his taxes to resource-weak cantons whereas in resource-weak cantons, taxpayers each receive (an average of) 2,288 CHF coming from the equalisation mechanism.

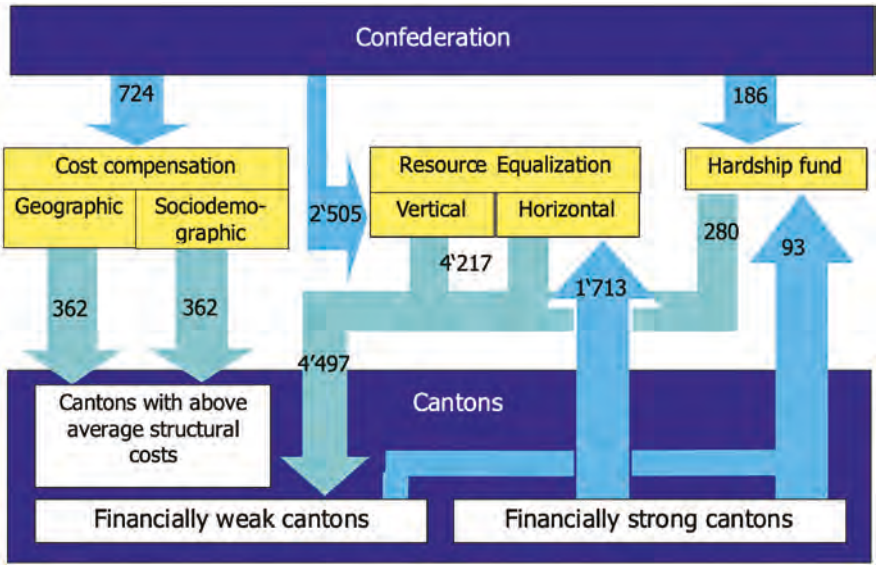

FIGURE 9.5 Schema of the final result of the Swiss financial resources and burden equalisation 2019
SOURCE: FEDERAL FINANCE ADMINISTRATION

8 Conclusion

The Swiss Tax System is an illustration of the tension that exists between diversity and equality in a federal State. The Federal Constitution grants the cantons (and indirectly the communes) considerable autonomy in levying direct taxes on the income and assets of natural and legal persons. Autonomy leads to significant differences in the tax burden, depending on the canton. These differences are first of all mitigated by the vertical and horizontal financial compensation attributed according to the equalisation mechanism. Furthermore, the formal tax harmonisation makes the various cantonal tax systems at least comparable. It has to be mentioned that to date, all proposals for material tax harmonisation[132] have been rejected.[133] Finally, individual taxpayers are

132 Material tax harmonisation as in the substance of tax law being harmonised, not only formal, procedural elements of it.

133 The most recent propositions being the federal initiative 'Steuergerechtigkeits-Initiative', rejected by the Swiss voters (see BBl 2011 2772) and the parliamentary motion 15.3113 introduced by Barbara Gysi, member of the Swiss National Council (one of the chambers of the Swiss Parliament) (see AB 2017 NR 25 f.).

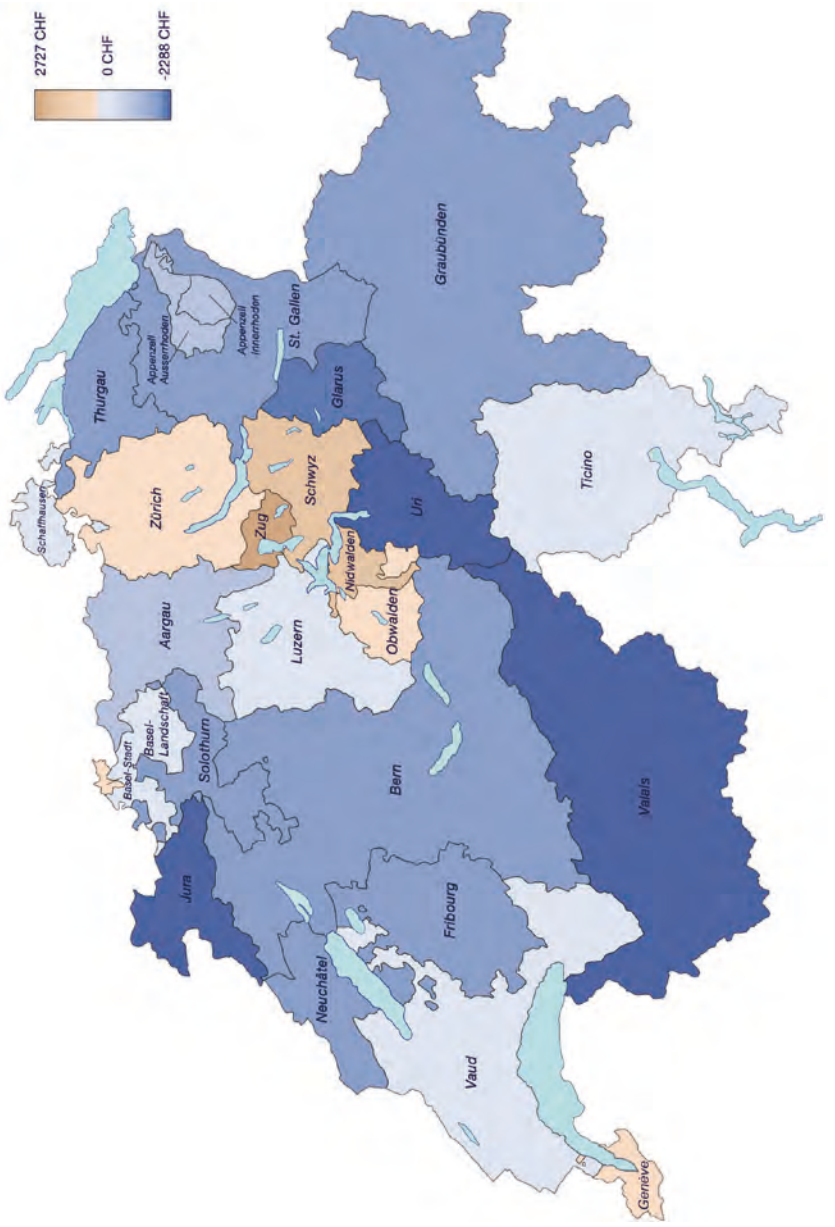

FIGURE 9.6 Net amouns per capita in CHF of the equalisation in 2019
SOURCE: FEDERAL FINANCE ADMINISTRATION

protected against arbitrary discrimination due to differences in tax burdens by certain constitutional, legally enforceable minimal guarantees, which constitute the concretisation of the general right to equal treatment.

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CHAPTER 10

Principle of Equality and Social Care Policies in the Italian Regional System between Autonomy and Centralisation

Giulia Maria Napolitano and Gabriella Saputelli

1 Introduction[1]

Since the Constitution of 1947, Italy has been a regional system with fifteen ordinary Regions, five special Regions (enjoying 'special forms and conditions of autonomy') and two autonomous Provinces (Trent and Bolzano) that were guaranteed legislative and administrative powers defined in the Constitution. The implementation and the evolution of Italian regionalism over the years have been strictly linked to the main political events of the Republic, which sometimes brought 'formal' revision of the Constitution (i.e. the constitutional reform of 2001) and in most cases 'substantially' affected the regional powers or the relationship between State and Regions.[2]

This chapter aims to analyse the extent to which the principle of equality is respected and implemented in social care policies in the Italian regional system, deepening the tensions between autonomy and centralisation arising from the relationships between State and Regions. The principle of equality is a fundamental principle of the Italian legal system, established in Article 3 of the Italian Constitution with formal (para. 1) and substantive (para. 2) meaning: 'All citizens shall have equal social dignity and shall be equal before the law, without distinction of gender, race, language, religion, political opinion, personal and social conditions. It shall be the duty of the Republic to remove those obstacles of an economic or social nature which constrain the freedom and equality of citizens, thereby impeding the

1 This chapter was produced in close cooperation of the two authors. As regards the drafting of the text, however, Dr. Napolitano edited para. 1 and 4 while Dr. Saputelli edited para. 2, 3, 5 and 6.

2 For a description of the Italian regional system and its evolution, see Stelio Mangiameli, ed., *Italian Regionalism: Between Unitary Traditions and Federal Processes, Investigating Italy's Form of State* (Heidelberg, Cham: Springer, 2014); Antonio D'Atena, "Regionalism in Italy," *Italian Papers on Federalism*, no. 1 (2013): 1.

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full development of the human person and the effective participation of all workers in the political, economic and social organisation of the country.'[3] According to this second paragraph, the Republic (which means all Institutions) has the responsibility to do whatever is necessary to fulfil the principle of equality.

Article 38 of the Constitution establishes that 'Every citizen unable to work and without the necessary means of subsistence shall be entitled to welfare support. Workers shall be entitled to adequate means for their living requirements in case of accidents, illness, disability, old age and involuntary unemployment. Physically and mentally disabled persons shall be entitled to education and vocational training. Responsibilities under this Article shall be entrusted to entities and institutions established or supported by the State. Private-sector assistance may be freely provided.'[4]

These provisions are the core of the welfare state, which has been affirmed in Europe and includes several services and benefits: pensions, healthcare, education, social care, etc.

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3 On art. 3 of the Constitution see Carlo Esposito, "Eguaglianza e giustizia nell'art. 3 della Costituzione," in *La Costituzione italiana, Saggi*, ed. Carlo Esposito (Padova: Cedam, 1954), 17 et seq; Livio Paladin, *Il principio costituzionale di eguaglianza* (Milano: Giuffré, 1965); Alessandro Pizzorusso, *Che cos'è l'eguaglianza* (Roma: Editori riuniti, 1983); Claudio Rossano, *Il principio d'eguaglianza nell'ordinamento costituzionale* (Milano: Giuffré, 1966); Augusto Cerri, "Uguaglianza (principio costituzionale di)," in *Enciclopedia Giuridica Treccani, XIV,* eds. Pasquale Stanislao Mancini and Errico Pessina (Milano: società editrice libraria, 2005), 1–13; Beniamino Caravita, *Oltre l'eguaglianza formale, Un'analisi del'art. 3 comma 2 della Costituzione* (Padova: Cedam, 1984); Norberto Bobbio, *Eguaglianza e libertà* (Torino: Giappichelli, 1995); Paolo Biscaretti di Ruffia, "Uguaglianza (principio di)," in *Novissimo Digesto Italiano, XIX* (Torino: Utet, 1973); Antonio Stefano Agrò, "Art. 3," in *Commentario della Costituzione*, ed. Giuseppe Branca (Bologna, Roma: Zanichelli, 1975), 123 et seq; AaVv., *Corte costituzionale e principio di eguaglianza*, *Atti del Convegno in ricordo di Livio Paladin* (Padova: Cedam, 2002); Alfonso Celotto, "Art. 3, 1° comma," in *Commentario alla Costituzione*, eds. Raffaele Bifulco, Alfonso Celotto and Marco Olivetti (Milano: Utet giuridica, 2006), 65 et seq; Andrea Giorgis, "Art. 3, 2° comma," in *Commentario alla Costituzione*, eds. Raffaele Bifulco, Alfonso Celotto and Marco Olivetti (Milano; Utet giuridica, 2006), 88 et seq.

4 On art. 38 of the Constitution see Lorenza Violini, "Art. 38," in *Commentario alla Costituzione*, eds. Raffaele Bifulco, Alfonso Celotto, Marco Olivetti (Milano: Utet giuridica, 2006), 775 et seq; Ugo M. Colombo, *Principi e ordinamento dell'assistenza sociale* (Milano: Giuffré, 1959); Guido Corso, "I diritti sociali nella Costituzione italiana," *Rivista Trimestrale di Diritto Pubblico* (1981), 755 et seq; Roberto Gianolio, Luciano Guerzoni and G. Paolo Storchi, eds., *Assistenza e beneficenza tra pubblico e privato* (Milano: Franco Angeli, 1980); Mattia Persiani, "Art. 38," in *Commentario della Costituzione*, ed. Giuseppe Branca (Bologna, Roma: Zanichelli, 1979), 232 et seq; Raffaello Maggian, *Il sistema integrato dell'assistenza* (Roma: Carocci, 2003); Elena Ferioli, *Diritti e servizi sociali nel passaggio dal welfare statale al welfare municipale* (Torino: Giappichelli, 2003).

Social care policy is one of the most discussed competences or subject matters when speaking of the fulfilment of the principle of equality and it is also emblematic of the tension between autonomy and centralisation which occurs in a regional system in the relationships between the State and the Regions.[5]

In the expression 'social services' are usually included 'all the activities relating to the provision and delivery of free and paid services and all monetary benefits to remove and supersede states of need and difficulty which people may encounter in the course of their lives, excluding only those provided by the pension and health care systems, and those guaranteed through the administration of justice'.[6]

2 The Constitutional Framework of Social Care Policy after the Constitutional Reform of 2001

The constitutional reform of 2001 gave the Regions residual legislative powers on social care,[7] while acknowledging that the State has the exclusive competence to 'determine the basic levels of care relating to civil and social entitlements to be guaranteed throughout the national territory'.[8] Therefore, since 2001, the Regions have become the first planning tier and the State is responsible for ensuring essential service levels and benefits in civil and social rights, delivered all over the country according to uniform standards.[9]

The constitutional reform was designed to introduce a high degree of regional autonomy into the Constitution and identified the essential levels of care[10] as the elements that could maintain unity and homogeneity (equality)

5 In the Italian system health care and education are shared competences (art. 117 para. 3 of the Constitution) while the pension system is an exclusive competence of the State (art. 117 para. 2 letter o of the Constitution).

6 Legislative Decree no. 112 of 1998, art. 128 para. 2.

7 Art. 117 para. 4 of the Constitution.

8 Art. 117 para. 2 letter m of the Constitution. For the constitutional reform and implications of the new division of competences see Stelio Mangiameli, *La riforma del regionalismo italiano* (Torino: Giappichelli, 2002), 107–152; Antonio D'Atena, *Diritto regionale* (Torino: Giappichelli, 2017), 137–180.

9 On the Italian welfare system in an historical and sociological perspective see Yuri Kazepov, ed., *La dimensione territoriale delle politiche sociali in Italia* (Roma: Carocci, 2014); Cristiano Gori et al., *Il welfare sociale in Italia, Realtà e prospettive* (Roma: Carocci, 2015); Ilaria Madama, *Le politiche di assistenza sociale* (Bologna: Il Mulino, 2010).

10 On this concept see Enzo Balboni, "I livelli essenziali e i procedimenti per la loro determinazione," *Le Regioni*, no. 6 (2013): 1183–1199; Enzo Balboni, "Coesione sociale e livelli essenziali delle prestazioni: due paradigmi paralleli della tutela multilivello dei diritti sociali," in *La tutela multilivello dei diritti sociali*, ed. Enzo Balboni (Napoli: Jovene, 2008); Claudio

throughout the whole of the national territory.[11] These levels constitute an inviolable set of core services which must be guaranteed by the Regions by complying with standards defined as 'essential',[12] and are protected by the Constitution by giving the State exclusive control over this subject-matter: the Regions do not have the power to reduce these levels and, if anything, they may only extend them.[13]

Closely related to the loss of planning powers, the State has lost the right to place allocation constraints on funding, which, however, continue to take the form of transfers from the centre to the periphery. Welfare, in fact, has hitherto been funded by a variety of different national, regional and local funds, sometimes with a part of the cost being charged to the beneficiaries in the form of co-payment.[14] The main source of funding is the National Social Policies Fund, first introduced in 1997 and modified over time. Where the reform of Title V

Panzera, "I livelli essenziali delle prestazioni concernenti i diritti sociali," in *Diritto costituzionale e diritto amministrativo: un confronto giurisprudenziale*, eds. Giuseppe Campanelli, Michele Carducci, Nicola Grasso and Vincenzo Tondi della Mura (Torino: Giappichelli, 2010), 57–105; Michele Belletti, "I livelli essenziali delle prestazioni concernenti i diritti civili e sociali alla prova della giurisprudenza costituzionale, Alla ricerca del parametro plausibile," *Le istituzioni del federalismo*, no. 3–4 (2003): 613–646; Giovanni Guiglia, *I livelli essenziali delle prestazioni sociali alla luce della recente giurisprudenza costituzionale e dell'evoluzione interpretativa* (Padova: Cedam, 2007); Anna Banchero, "I livelli essenziali delle prestazioni nell'ambito dei servizi alla persona: dalla tutela della salute alla protezione sociale," *Quaderni regionali*, no. 2 (2008): 461–483; Lara Trucco, "Livelli essenziali delle prestazioni e sostenibilità finanziaria dei diritti sociali," *Gruppo di Pisa, Rivista*, no. 3 (2012): 1–92, https://www.gruppodipisa.it/images/rivista/pdf/Lara_Trucco_-_Livelli_essenziali_delle_prestazioni_e_sostenibilita_finanziaria_dei_diritti_sociali.pdf; Cristiano Gori, "I livelli essenziali di assistenza," in *La riforma dei servizi sociali in Italia, L'attuazione della legge 328 e le sfide future*, ed. Cristiano Gori (Roma: Carocci, 2002), 55 et seq.

11 According to Luisa Torchia, "Premessa," in *Welfare e federalismo* (Bologna: Il Mulino, 2005), 15, in the Italian system the clause concerning essential levels of care could be the keystone of the relationship between welfare and federalism, and serve as a basis for the construction of a unitary system in which responsibilities between different levels of government are consistently distributed.

12 Enzo Balboni, "Il concetto di 'livelli essenziali e uniformi' come garanzia in materia di diritti sociali," *Le istituzioni del federalismo*, no 6 (2001): 1103 et seq.

13 Judgements no. 10 and 207 of 2010; no. 200 and no. 322 of 2009; no. 387 of 2007; no. 248 of 2006.

14 The Constitutional Court (in Judgement no. 423 of 2004, point 4.2.) indicated the major novelties introduced by Act no. 328 'setting forth a general rule according to which the implementation of an integrated system of welfare services is provided for from a variety of different funding sources to which the Central Government, the Regions and the Local authorities contribute according to their respective powers'.

redefined the procedures for financing the Regions,[15] it removed the allocation constraint on funds from the National Social Fund thus allowing the Regions to manage their social policies autonomously, using transfers.

At the legislative level, just one year before the constitutional reform of 2001, the State adopted framework Act no. 328 of 2000,[16] which formally is no longer binding on the Regions but still 'authoritative', because all the regional re-organisation laws that followed took up many of its innovations (such as the model of an integrated network system, the central role of the municipalities as the essential link in the care system, the 'zonal plan' as the programming instrument, and the enhanced role given to the 'third sector'). The emerging system of regional legislation was not dissimilar to that of the framework Act, except for one major difference, in that the regional Governments achieved planning powers and general legislative powers over welfare services, even if this legislative power was bound to run into the State's legislative power to establish essential levels of service.

In general, placing social care services among the residual competences of the Regions has substantially increased the volume of legislation and regulations governing this sector, and has greatly increased the caseload of litigation between the State and the Regions before the constitutional Court on matters of competence.[17] Moreover, the new financing model, whose profile was not

15 For the financial model see Luca Antonini, "La vicenda e la prospettiva dell'autonomia finanziaria regionale: dal vecchio al nuovo art. 119," *Le Regioni* (2003): 34 et seq; Piero Giarda, "Le regole del federalismo fiscale nell'articolo 119: un'economista di fronte alla nuova Costituzione," *Le Regioni* (2001): 1425 et seq; Davide De Grazia, "L'autonomia finanziaria degli enti territoriali nel nuovo Titolo V della Costituzione," *Le istituzioni del federalismo*, no.2 (2002): 267 et seq; Stelio Mangiameli, "Autonomia finanziaria," in *Dizionario sistematico di Diritto costituzionale*, ed. Stelio Mangiameli (Milano: Il sole 24 Ore, 2008); Enrico Buglione, "Regional Finance in Italy: Past and Future," in *Italian Regionalism: Between Unitary Traditions and Federal Processes, Investigating Italy's Form of State*, ed. Stelio Mangiameli (Heidelberg, Cham: Springer, 2014), 307 et seq.

16 For comments see Enzo Balboni, Bassano Baroni and Angelo Mattioni, eds., *Il sistema integrato dei servizi sociali, Commento alla legge no. 328 del 2000 e ai provvedimenti attuativi dopo la riforma del titolo V della Costituzione* (Milano: Giuffré, 2003).

17 The role of the constitutional Court has been fundamental in defining the division of competences between the State and the Regions. According to Stelio Mangiameli, "Il Titolo V della Costituzione alla luce della giurisprudenza costituzionale e delle prospettive di riforma," *Rivista AIC*, no. 2 (2016), 36, https://www.rivistaaic.it/it/rivista/ultimi-contributi-pubblicati/stelio-mangiameli/il-titolo-v-della-costituzione-alla-luce-della-giurisprudenza-costituzionale-e-delle-prospettive-di-riforma: 'the constitutional case law was animated by the desire to safeguard the unity of the legal system, supporting – even in a substitute role – the state legislature, and what has been done has had the sense to maintain an overall balance'. On this role see also Antonio D'Atena, *Tra autonomia e*

clearly defined and which was difficult to establish at the time, was one of the critical aspects of the system from the outset. This inevitably led to a great deal of litigation before the constitutional Court, which was called upon to rule on a complex range of issues.

Both tiers of government have been trying to carve out a place for themselves in the new system: the Central Government has been endeavouring to hold on to its existing prerogatives, while the Regions have been determined to defend the powers already acquired, as well as their autonomy.

3 What the State Has (Not) Done in the Field

Unlike healthcare[18] and education,[19] the State has failed to lay down the essential levels of welfare during the ten years following the constitutional reform. This legal vacuum is of particular importance because of what is involved is the policy financing, as well as what is deemed to be (or rather, what the Central Government considers to be) the unchangeable core of services and benefits that must be guaranteed in order to enable citizens to fully enjoy their civil and social rights. The main reasons for the persistence of this state of affairs are that the definition of the essential level of care implies that the State is to provide the relevant funding.

The 2003 Budget Act[20] entrusted the task of defining the essential levels of welfare to a Decree of the President of the Council of Ministers in agreement

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neocentralismo, Verso una nuova stagione del regionalismo italiano? (Torino: Giappichelli, 2016), chapters III and IV.

18 The Decree of the President of the Republic of 29 November 2001 defined the essential levels of health care; see George France, "The Italian Health Care System and the Economics of the Right to Health," in *Italian Regionalism: Between Unitary Traditions and Federal Processes, Investigating Italy's Form of State*, ed. Stelio Mangiameli (Heidelberg, Cham: Springer, 2014), 335 et seq. Essential levels of health care have recently been updated by a prime ministerial decree (d.P.C.m.) of 12 January 2017.

19 Actually, there are no clear indications regarding the essential standards to be met with regard to education except for a reference in Article 21 of Act no. 59 of 1997 which provided for 'unitary and nationwide levels of the right to an education, and the elements common to the whole State school system regarding Central Government management and planning'. Subsequently, Act no. 53 of 2003 gave the government delegated powers to lay down general rules for education and set the essential levels of the services to be provided by schools and vocational training. Legislative Decree no. 226 of 2005 then laid down the essential levels for the second cycle of the educational and vocational training system.

20 Act No. 289 of 2002, Article 46 (3).

with the State-Regions Conference (or the Joint Conference), with the limitation of the resources available in the National Social Fund. However, this procedure has never been applied. Later attempts were made by a number of institutional players to provide a standard nationwide definition of essential levels of care, but this never went further than being a mere proposal. The deadlock was not resolved, and between 2004 and 2005 the Ministry of Labour and Social Policies drafted a document defining a list of services and benefits, with an explicit acknowledgement of the work done by the Regional Governments and of the inertia of Central Government.[21]

Over the years, several acts have indicated how to define and finance the essential levels of care without indicating the contents, which nowadays remain those of the framework Act 328 of 2000[22] – even if the Court has considered the levels defined in that Act to be 'a series of services and benefits that are wholly heterogeneous both in terms of content and conditions of entitlement'.[23]

The results of this failure are the disaggregation of benefits, the lack of a commonly agreed list[24] and of a joint commonly agreed approach to the non-monetary benefits and services to be provided to people in a specific state of need.[25] The main consequence of the absence of State intervention on the

21 As stated in the Social Services Monitoring Report, published by the Directorate-General for the Management of the National Fund for Social Policies and of Social Expenditure at the Ministry of Labour and Social Policies, '[t]he Regions are beginning to govern types of services and benefits that have been traditionally the preserve of Central Government, such as poverty-alleviation measures, legislation on matters very closely connected with the (as-yet undefined) 'essential levels of care''; Directorate-General for the Management of the National Fund for Social Policies and of Social Expenditure at the Ministry of Labour and Social Policies, *Social Services Monitoring Report* (September 2005), 44.

22 The law seemed to point the way to establishing 'the essential levels of welfare to be delivered in the form of goods and services in accordance with the characteristics and requirements established in national, regional and zonal plans, within the limits of the resources of the National Fund for Social Policies, taking into account the ordinary resources already allocated by the local authorities for social expenditure' (Article 22).

23 Judgement no. 224 of 2006.

24 It was not until October 2009 that a 'Nomenclature of services and social measures' was adopted by the Conference of Regions and of Autonomous Provinces. This idea was first broached at the beginning of 2006 following an analysis of the results of the 'Survey of social services and measures' adopted by individual and associated municipalities, conducted by ISTAT in conjunction with the Ministry of Labour, Health and Social Policies, the General Accounting Office and the regional Governments. The nomenclature can be found on http://www.regioni.it/upload/DOCCRP10%29NOMENCLATORE_SERVIZI_SOCIALI.pdf.

25 Cristiano Gori, "Applicare i livelli essenziali nel sociale," *Prospettive sociali e sanitarie* 33, no. 15 (2003): 1 et seq; Cristiano Gori and Ilaria Madama, "Le politiche socio-assistenziali,"

essential levels of care means that not everyone has access to the same level of care across the country.

The only two provisions which have been introduced in terms of essential levels of care during the past fifteen years are the ISEE[26] and the recent Inclusion Income Act.[27] The latter is the means by which the State ensures uniformity in care delivery across the country, thus overcoming the absence or different degrees of income support.

From a financial point of view, even in the years that followed the constitutional reform, measures were taken to maintain pre-existing funds.[28] Additional sectoral funds, parallel to the National Fund, were also created, such as the Family Policies Fund,[29] the Youth Policies Fund,[30] the Fund for the Non-Self-Sufficient,[31] all of which were designed to support interventions in the social sphere. Some of these funds, mostly set up under the State's Budget Acts, have led to numerous legal disputes with the State. In particular, the Regions claimed their right to new money transfers from the Central Government with no allocation constraints, and they accused the State of having created funds for matters falling within the Regions' competence in violation of their constitutional autonomy over revenue and expenditure (Article 119 of the Constitution).

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in *La riforma del Welfare, Dieci anni dopo la 'Commissione Onofri'*, ed. Luciano Gurzoni (Bologna: Il Mulino, 2007), 347–358; Alberto Comino, Alessandra De Marco and Alessandro Natalini, "La determinazione dei livelli essenziali delle prestazioni," in *Welfare e federalismo*, ed. Luisa Torchia (Bologna: Il Mulino, 2005), 95 et seq.

26 Legislative Decree no. 109/1998, amended in 2011 and 2013. ISEE is the index for evaluating the economic situation of the family in order to access social services or to establish the co-payment of social benefits. It was introduced by Legislative Decree no. 109/1998, and then amended by Article 5 of Legislative Decree 201/2011 (converted into Act no. 214/2011) and by d.P.C.m. no. 159/2013, *Regolamento concernente la revisione delle modalità di determinazione e i campi di applicazione dell'Indicatore della Situazione Economica Equivalente* (*ISEE*), which established that it has to be considered an essential level of care, thus binding for the Regions.

27 Act no. 33/2017 was adopted by the State to combat poverty and social exclusion and introduced the so-called 'Reddito di Inclusione' (Inclusion Income), a measure that provides a form of direct income for households below the absolute poverty line and is aimed at ensuring economic autonomy and occupation for idle, unemployed or precariously employed citizens.

28 In addition to those listed below there is also the National Fund for Children and Adolescents instituted by Act no. 285 of 1997.

29 Instituted by Decree-Act no. 223 of 2006, enacted by Act no. 248 of 2006.

30 Instituted by Decree-Act no. 223 of 2006, enacted by Act no. 248 of 2006.

31 Instituted by Act no. 296 of 2006 (the 2007 Budget Act).

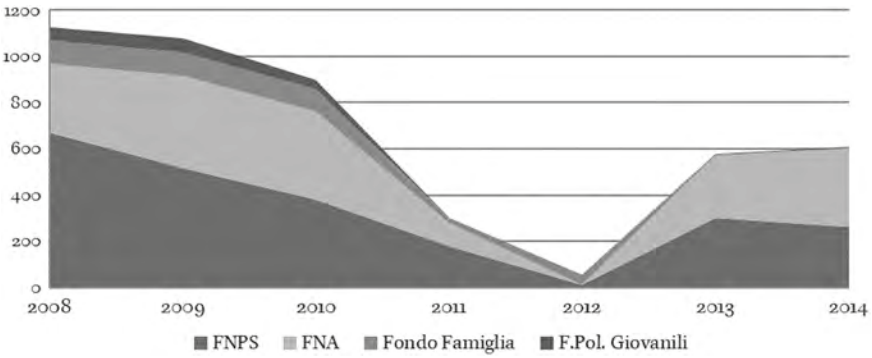

FIGURE 10.1 National funds for social policies: share allocated to Regions

For instance, during the economic crisis of the late 2000s, the State drastically reduced the shares of the National Social Fund allocated to the Regions (see Figure 10.1) and adopted a different measure instead: the *Social Card*,[32] which cannot be considered an essential level of care but can be regarded as a way of aiding the satisfaction of basic needs (such as for purchasing food, paying for gas bills and healthcare services, etc.).

The Act which introduced the Social Card was challenged by the Regions on the grounds that it infringed their competence over social care matters. However, the constitutional Court saved the provisions, because 'State laws designed to protect particularly disadvantaged individuals, although encroaching on the Regions' competence in the field of social services and assistance, must be evaluated also in the light of the fundamental principles of Articles 2 and 3, para. 2, 38 and Article 117, para. 2 letter M'. In consequence, the principles of equality and solidarity represent the foundation for State intervention, which is permitted in extraordinary, exceptional and urgent cases resulting from international economic and financial crisis situations such as those that affected the country in 2008 and 2009. Moreover, according to the reasoning followed by the Court, the jurisdiction of the State and the exceptional situation in which it was exercised also make the requirement to respect the principle of loyal cooperation irrelevant, but rather involve the

32 D.L. 112/2008, converted into Act no. 133 of 2008 (Conversion into law, with amendments, of Law Decree no 112 of 25 June 2008 laying down urgent provisions for economic development, for the simplification, competitiveness and stabilisation of public finance and tax equality), amended by Article 60 of D.L. no. 5/2013.

exercise of the regulatory power by the State, and the establishment of the discipline in detail.[33]

In this judgement, the Court clearly considered the State to be the main guarantor of the principle of equality, and despite the division of competences between the State and the Regions, it justified the intervention of the State on the basis of the constitutional framework.

Finally, it is worth specifying that even the act carrying out fiscal federalism – adopted with considerable delay and whose unwieldy process of implementation was interrupted because of the negative economic cycle caused by the international economic crisis – requires essential levels of care to be defined because it lays down new rules for financing these services.[34]

4 What the Regions Have Done: Regional Social Care Policies as 'Labs' for Welfare Policies and as a Test-Bench for Autonomy

The national framework law and the reform of Title V of the Constitution fostered the development of different regional welfare models. All Regions issued welfare laws which fall into three groups: (1) those issued before the framework Act No. 328 of 2000, (2) those passed more or less at the same time as the framework law, and (3) those enacted subsequently.[35] Despite their different procedures, planning in all Regions takes place at two levels: at the regional

33 Constitutional Court, Judgement n. 10 of 2010, point 6.4; Judgement no. 62 of 2013. For comments on the judgements: Adele Anzon Demmig, "Potestà legislativa regionale residuale e livelli essenziali delle prestazioni," *Giurisprudenza Costituzionale*, no. 1 (2010): 155 et seq; Erik Longo, "I diritti sociali al tempo della crisi, La Consulta salva la social card e ne ricava un nuovo titolo di competenza statale," *Giurisprudenza costituzionale* 55 (2010): 164 et seq; Marta Cerioni, "Un'ulteriore fattispecie di superamento giurisprudenziale della rigidità del riparto di competenze: 'I livelli essenziali delle prestazioni al tempo della crisi'," *Giurisprudenza italiana* (2010): 2518 et seq; Antonio Ruggeri, " 'Livelli essenziali' delle prestazioni relative ai diritti e ridefinizione delle sfere di competenza di Stato e Regioni in situazioni di emergenza economica (a prima lettura di Corte cost. n. 10 del 2010)," *forumcostituzionale.it* (February 2010), http://www.forumcostituzionale.it/wordpress/images/stories/pdf/documenti_forum/giurisprudenza/2010/0002_nota_10_2010_ruggeri.pdf; Claudio Panzera, "I livelli essenziali delle prestazioni fra sussidiarietà e collaborazione," *Le Regioni*, no. 4 (2010): 941.

34 Act no. 42 of 2009.

35 On the regional welfare models see Giulia Maria Napolitano, "Social Care as a Workshop for Regional Welfare Policies," in *Italian Regionalism: Between Unitary Traditions and Federal Processes, Investigating Italy's Form of State,* ed. Stelio Mangiameli (Heidelberg, Cham: Springer, 2014), 360–362.

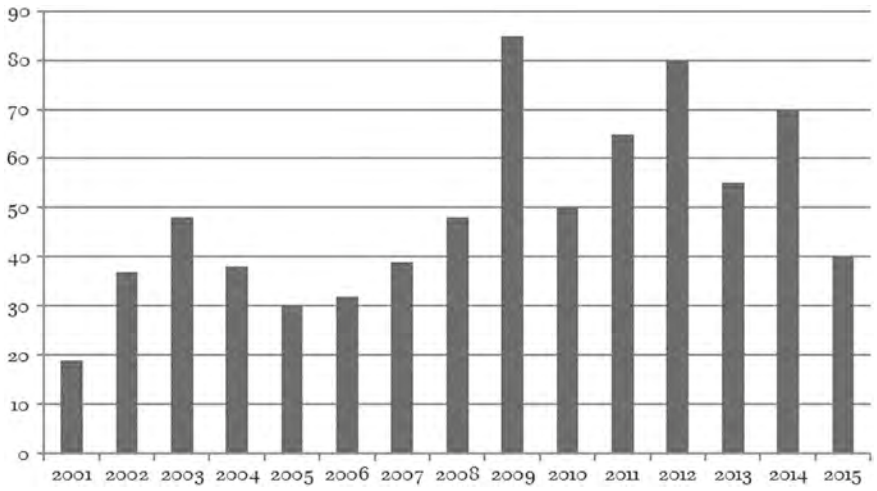

FIGURE 10.2 Regional legislation on social care

level, through the Welfare Plan or the Social and Health Care Plan, and at the sub-regional level, through the Zonal Plan.

A total of 739 laws on welfare and health care policies were issued between 2001 and 2015, accounting for about 8 % of the total regional legislation produced in that period.[36] The number of laws varied from one year to another during these fifteen years (see Figure 10.2). The figures reveal the regional lawmakers' increasing interest in, and sensitivity towards, social policies.

Within social and health care policies there are four areas that account for the bulk of the laws passed in the 2001–2015 period (see Figure 10.3)[37]: the 'third sector' and the reorganisation of care and charitable entities (16 %), family and mother-child policies (16 %), disabilities and invalidity (15 %) and organisational-institutional matters, namely implementation and management of the system (11 %).

The lack of indications on services and benefits, as well as on the minimum levels of care to be guaranteed, together with the large number of regional

36 ISSIRFA sources; see the systematic collection of regional legislation in the chapters edited by Giulia Maria Napolitano and published annually in "Tendenze e problemi della legislazione regionale," in *Rapporto sulla legislazione tra Stato, Regioni e Unione europea*, ed. Camera dei deputi (Rome: Camera dei deputati, 2007–2015), http://www.issirfa.cnr.it/rapporto-camera.html.

37 Napolitano, "Tendenze e problemi."

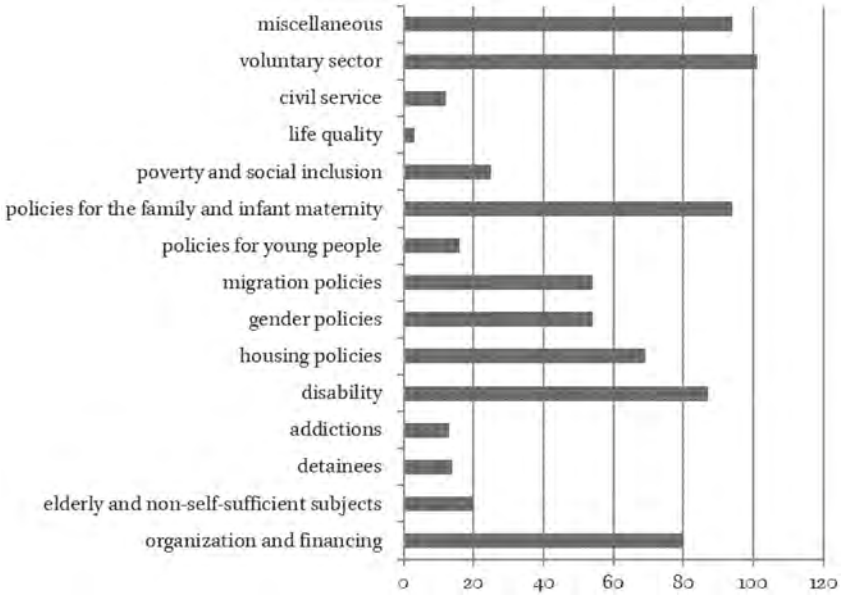

FIGURE 10.3 Regional legislation governing welfare and health care: distribution per sector

legislation and administrative measures on social and welfare policies, also free from State funding and planning constraints, have given rise to different approaches to the question of essential levels of care by the Regions. They intervened in this process in three ways, which may be summarised as pragmatic, wait-and-see, and innovative. In the first approach, some Regions have not addressed the issue of qualifying services and benefits as 'essential' but have set objectives and priorities on the basis of available resources. Others – the 'wait-and-see' Regions – have wholly or partially transposed the text of the State law into regional law, or simply make reference to the articles of the State law without issuing provisions defining what those essential levels are. Lastly, the innovative Regions have moved far beyond the State law provisions in that they have broadened the range of services and benefits. In all these cases, it could be said that the Regions have somehow filled the empty space left by the State in defining the essential levels of services.

In the absence of State regulations on the essential levels of care, regional policy choices were strongly differentiated throughout the country. Subsequently, since the essential levels of care were never defined, all the benefits and services provided by the Regions in the social sphere were mapped in the '*Interregional Nomenclature of services and social measures*'

drawn up by the Social Policies Committee of the Conference of Regions and of the Autonomous Provinces. This document was adopted in 2009 by the Conference of Regions and of Autonomous Provinces and updated in 2014 both in terminology and content. The *Nomenclature* has provided a grouping of social services and defined macro levels of services, within which 'service objectives' have been identified.

With the economic crisis, the Regions have expanded existing services or introduced new measures to support incomes (examples: baby/child bonus, income support measures, etc.). These measures vary depending on the financial resources available for each Region, thus increasing the gap between Regions (especially between North and South), and on political pressure.

From a financial point of view, the Regions and the Municipalities have contributed with their own resources,[38] besides receiving transfers from the State and EU funds, with co-payment by beneficiaries which vary from one Region to another. On the whole, during the economic crisis, regional resources have been increased while national resources have been reduced. Therefore, it may be stated that the Regions have provided social safety nets during the economic crisis thus filling in the vacuum left by the State. This aspect was adversely affected by the local governments' failure to achieve financial autonomy, which meant that the regional policies were managed through a top-down approach to the detriment of the accountability and autonomy of local governments. This situation was considerably worsened over the years because public spending was curtailed, and the coordination of public finance led to an impoverishment of the already scanty regional resources.[39]

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38 Regional resources take the form of co-financing that is added to Central Government transfers for the management and maintenance of the care system, and to other funds to finance policies identified by the Regions as priorities, such as the Regional Funds for the Non-Self-Sufficient, or to provide various kinds of support for family policies and policies for immigrants.

39 On the impact of the coordination of public finance over regional policies see D'Atena, *Diritto regionale*, 220; Michele Belletti, "Forme di coordinamento della finanza pubblica e incidenza sulle competenze regionali, Il coordinamento per principi, di dettaglio e 'virtuoso', ovvero nuove declinazioni dell'unità economica e dell'unità giuridica," in *Il regionalismo italiano tra giurisprudenza costituzionale e involuzioni legislative dopo la revisione del Titolo V – Atti del Seminario*, ed. Stelio Mangiameli (Milano: Giuffré, 2014), 86 et seq; Guido Rivosecchi, "Il coordinamento della finanza pubblica: dall'attuazione del titolo V alla deroga al riparto costituzionale delle competenze," in *Il regionalismo italiano tra giurisprudenza costituzionale e involuzioni legislative dopo la revisione del Titolo V – Atti del Seminario*, ed. Stelio Mangiameli (Milano: Giuffré, 2014), 147 et seq; on the impact of crisis over regionalism and the relationship between State and Regions see Stelio Mangiameli, *Le Regioni italiane tra crisi globale e neocentralismo* (Milano: Giuffré, 2013).

The Regions have also been laboratories for testing policies addressing new needs, such as in the field of immigration: the Regions were the first institutions to develop measures to deal with this situation, in some cases including, and in other cases excluding, migrants from services, and causing State intervention in both cases.[40]

In fact, even if the State has exclusive competence over immigration matters,[41] specifically migration flows, the Regions have claimed the power to guarantee the integration of immigrant populations in different ways and with different means, recognising their entitlement to essential health and welfare services and benefits regardless of whether their presence in the territory is legal or not. All the comprehensive laws on immigration, except for the regional law of Lazio, have been challenged before the constitutional Court[42] by the State.

5 The Constitutional Court as a Balance between the State and the Regions, between Equality and Autonomy

The constitutional Court has been called upon to strike a balance between State and Regional competences. The case law of the last fifteen years shows that the Court has taken on the role of mediator between autonomy and equality.

40 On this issue see Laura Ronchetti, ed., *I diritti di cittadinanza dei migranti, Il ruolo delle Regioni* (Milano: Giuffré, 2012); Laura Ronchetti, ed., *La Repubblica e le migrazioni* (Milano: Giuffré, 2014).

41 Article 117 (2) (b) of the Constitution provides that immigration is one of the subject-matters over which the State has exclusive competence.

42 The main complaint made against them is that Regions have unlawfully encroached on the State's powers in the matter of immigration and unlawfully recognised 'the rights of immigrants living illegally in Italy or awaiting regularization' (Referral against the Campania Region, No. 62 of 2010, published in the *Gazzetta Ufficiale*, no. 20 (May, 2010). According to a ruling of the Constitutional Court, '[t]he Regions are fully empowered to enact legislation relating to immigration […] it being understood that this legislative power may not be applied to matters referring to policies for planning the entry or stay of immigrants on national soil, but over other matters, such as the right to study and to receive social care, *which fall within* the scope of the Regions' concurrent or residual powers' (Judgements nos. 134 and 299 of 2010, italics added). The Constitutional Court recently reiterated the fact that 'public intervention relating to foreign nationals cannot be limited merely to controlling the entry and stay in Italy of immigrants, but must necessarily consider other areas – welfare, education, healthcare, housing – which involve many legislative powers, some of which are vested in the State and others in the Regions' (Judgement no. 61 of 2011, see also Judgements no. 300 of 2005; no. 156 of 2006), *a fortiori* because 'foreign nationals possess all the constitutionally guaranteed basic personal rights' (Judgement no. 148 of 2008, see also Judgement no. 432 of 2005; no. 324 of 2006).

On the one hand, the constitutional Court has recognised social care as a residual competence of the Regions because it is not on the list of exclusive competences of the State nor is it included among the concurrent competences.[43] On the other hand, the constitutional Court has explicitly recognised that the State's competence to establish essential levels of services regarding civil and social rights is not a 'subject-matter' *strictu sensu*, but a 'competence of Central Government that may affect all subject-matters in respect of which the State legislator must lay down the necessary rules to guarantee that everyone, throughout the country, may enjoy guaranteed services, as the essential substance of these rights, without Regional law being able to restrict or condition them'.[44]

The cross-cutting nature of State competence entails 'a strong impact on the exercise of the legislative and administrative powers of the Regions',[45] so that its exercise requires compliance with the principle of loyal cooperation between the State and the Regions,[46] unless there are exceptional circumstances in which the determination of the essential levels of care 'is not sufficient to effectively realize the purpose [...] of protecting extremely disadvantaged individuals' but it legitimises the State to provide welfare benefits directly, without considering the principle of loyal cooperation with the Regions.[47]

For these reasons, the State, in the few cases in which it has determined the essential levels of health care or social care, has often provided instruments for the involvement of the Regions (in the form of 'agreement') to respect their competences. In the case of the ISEE, for instance, the determination of the index, of the types of benefits provided, and of the income level providing access to the benefits significantly affects the residual competence of the Regions in the field of 'social services' and, at least potentially, the finances of the Region that sustain the economic burden of such services. According to the Court, '[it] is, therefore, evident that such determination of the ISEE requires the reconsideration of local situations and the assessment of financial sustainability [...] It follows that fair cooperation by the Region is necessary to implement the challenged provision'.[48]

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43 Cfr., *ex plurimis,* Judgements no. 296 of 2012; no. 61 of 2011; no. 121 and no. 10 of 2010; no. 168, no. 166 and no. 50 of 2008; no. 300 of 2005.

44 Judgement no. 282 of 2002. See also Judgements no. 203 of 2012; no. 232 of 2011; no. 10 of 2010; no. 322 of 2009; no. 168 and no. 50 of 2008; no. 162 and no. 94 of 2007; no. 282 of 2002. On the characteristics of cross-cutting matters see D'Atena, *Diritto regionale*, 161 et seq.

45 Judgements no. 8 of 2011; no. 88 of 2003.

46 Judgements no. 330 and no. 8 of 2011; no. 309 and no. 121 of 2010; no. 322 and no. 124 of 2009; no. 162 of 2007; no. 134 of 2006; no. 88 of 2003.

47 Judgement no. 10 of 2010 on the 'Social card'.

48 Judgement no. 297 of 2012.

An important part of the case law of the Court concerns the financial system. Both the National Social Fund and the 'parallel funds' established after 2001 for social and health care purposes have been challenged before the constitutional Court. The circumstances surrounding these funds are emblematic of the huge efforts that the Court has deployed to resolve the issues created by the Central Government's attempts to continue laying down social policies in respect of matters that the Regions are empowered to manage autonomously. In particular, the Court has declared a number of State funds to be unconstitutional,[49] on the grounds that 'funding with allocation constraints shall not be provided for matters and functions of Regional competence, whether they fall within the exclusive competence of the Regions or within their concurrent powers, albeit in compliance with the fundamental principles established in State law'.[50] However, the Court has also ruled that any effects they had already produced should be retained, on the grounds that 'the social nature of the benefits provided, which refer to fundamental rights, are such that the continuity of said services are to be guaranteed, on the basis of principles of social solidarity, such that it is necessary to maintain any expenditure proceedings in progress, even if they have not yet been completed'.[51]

On the other hand, the Court has 'saved' other Central Government funds,[52] sometimes on the grounds that the provisions were unable to undermine regional powers,[53] or acknowledging the unitary and indivisible nature of the

49 In Judgement no. 50 of 2008, the Court ruled the Fund for the Social Inclusion of Immigrants (article 1 (1267) of Act no. 296 of 2006), and the Fund for the Removal of Architectural Barriers (article 1 (389) of Act no. 296 of 2006) to be unconstitutional. In Judgement no. 370 of 2003 it also ruled that the Fund for the Institution of Nurseries (article 70 of Act no. 448 of 2001) was unconstitutional. The Court has not only intervened in relation to 'parallel' funds but also in relation to the National Social Fund itself, and has reiterated the ruling that any allocation constraint is non-legitimate, even if it relates to only a portion of the Fund, because this would limit the autonomy of the Regions (Judgement no. 423 of 2004). In reality, the Court has challenged the very survival of the Fund once the constitutional reform is implemented, since the structure and function of the Fund do not reflect any of the financing instruments provided for by the new article 119 of the Constitution. At the same time, continuing to keep its balance, the Court has not wholly excluded the survival of the Fund once article 119 is implemented, provided that it is used exclusively to finance welfare or minimum levels of care, which are exclusive competences of the State (see Judgement no. 423 of 2004).

50 Judgement no. 160 of 2005. See also Judgements no. 50 of 2008; no. 77 and 51 of 2005; no. 423 and 16 of 2004; no. 370 of 2003.

51 Judgement no. 50 of 2008. See also Judgements no. 423 of 2004; no. 370 of 2003.

52 Judgements no. 453 of 2007; no. 141 of 2007. For example, the Family Policies Fund, the Youth Policies Fund, the Equal Rights and Opportunities Policies Fund.

53 Italics added.

Fund and its purpose of being used for matters over which both Regions and State have competence,[54] without any material sphere being identifiable as having prevalence over the others. In this case, referring to the principle of loyal cooperation, the Court ruled that the agreement or the opinion issued by the Joint Conference was an instrument for 'safeguarding' the fund.

During the years of the crisis, the Court was called upon on several occasions to judge the curtailing of regional resources imposed in order to ensure budgetary consolidation. In the abundant case law on the coordination of public finance, it is worth mentioning the judgement stating that 'the determination by the State of the essential levels of service with regard to civil and social rights that are to be ensured across the national territory is useful. With regard to the health sector this determination occurred recently with d.P.C.m. of 12 January 2017 (prime ministerial decree) which offers the Regions a significant orientation criterion for identifying objectives and areas where resources are to be reduced, also indicating the threshold below which spending – provided it is efficient – cannot be further compressed (Judgement no. 65 of 2016)'.[55] Failure to set essential levels for social policies has led to a reversal in the burden of proof,[56] and so the Regions, in order to counter the linear cuts made within the framework of a policy curbing public spending, are compelled to provide evidence showing that it is impossible for them to offer adequate levels of service to cater to the needs of the people.[57]

The efforts made over the past few years by the constitutional Court seem to have been designed with several purposes: firstly, to reconcile the need to guarantee adequate economic support for social policies, with respect for the autonomy of the Regions in the management of social policies; secondly, to restrict attempts by the Executive to assert its earlier overarching Central Government power; thirdly, to ensure that any effects produced by the allocation of resources are protected, while ensuring that any possible benefits, rights or expectations created are not cancelled; lastly, to shuttle the welfare model into the new system via a transition phase. This complex operation shows the Court to be walking the tightrope in an area where the boundaries are still ill-defined while awaiting the implementation of the constitutional reform that the Court itself has so frequently called for.

54 This particular case referred to the Family Policies Fund and to the National Fund against Sexual Violence (Judgement no. 453 of 2008).

55 Judgement no. 154 of 2017, point 4.6.2.1.

56 Judgement no. 154 of 2017.

57 Judgements no. 65 and 141 of 2016.

Finally, it is necessary to mention the case law on migration, because for the constitutional Court the protection of equality also extends to the recognition of social assistance benefits to foreigners present in the country.[58] For instance, in Judgement 40/2011, the Court declares unconstitutional an Act of the Region of Friuli Venezia Giulia which offers access to the integrated system of social services of the Region only to EU citizens who have resided in the Region for at least thirty-six months. The exclusion of entire categories of persons was considered by the Court to be a violation of the principle of equality, since it introduces arbitrary distinctive elements that constitute the prerequisite for provisions which, by their very nature, do not tolerate distinctions based on citizenship, or on particular types of residence.[59]

6 Concluding Remarks: The Relationship between the State and the Regions, from Conflict to 'Political Agreement' and Institutional Involvement

The State has frequently claimed the power to define the essential levels of care, but it has been unable to do so, even by resorting to instruments other than State law. The Regions have shown their determination to protect their powers by claiming, on the one hand, compliance with the principle of legality, and on the other, they have defended their right to play a part, in one way or another, in defining social policies based on the principle of loyal cooperation.

As pointed out, the Regions have filled the vacuum left by the State in defining the essential levels of services and the State has intervened in very few cases to guarantee equality. However, this role of the Regions, which has substituted that of the State, has not succeeded in redressing the effects of the absence of State intervention because it does not solve the problem of different levels of services in different areas of the country.

The relationship between the State and the Regions has often been riddled with constitutional conflicts. The division of competences between State and Regions and the complex financing system under the Italian legal order could

58 Judgements no. 306 of 2008; no. 187 of 2010; no. 269 of 2010; no. 40 of 2011; no. 61 of 2011.

59 On this issue see Gabriella Saputelli, "Differenziazioni regionali in merito all'accesso dei migranti ai servizi sociali," in *I diritti di cittadinanza dei migranti, Il ruolo delle Regioni*, ed. Laura Ronchetti (Milano: Giuffré, 2012), 227–263; Laura Ronchetti, "I diritti fondamentali alla prova delle migrazioni (a proposito delle sentenze nn. 299 del 2010 e 61 del 2011)," *Rivista AIC*, no. 3 (2011); on the rights of migrants see Enzo Di Salvatore and Michela Michetti, *I diritti degli altri, Gli stranieri e le autorità di governo* (Napoli: Esi, 2014).

not avoid the intervention of the constitutional Court, which has the function of clarifying and defining a balance between the two legislators. In recent years, some elements have revealed that the system has been going from conflict to 'gentlemen's agreements' and to institutional involvement.

In 2012, when the national resources for the Regions were significantly reduced, there was no agreement in the State-Regions Conference (or the Joint Conference) on the allocation of Social Funds because of insufficient resources, and the distribution of funds was frozen. This circumstance was the starting point for moving into a phase of negotiations.

The following year, the Ministry of Labour and Social Policies 'transposed' the Nomenclature of Services and Social Measures adopted by the Conference of Regions and of Autonomous Provinces in 2009 into the administrative decree for the distribution of National Social Policies Fund for the period 2013–2015.[60] Consequently, agreements were reached on allocations from the National Social Policy Fund and resources were distributed.

This mechanism was repeated in the following years. The recent Act on Minimum Income[61] introduced a new form of regional participation: a network which involves a delegation from each regional or provincial Government is commissioned to develop a number of plans (the National Social Plan, the Social Action Plan and Social Services for Poverty, the Plan for Self-Sufficiency) and to define guidelines for social policies. It is worth specifying that this novelty does not exclude, but it comes to add to, the participation in the Joint Conference because it precedes the legislative phase.

In the decentralised Italian system, the Regions have become essential interlocutors of the State which, in defining its policies, cannot ignore the results achieved. Both the nomenclature of 2009 and the network introduced in the recent Legislative Decree confirm this relationship.

The real challenge for the State and the Regions seems to be the need to find a 'no-conflict zone' for participation wherein policies can be defined. This question involves the well-known problems of the lack of an institutional forum where the Regions can participate in the legislative process (which is a characteristic of Federal States).[62] As mentioned in this chapter on the Italian

60 DM 26/6/2013.

61 L. 15 marzo 2017, n. 33, Delega recante norme relative al contrasto della poverta', al riordino delle prestazioni e al sistema degli interventi e dei servizi sociali. (17G00047) (GU Serie Generale n.70 del 24-03-2017) available on https://www.gazzettaufficiale.it/eli/id/2017/03/24/17G00047/sg.

62 On the second Chamber there is a vast literature. See Stelio Mangiameli, ed., *Un senato delle autonomie per l'Italia federale* (Napoli: Edizioni Scientifiche Italiane, 2003); Luca Castelli, *Il Senato delle autonomie, Ragioni, modelli, vicende* (Padova: Cedam, 2010);

experience, the system of Conferences, even if considered inadequate, is used 'in the continuing absence of changes in the parliamentary institutions'.[63] While the choice of cooperation compensates for the absence of a 'Senate of the Regions', the issue of financial regional autonomy remains unsolved.

Failure to implement Article 119 of the Constitution (financial autonomy), together with the State competence over coordination of public finance have been obstacles to the autonomous management of regional policies.[64] Without fiscal powers and being repeatedly subject to linear cuts, the Regions are unable to achieve the purpose of being the institution that can best meet the needs of the territories. As is well known, these two elements are essential in a regional state, and their absence undermines the functioning of the system.

It can be concluded that the analysis of the institutional political events and the case law of the Court shows that the implementation of the principle of equality in the Italian regional system was not achieved through a dual system of rigid separation of competences, but through an often contradictory dynamic process of relations between central and regional levels.

Furthermore, in a decentralised system, the two principles of autonomy and equality may seem to be in opposition with each other, but an analysis of social care in the Italian system has shown that the principle of equality can also be achieved *through* autonomy. This circumstance demonstrates the value of the decentralised system, where the two levels stimulate each other – even through conflict – and play a mutually complementary role. Indeed, the Regions which are the institutions that are closest to the citizens are responsible for the needs and demands that come from the communities and can develop diverse experiences in the territory. Obviously, there is a tension between the two institutional subjects (State and Regions), but this tension is functional to the implementation of equality.

D'Atena, *Tra autonomia e neocentralismo*, 271 et seq; Eduardo Gianfrancesco, "La partecipazione delle regioni alla vita dello Stato (e della Repubblica): bicameralismo, camera delle regioni e conferenze," *Italian Papers on Federalism*, no. 2 (2017).

63 Judgement no. 6 of 2004. On the system of Conferences see Guido Carpani, *La Conferenza Stato-regioni, Competenze e modalità di funzionamento dall'istituzione ad oggi* (Bologna: Il Mulino, 2006), 20; Riccardo Carpino, "Evoluzione del sistema delle Conferenze," *Istituzioni del Federalismo*, no. 1 (2006): 19 et seq; Commissione parlamentare per le questioni regionali, *A Conclusione dell'indagine conoscitiva sulle forme di raccordo tra lo Stato e le Autonomie territoriali, con particolare riguardo al 'Sistema delle Conferenze' – Approvato dalla Commissione parlamentare per le questioni regionali nella seduta del 13 ottobre 2016*, Doc. XVII-bis n. 7, http://www.senato.it/service/PDF/PDFServer/DF/327040.pdf.

64 See Antonio D'Atena, "The Financial Autonomy of Italy's Regional Authorities: its Constitutional Model and the History of its Implementation," *Italian Papers on Federalism*, no. 1 (2018): 1.

In this perspective, we can make use of what US Supreme Court Justice Louis Brandeis said in a famous Dissenting opinion:

> Denial of the right to experiment may be fraught with serious consequences to the nation. It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country. This Court has the power to prevent an experiment. We may strike down the statute which embodies it on the ground that, in our opinion, the measure is arbitrary, capricious, or unreasonable. We have the power to do this because the due process clause has been held by the Court applicable to matters of substantive law as well as to matters of procedure. But, in the exercise of this high power, we must be ever on our guard lest we erect our prejudices into legal principles. If we would guide by the light of reason, we must let our minds be bold.[65]

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65 Luis Brandeis, Dissenting opinion, in US Supreme Court, *New State Ice Co. v. Liebmann* (1932, no. 463), 285 U.S. 262, Judgement of 21 March 1932.

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PART 4

Case Studies on Political Equality

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CHAPTER 11

Federal States and Equality in Political Representation

Federalism Superseding Democracy?

Sérgio Ferrari

1 Introduction: Aim and Outline of the Research

This chapter aims to present a brief reflection on the distribution of seats in the lower chamber of Brazilian parliament and its possible impact on the principle of equality and democracy.

The survey was based on empirical data concerning the number of representatives from each state and the number of voters. All data was obtained from publicly available government sources. From simple calculations, there was the possibility of verifying that the division of seats, as provided for in Brazilian legislation, leads to an imbalance in the representation of citizens from different States.

This chapter will proceed with the following outline: chapter 2 will present the *one person, one vote* principle as well as its practical application. In addition, the relationship between such a principle and democracy will be discussed. Chapter 3 will point out some elements of formation of parliaments in federal states, bicameralism and the reasons for its adoption. In this chapter, the methods for the constitution of the lower house and the need to distribute seats between certain groups of the electorate, territorially determined, will also be considered. In chapter 4, basic data about Brazil and its Constitution will initially be shown so that the reader can more easily understand the problem to be examined. Then, the numbers obtained in the empirical survey and their impact on equality among voters will be analysed. In this chapter, the causes of the distortion found will also be discussed. In chapter 5, possible measures to solve or mitigate the distortion will be appraised, discussing the advantages and disadvantages of each one. Finally, in the conclusion (chapter 6), the arguments and possible solutions will be taken up, with the opinion of the author.

2 *One Person, One Vote*: Democracy and Equality in Representation

The relationship between democracy and equality is almost intuitive. Every human being enjoys the same dignity and is entitled to the same possibilities to participate in the decision-making of the community.

The term *one man, one vote* (today, more appropriately, *one person, one vote*) often designates such a rule of equal representation in the United States Constitution, as stated in the 14th Amendment, 1868, Section 2:

> Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed.[1]

Historically, the idea of universal suffrage was a conquest that took many centuries to happen. Women and ethnic minority groups were denied political rights. Nowadays, there is a general consensus that the principle of equality requires every human to be equally represented in the deliberative chambers of the country. In this sense, equality is an essential requirement for democracy.

This idea is widely accepted by scholars, as Snyder and Samuels say:

> Although scholars vigorously dispute the exact meaning and definition of democracy, wide agreement exists that free and fair elections are the cornerstone of any democratic system of government. An essential characteristic of electoral 'fairness' in democracies is that the vote of each citizen counts equally. This notion of fairness embodies the well-known principle of 'one person, one vote' that theorists such as Robert Dahl consider a necessary ingredient of democracy.[2]

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1 Indigenous people, under American law, have a special legal regime; they are not considered subject to the sovereignty of the states or the central government, which is called 'triadic federalism': 'Indeed, Indian tribes today continue to possess important governmental authority over their lands and members. The rationale is that tribes were sovereign before European contact and have retained all pre-existing sovereignty that (1) remains consistent with the tribes' 'dependent status', (2) has never been ceded away by them by treaty, and (3) has never been pre-empted by federal statute.' Daniel A. Farber, William N. Eskridge Jr., Philip P. Frickey. *Constitutional Law* (St. Paul: Thomson West, 2003), 1048.

2 Richard Snyder and David J. Samuels, "Legislative Malapportionment in Latin America," in *Federalism and Democracy in Latin America,* ed. Edward L. Gibson (Baltimore: The John Hopkins University Press, 2004), 131.

It is also present in the Universal Declaration of Human Rights (article 25)[3] and in the American Convention on Human Rights (article 23).[4] A similar statement is found in article 14 of the Brazilian Constitution.[5] Moreover, this assumption leads to the idea that every vote is worth the same. Ideally, each member of the parliament should represent the same number of citizens.

3 Representation in Federal States

In this section, representation in federal states and its repercussions on the principle of equality among citizens will be analysed. In the first part (3.1), bicameralism, the reasons for its adoption in federal states and the division of chairs in the upper chamber will be discussed. In the second part (3.2), the formation of the lower house and the difficulties of finding a method that meets proportionality between the states and, therefore, equality between citizens will be specifically analysed.

3.1 *Bicameralism and the Reasons for Its Emergence: The Formation of the Upper House*

The federal form of state, despite some characteristic traits in previous historical periods,[6] had its genesis in the foundation of the United States of America.[7] In addition, the American Constitution of 1787 influenced the Constitutions

3 The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.

4 Every citizen shall enjoy the following rights and opportunities:
   a. to take part in the conduct of public affairs, directly or through freely chosen representatives;
   b. to vote and to be elected in genuine periodic elections, which shall be by universal and equal suffrage and by secret ballot that guarantees the free expression of the will of the voters.

5 Art. 14. Popular sovereignty will be exercised by universal suffrage and by direct and secret vote, with equal value for all.

6 Daniel Elazar, *Exploring Federalism* (Tuscaloosa: The University of Alabama Press, 1987), xii.

7 Sanchez Agesta says about the importance of the USA example: 'The founders of Philadelphia had a very clear idea of the problems they had to solve and of the solution with which they wanted to solve them. Few times we find in History, with so much evidence, the root of institutions'; Luis Sanchez Agesta, *Curso de derecho constitucional comparado* (Madrid: Universidad de Madrid, Facultad de Derecho, 1976), 178.

of Latin American countries that gained independence in the nineteenth century,[8] including Brazil.

During the formation of the US federation at the Philadelphia Convention, discussions took place on how best to balance the representation of States. As can be read in the Federalist Papers (n. 62I) 'The Equality of representation in the senate is another point, which, being evidently the result of compromise between the opposite pretensions of the large and the small states, does not call for much discussion.'[9]

The main issue in federations is the need to represent citizens individually but also the constituent states in a reasonably balanced way. Thus, the bicameral formation emerges as a solution to this question. According to George Anderson's summary, the representation of constituent units, in almost all federations, leads to a bicameral organisation.[10]

However, this formula of bicameralism already generates some distortion: the population of less populous states will have a larger representation in the upper chamber. Therefore, it means there are two factors present in federal states, which must be taken into account in the distribution of seats of parliament: equal representation *of citizens* and equal representation *of constituent units*. If only one of such factors is considered – as it usually is in the upper chambers – clearly, the other will be impaired. This impairment will be more extensive, proportionally to the difference of population between the constituent units. Hueglin and Flenna show some examples of inequality in the upper chamber, including the critical case of the USA.[11]

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8 'While the federations of Latin America followed American governmental design very closely, these institutional similarities tend to obscure the fact that the Latin America road to federalism was quite different.' Thomas O. Hueglin and Alan Fenna. *Comparative Federalism: A Systematic Inquiry* (Quebec: Broadview Press, 2005), 133.

9 Alexander Hamilton, John Jay and James Madison, *The Federalist*, eds. George W. Carey and James McClellan (2001), 320, http://files.libertyfund.org/files/788/0084_LFeBk.pdf.

10 'Almost all the federations count on a high chamber whose composition, in some way, represents the constituent units. The prevalence of upper chambers thus configured in federations is associated with the idea that both the population and the constituent units are parts of the federation and that these two dimensions need to be reflected in the central institutions'; George Anderson, *Federalismo: uma introdução* (Rio de Janeiro: FGV, 2009), 69.

11 'The path of equal representation was taken by the Americans, conforming naturally to their original confederal approach under the Articles and carried over to the final Constitution. This results in 'massive overrepresentation' of the small states; modern-day California is awarded only the same number of Senate seats as Wyoming despite having 66 times the population. Among the classical federations, only Australia and, with a minor variation, Switzerland has followed this example – and in Australia malapportionment at this most extreme is only 14 to one (New South Wales versus Tasmania)'; Thomas

That is why we do not need to be afraid to say that, in this specific point, federal arrangement is not democratic. Preston King points it out in a clear way:

> First, the voting populations of the different territorial units in federations are always of unequal size, sometimes dramatically so. Since the votes of citizens in some territories will have greater force than those of citizens in other states, federations must in this sense, and in varying degree from case to case, prove undemocratic.[12]

Regarding specifically the Brazilian case, George Anderson presents the following numbers: 'At one extreme is Brazil, where senators from states that together comprise 8 % of the national population occupy more than 50 % of seats.'[13] In the extreme, there are Roraima (177 thousand people for each senator) and São Paulo (14.5 million people for each senator).

Therefore, in short, it is possible to say that, in a federal state, the adoption of bicameralism is justified because:

– The upper chamber is supposed to *represent states*, guaranteeing the same number of chairs for each of them and
– The lower chamber is supposed to *represent citizens*, distributing the seats proportionally to the population or the electorate of each state.

This statement is deliberately a simplification. We know there are federal states that do not adopt bicameralism. There are also federal states where representation of states in the upper house is not entirely equal. These exceptions, however, do not invalidate the above findings.

The overrepresentation of some citizens in the upper house, in this sense, can be an important guarantee for the representation of minorities. If the upper house already performs this function, the lower house must, on the other hand, guarantee, to the greatest extent possible, the equality of citizens' representation. Understanding this point is the only reason why this chapter discusses bicameralism and its role in federations. The purpose of the chapter is to analyse exclusively the formation of the lower chamber in a federal state and how its criteria can impact equality.

An interesting approach to representation in federal states is offered by Francesco Palermo, who suggests that, in order to guarantee more

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O. Hueglin and Alan Fenna, *Comparative Federalism: A Systematic Inquiry* (Quebec: Broadview Press, 2005), 181.

12 Preston King, *Federalism and Federation* (Baltimore: The Johns Hopkins University Press, 1982), 88.

13 Anderson, *Federalismo: uma introdução,* 71.

representation and participation to local interests, we should focus on analysing the phenomenon of bilateralism.[14] Bilateralism, in this context, can be understood as the process of cooperation and direct understanding between a single local government and the central government, without the aspect of collective deliberation that characterises multilateral bodies.[15]

Nevertheless, the focus of this chapter is the lower chamber. It will be discussed in the next chapters, regarding the Brazilian case.

3.2 *The Lower Chamber and Its Formation*

As seen above, the composition of the lower chamber should be proportional to the electorate of each state (*one person, one vote* …) so that it may be capable of representing citizens equally. Also, in federations, states are usually electoral districts. For this reason, the ratio between the number of citizens and the number of seats assigned to each state becomes a very important issue.

At this point, it is possible to say that bicameralism can offer a balance between the two factors mentioned above, that is, equality of representation between citizens and equality of representation between constituent units. Clearly, disproportional representation of citizens in the upper house is a price to pay for the federative balance.[16] The option for federalism brings with it the acceptance of this difference between the citizens of the states regarding the representation in the upper house. The assumption, however, is that in the lower house the representation of citizens is as egalitarian as possible. So far, there is nothing new.

However, when, in addition to the natural imbalance of representation of citizens in the upper house (a fact inherent in almost all federations), there

14 'While the political and scholarly discourse too often looks at how second chambers could be made more effective in representing subnational interests, it forgets that *the issue is participation, that participation takes place outside of second chambers* and that, in a growing number of cases, *the main problem is to determine the right balance between individual and collective bargaining between the levels of government'*; Francesco Palermo, "Beyond Second Chambers: Alternative Representation of Territorial Interests and Their Reasons," *Perspectives on Federalism* 10, no. 2 (2018).

15 'This is why more and more frequently strong subnational units pursue bilateral instruments for negotiation and cooperation with the national level and very often such fora are legally established since the national level acknowledges that they are necessary.' Francesco Palermo, "Beyond Second Chambers: Alternative Representation of Territorial Interests and Their Reasons," *Perspectives on Federalism* 10, no. 2 (2018).

16 'Federations, then, sacrifice in some degree citizen equality in order to secure, again in some degree, regional equality.' King, Preston. "Federalism and Representation," in *Comparative Federalism and Federation*, eds. Michael Burgess and Alain-G. Gagnon (London: Harvester Wheatsheaf, 1993), 101.

is also an overrepresentation of some constituent units in the lower house, there is an excessive impairment to equality among citizens. In this sense, it is understood that the federal organisation can mean a threat to democracy.

In federal states, there is a division of chairs, in lower chamber, among the states. Therefore, since members of congress must be elected by the votes of only a single state, territorial division can cause an impact on equality of representation. Hence, there is a clear relationship between the *division of territory* (one of the key subjects of studies on *federalism*) and equality in representation: if the states are different in population or density, it is often hard to find a mathematical formula to preserve equal representation.

Proportionality in the representation of citizens of different states may seem a simple task, but, indeed, it is not. The first problem concerns only mathematics. As a starting point, let us take the division of the total population of a country by the number of seats in the lower chamber, obtaining a 'quotient'. Then, we divide the population of each state by this quotient. The result should indicate how many inhabitants each congressperson represents. However, the division will rarely be exact, i.e., resulting in a counting number. If the result indicates that state A should have 5.6 representatives, and state B must have 2.4 representatives, which state should assign the chair, A or B? Also, if a state has a population below the quotient, can it remain without representation?

Almost all Constitutions of federations require that each constituent unit must have at least one representative in the lower house. This point is highlighted, for instance, in the Swiss system of dividing the 200 seats of the lower house,[17] as well as in the formula of the US Constitution.[18] Despite the different solutions adopted in each federation, the minimum of one representative per constituent unit has an obvious basis: if a constituent unit without representatives were possible, its citizens would simply not be represented in parliament,

17 'In the first round, the total number of all inhabitants is divided by 200. Cantons that have a population of less than the determined number receive one seat. These cantons and their share in the Swiss population are excluded from the further procedure. In the second round, the remaining population is divided by the remaining seats. Again, the cantons whose population is less than the determined number receive one seat, and they and their populations are, from then on, excluded from the procedure. This procedure is repeated until all remaining cantons have populations higher than the determined number. In the third round, for the distribution of remaining seats, the population of each remaining canton is divided by the last determined number'; Thomas Fleiner, Alexander Misic and Nicole Töpperwien, *Constitutional Law in Switzerland* (Alphen aan den Rijn: Stämpfli Publishers, 2012), 89.

18 Article 1, section 2, clause 3: 'The Number of Representatives shall not exceed one for every thirty Thousand, but each State shall have at Least one Representative.'

which would mean the annulment of their citizenship. This conclusion, however, will only be valid if we have as an insuperable dogma the idea that a citizen can only be represented in the lower house,by another citizen of the same state.

A second mathematical problem is the assignment of minimum and maximum numbers of representatives per constituent unit. This tends to damage the more populous states and favour the less populous. From a strictly arithmetic point of view, it is quite clear that citizens of more populous constituent units are underrepresented, in comparison with citizens of less populous ones (overrepresented). In my view, a simple breach of the rule *one person, one vote* is enough to characterise an impairment to equality of representation and, consequently, to democracy. It is true that the functionality of the system may require toleration of some distortion, at least in extreme cases (very populous or very sparsely populated constituent units). Nevertheless, the preservation of equality and democracy means that we must always seek the formula that minimises these problems as much as possible.

Finally, in a time perspective, population may vary over time from one constituent unit to another in a different way. Taking any period of time, a constituent unit may have a higher population growth than another one. This may be due to demographic differences such as higher birth rates or longevity in some states. However, the most common cause in Brazil is migration within the country.[19] This is especially dramatic in countries with high social inequality, such as Brazil, where workers from the north and northeast regions tend to migrate to the southeast region, in search of jobs and a higher quality of life. Hence, rules of division of chairs must be periodically updated. In case such updates prove to be impossible, flexible rules should at least be adopted, in order to modify the division with a simple update of population numbers. If there are no updates (of rules or information), such distortion tends to increase over time.

4 The Brazilian Case

From this topic, the Brazilian case will be specifically addressed, in three subtopics. In the first, some general information will be presented for a better understanding of the local context, especially for the foreign reader. In the

19 Jairo Nicolau, *Representantes de quem? Os descaminhos do seu voto da urna à Câmara dos Deputados* (Rio de Janeiro: Zahar, 2017), 99.

second topic, Brazilian constitutional and legal rules on the formation of the lower house will be exposed, as well as the figures resulting from the application of these rules. In the third, the effects of these results on the principle of equality will be discussed.

4.1 *The Context: Key Facts about Brazil*

As an overview, the Brazilian federation is made up of 26 states and one federal district. The total population estimated for 2017 is 207.7 million people.[20] For study purposes, the country is usually divided into five regions: north, northeast, centre-west, southeast and south.[21] The southeast is where most of the population is concentrated, while the north and centre-west have great territorial extension and smaller population, resulting in low demographic density.[22] The northern region holds large, still-preserved forests and indigenous populations.[23] The centre-west is currently one of the world's largest producers of animal protein and grains, especially soybeans.[24] The north and northeast have the worst indicators of development and quality of life.[25] The south and southeast regions have higher rates of development and some cultural homogeneity between them. More than 40 % of the population is

20 IBGE (2017), https://agenciadenoticias.ibge.gov.br/agencia-sala-de-imprensa/2013-agencia-denoticias/releases/16131-ibge-divulga-as-estimativas-populacionais-dos-municipios-para 2017#:~:text=O%20IBGE%20divulga%20hoje%20as,2016%20(0%2C80%25).

21 IBGE (2020), https://www.ibge.gov.br/geociencias/organizacao-do-territorio/divisao-regional/15778-divisoes-regionais-do-brasil.html?=&t=0-que-e. The states of each region are: North: Amazonas (AM), Pará (PA), Acre (AC), Rondônia (RO), Amapá (AP), Roraima (RR) and Tocantins (TO); Northeast: Maranhão (MA), Piauí (PI), Ceará (CE), Rio Grande do Norte (RN); Pernambuco (PE), Alagoas (AL), Paraíba (PB), Sergipe (SE) and Bahia (BA); Centre-West: Mato Grosso (MT), Mato Grosso do Sul (MS), Goiás (GO) and the federal district – Distrito Federal (DF); Southeast: Espírito Santo (ES), Minas Gerais (MG), Rio de Janeiro (RJ) and São Paulo (SP); South: Paraná (PR), Santa Catarina (SC) and Rio Grande do Sul (RS).

22 IBGE (2010a), https://censo2010.ibge.gov.br/sinopse/index.php?dados=10&uf=00. Agência Brasil (2019), https://agenciabrasil.ebc.com.br/economia/noticia/2019-10/estudo-diz-que-sudeste-reune-maior-numero-de-residentes-422#:~:text=A%20regi%C3%A30%20Sudeste%20%C3%A9%20a,Oeste%20(7%2C7%25).

23 Ministério do Meio Ambiente (2020), https://www.mma.gov.br/informma/item/8746-regiao-norte.html.

24 CONAB (2019), https://www.conab.gov.br/institucional/publicacoes/perspectivas-para-a-agropecuaria.

25 IPEA(2019),https://www.ipea.gov.br/portal/index.php?option=com_content&view=article&id=34681&Itemid=7#:~:text=Em%202017%2C%200%20%C3%ADndice%20atingia,era%20inferior%20ao%20do%20pa%C3%ADs.

concentrated in only three states of the federation (São Paulo, Minas Gerais and Rio de Janeiro), all in the southeast region.[26] The three coastal states of the southeast region (Rio de Janeiro, São Paulo and Espírito Santo) produce more than 95 % of Brazilian oil.[27] For this reason, they also have a predominant share of royalty revenue.

Although there are variations between states, none of them significantly concentrates any ethnic or religious group, which are scattered over the country. The uniformity of the language is almost total, since only a very small part of the population (indigenous people still living in isolation) do not speak Portuguese.[28] Regional variations of the language are irrelevant.

In summary, Brazilian states and regions are highly homogeneous as to the key factors that most commonly identify minorities in need of protection: nationality, ethnicity, religion and language.

Presidentialism is the system of government, with a president elected directly every four years, on the same date as the legislative elections. Only a second consecutive term is allowed for the president, with no limits for non-consecutive periods. Voting is mandatory for all Brazilians between 18 and 70 years of age, and it is optional for those between the ages of 16 and 17 and those over 70. In the 2016 elections, there were 144 million people eligible to vote.[29]

The 26 states and the Federal District have their own parliaments (with a single chamber), directly elected by citizens according to the *one person, one vote* principle. However, its relevance is narrow. All important legislative matters, according to the Constitution, must be regulated by federal laws and, therefore, passed in the national parliament.[30]

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26 IBGE (2017), https://agenciadenoticias.ibge.gov.br/agencia-sala-de-imprensa/2013-agencia-de-noticias/releases/16131-ibge-divulga-as-estimativas-populacionais-dos-municipios-para2017#:~:text=O%20IBGE%20divulga%20hoje%20as,2016%20(0%2C80%25).

27 ANP (2019) http://www.anp.gov.br/publicacoes/anuario-estatistico/5237-anuario-estatistico-2019.

28 According to the latest official information available (2010 census), 17.5 % (143,144) of indigenous people (817,963), who represent 0.08 % of the total population (190,755,799) do not speak Portuguese. IBGE (2010b), censo2010.ibge.gov.br/https://indigenas.ibge.gov.br/graficos-e-tabelas-2.html.

29 TSE (2016), http://www.tse.jus.br/imprensa/noticias-tse/2016/Novembro/segundo-turno-municipios-com-biometria-tem-indice-menor-de-abstencoes.

30 Marcelo Piancasteli. "The Federal Republic of Brazil," in *Distribution of Powers and Responsibilities in Federal Countries*, eds. Akhtar Majeed, Ronald L. Watts and Douglas M. Brown (Montreal: McGill-Queen´s University Press, 2006), 81.

Brazilian Constitution clearly establishes the role of each house: the Chamber of Deputies is composed of representatives of the people and the Federal Senate is composed of representatives of the states.[31]

The Senate is composed of three representatives from each constituent unit (26 states and the federal district), totalling eighty-one senators. Each senator has a mandate of eight years. Renewal occurs every four years, alternating one of three and two of three, i.e., one senator per state in one election, and two senators per state in the next election, and so on. Election occurs through the majority system, that is, the most voted are elected, regardless of party.[32]

4.2 *The Formation of the Brazilian Lower Chamber: Rules and Numbers*

For the composition of the Chamber of Deputies, candidates within the same state compete for the chairs allocated to that constituent unit. Voters in each state can only vote for candidates from that state. Election obeys the proportional system, that is, the seats are divided between parties according to the total votes for each party, in that state.[33]

The total number of deputies is determined by complementary law.[34] The Constitution further determines that the number of representatives per state must be proportional to its population. However, the Constitution itself (not an ordinary law) also establishes a minimum of eight and a maximum of seventy deputies per constituent unit.[35]

It is important to note that the role of each chamber in the legislative procedure is very similar. Both are equally important in the law-making and in the oversight of the Executive Branch. Ordinarily, every law must be passed

31 Art. 44: 'The Legislative Power is exercised by the National Congress, which is composed of the Chamber of Deputies and the Federal Senate.'

32 Art. 46: 'The Federal Senate is constituted of representatives of the States and the Federal District, elected according to the majority principle; Paragraph 1: Each State and the Federal District shall elect three Senators, with a term of eight years.'

33 Art. 45: 'The Chamber of Deputies is composed of representatives of the people, elected by the proportional system, in each State, in each Territory and in the Federal District.'

34 The complementary law ('lei complementar') is a special type of law whose subject to be regulated is previously determined by the Constitution. Its approval requires an absolute majority (more than half of the members of the whole chamber), while the ordinary law ('lei ordinária') may be passed by a simple majority (more than a half of those present).

35 Art. 46 Paragraph 1: 'The total number of Deputies, as well as the representation by State and by the Federal District, shall be established by complementary law, proportionately to the population, with the necessary adjustments, in the year preceding the elections, so that none of those units of the Federation has less than eight or more than seventy Deputies.'

in both chambers successively. In addition, several deliberations are bound to the *Congresso Nacional* (National Congress), which consists of the unicameral meeting of the two chambers.

The Complementary Law 78 of 1993, which complements these norms, thus establishes that the maximum number of federal deputies is 513, the most populous state must have seventy deputies and none of them shall have less than eight (repeating what the Constitution settles). Furthermore, information from the official statistics institute must be used to calculate the distribution of chairs between states.[36]

The last general revision of the composition of the Chamber of Deputies took place in 1986. Subsequently, seats were added only to some states, reaching the number of 513, which has remained the same since 1993. Therefore, for almost 25 years, the division of seats between constituent units has been unchanged, despite the variation of total population and also in each constituent unit.

These rules contained in Brazilian laws generate great distortion in the representation of the states in the lower chamber. Table 11.1 shows the number of representatives (second column, 'A') and inhabitants (third column, 'B') in each constituent unit. In the fourth column, the number of citizens represented by each representative is shown. This results from a simple division between the number of inhabitants (third column) and the number of representatives per constituent unit (second column). In the fifth column, there would be the number for each State, if an exact proportion were adopted (the 'ideal' number). In order to calculate the exact proportion, 513 seats were divided between the constituent units, *without considering the minimum of eight and the maximum of seventy*. In the fifth column is the difference, more or less, in that number of representatives.

This difference can be seen in Figure 11.1 below, where the bars indicate the number of citizens represented by each Member of the lower chamber by state (the 'C' factor in the table above).

The midpoint would be situated at 394,658 citizens, so that seven constituent units are underrepresented. On the other hand, twenty constituent

36 Art. 1: 'Proportional to the population of the States and the Federal District, the number of federal deputies shall not exceed five hundred and thirteen representatives, provided by the Brazilian Institute of Geography and Statistics Foundation, in the year prior to the elections, the demographic statistical update of the units of the Federation.'

Art. 2: 'None of the member states of the Federation shall have less than eight federal deputies.'

Art. 3: 'The most populous State shall be represented by seventy federal deputies.'

TABLE 11.1 Number of representatives and inhabitants per constituent unit in Brazil

Constituent unit	Representatives	Inhabitants	Division	Exact proportion	Distortion
	(A)	(B)	C=B/A	(D)	(A-D)
		´(2010)			
São Paulo (SP)	70	43.592.011	622.743	110	-40
Minas Gerais (MG)	53	20.524.700	387.258	52	1
Rio de Janeiro (RJ)	46	16.868.851	366.714	43	3
Bahia (BA)	39	14.517.499	372.244	37	2
Rio Grande do Sul (RS)	31	10.959.601	353.536	28	3
Paraná (PR)	30	10.917.904	363.930	28	2
Pernambuco (PE)	25	9.275.121	371.005	24	1
Ceará (CE)	22	9.022.175	410.099	23	-1
Pará (PA)	17	8.390.051	493.532	21	-4
Maranhão (MA)	18	7.096.909	394.273	18	0
Santa Catarina (SC)	16	6.753.006	422.063	17	-1
Goiás (GO)	17	6.581.240	387.132	17	0
Paraíba (PB)	12	3.941.613	328.468	10	2
Espírito Santo (ES)	10	3.746.205	374.621	9	1
Piauí (PI)	10	3.266.919	326.692	8	2
Alagoas (AL)	9	3.283.025	364.781	8	1
Rio Grande do Norte (RN)	8	3.387.060	423.383	9	-1
Amazonas (AM)	8	3.877.243	484.655	10	-2
Mato Grosso (MT)	8	3.342.705	417.838	8	0
Mato Grosso do Sul (MS)	8	2.660.685	332.586	7	1
Distrito Federal (DF)	8	2.882.625	360.328	7	1
Sergipe (SE)	8	2.227.984	278.498	6	2
Rondônia (RO)	8	1.663.797	207.975	4	4
Tocantins (TO)	8	1.513.492	189.187	4	4
Acre (AC)	8	841.660	105.208	2	6
Amapá (AP)	8	794.181	99.273	2	6
Roraima (RR)	8	531.053	66.382	1	7
TOTAL	513	202.459.315	394.658	513	

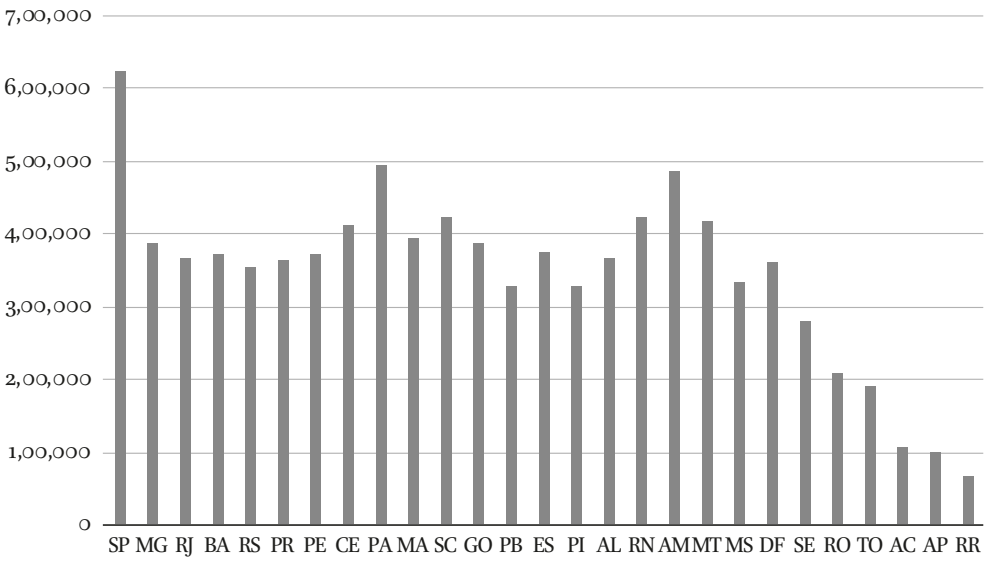

FIGURE 11.1 Citizen representation by members of the lower chamber by state

units are consequently overrepresented. However, the overrepresentation is proportionally very large. As shown, there is a huge difference between the population of the states, from 43 million people in São Paulo to 0.5 million in Roraima. However, the Constitution determines a range from eight to seventy representatives for each state, and a total number of 513. According to such numbers (settled by the *Constitution*, not only by a *regulation*), Brazil is an excellent example of the mathematical impossibility of a totally equal representation. Very briefly, it means there is overrepresentation in the lower chamber of less populated states, mainly by the northeast and the north regions.

4.3 *Consequences of Distortion: Is It a Real Problem?*

The correlation between democracy and federalism is almost a commonplace in studies of federations. In very succinct terms, the greater decentralisation of power between different constituent units would, in the most common view, lead to greater citizen participation and, consequently, bring them closer to a democracy. According to Ronald Watts:

> Democracy and governmental responsiveness can be enhanced within federations because multiple levels of government maximize the

> opportunity for citizen participation and because they provide for governments that are smaller and closer to the people.[37]

In spite of recognising the predominance of this view, some scholars, such as Alfred Stepan, ask for more research to confirm this statement.[38]

Regarding the specific issue of the present chapter, numbers alone demonstrate that the rule *one person, one vote* is seriously impaired in such a situation of inequality. There is clear inequality between citizens of different constituent units, which results from overrepresentation or underrepresentation. If there is no equality of representation, it cannot be said that democracy is whole.

In a non-federal state, inequalities in representation are also possible. However, the problem is certainly less severe because there is more flexibility for adjustments. The division of electoral districts could be done on the basis of equality of representation, with no limits in the borders of constituent units. On the contrary, in federal states, the limit of electoral districts, in the grid of borders of constituent units, makes it more difficult to manage distortions.

However, in a federation, the mandatory election of representatives within each state results in distortions. Such distortions can be more or less serious in each federation, for the reasons already mentioned above: mathematical problems, minimum and maximum number of representatives per state and internal migration (without periodic revisions of the representation of each state).

It cannot be denied, then, that the federal form of state can be, from such a point of view, less democratic, due to the distortion of the proportionality of representation *in the lower chamber* (which is supposed to represent *the people*) and the breaking of the principle *one person, one vote*.

In other words, when seeking formal equality between constituent units that are quite different, federalism leads to political inequality between citizens of different states. In the lower chamber, if the organisational model does not follow proportionality (for example, determining minimum and maximum numbers of representatives for each constituent unit), the result could be the inequality between citizens of different states.

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37 Ronald L. Watts. *Comparing Federal Systems* (Montreal: McGill-Queen´s University Press, 2008), 155.

38 'Some advocate federalism, as opposed to unitary government, because they believe it contributes to freedom, subsidiarity and democracy. I have not seen any systematic evidence to support these assumptions, but they clearly need to be researched'; Alfred Stepan, "Toward a New Comparative Politics of Federalism, Multinationalism and Democracy," in *Federalism and Democracy in Latin America,* ed. Edward L. Gibson (Baltimore: The Johns Hopkins University Press, 2004), 74.

In addition, researching some Latin American cases, including Brazil, Snyder and Samuels revealed important consequences of this distortion:

> Specifically, the high levels of malapportionment in Latin American countries have fostered: (1) a rural-conservative bias in legislature, (2) estrangement of the executive and legislative branches, (3) the proliferation of subnational authoritarian enclaves and (4) a strong capacity for subnational elites to 'hold the center hostage' with regard to major policy issues. [39]

Could such distortion be considered a benefit, rather than a problem? In other words, could it be said that this overrepresentation of some states is a way of protecting minorities, which, in the end, is one of the key ideas of federalism?

There are two answers: a more general one and a specific one for the Brazilian case.

In a more general perspective, if the citizens of smaller states are already overrepresented in the upper house, it does not make sense to give them an overrepresentation in the lower house as well. The role of the lower house, as seen, is to represent all citizens, regardless of the constituent unit in which they live. Therefore, there is no reason why the principle of equality should not be respected to the greatest extent possible in the lower house.

In Brazil, ethnic and religious groups are spread over several states, making it impossible to feature any state as representative of any minority. As for the language, the homogeneity of the Brazilian population is almost total. Therefore, overrepresentation of any state, just because it has fewer inhabitants, does not bring any benefit to minorities.

Further reflection is necessary: why should each state be an electoral district? Why have all federations, since the beginning, adopted this 'rule'? Is it part of the federal concept?

From the first federations, the election of representatives has been made by constituent units. It is as old a tradition as the federal form of state. In federations formed by aggregation of units (such as the United States and Switzerland), the historical reason seems fairly clear: the people of each state or canton elect their representatives to a central body. Each constituent unit already existed before the federation and the national parliament.

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39 Richard Snyder and David J. Samuels, "Legislative Malapportionment in Latin America," in *Federalism and Democracy in Latin America, ed.* Edward L. Gibson, (Baltimore: The John Hopkins University Press, 2004), 151.

However, in countries like Brazil, where their states were never independent, nor did they form a confederation, there is no such historical reason. So, the maintenance of this dogma (election of representatives only within the limits of each constituent unity) is the result only of a long tradition. It is not part of the federal concept. Simply, as far as is known, no different way has ever been attempted.

5 Possible Measures to Solve or Mitigate the Problem

At this point, I will discuss some suggestions for measures to solve or mitigate the problem of distortion of citizens representation in Brazil.

5.1 *An Almost Absolute Proportion*

One first idea would be to adopt an absolute proportion, determining the number of citizens that would be represented by each of the deputies, without establishing any maximum by states, and the minimum of one (this is the reason for the *almost* in the subsection title), but keeping the total size of the lower chamber. It means that the minimum number of representatives by state shall be one. In addition, a periodic review of the division would be important in order to take into account the internal migratory movements that could alter the population of the states.[40] The obvious advantage of this system would be the closest possible approximation to the principle *one person, one vote*.

On the other hand, such a solution could generate another distortion, since some states would have only one deputy and three senators. In this situation, it would be easier to be elected to the upper chamber than to the lower one.

5.2 *Developing Bilateralism*

In Brazil, a more extensive practice of bilateralism could go through the creation of interstate representation bodies for a collective dialogue with the central government. These bodies could be created by region, or by specific interests (oil producing states, for example), in order to make this dialogue more efficient. These ideas, however, would depend on deeper changes in the system and, therefore, on extensive and difficult changes in the Constitution.

Encouraging bilateralism would not exactly be a solution to the problem, but only a mitigating measure. With space for dialogue and discussion between

40 Jairo Nicolau argues that the periodic review should be done every four years, before each election, in order to eliminate this factor of distortion; Nicolau, *Representantes de quem?*, 155–157.

the constituent units and the central power, especially about the most controversial issues, citizens representativeness would be favoured, albeit indirectly.

5.3 *One State, Two or More Electoral Districts*

Observing the figures in the table above (Table 11.1), it is noted that the most serious problem of underrepresentation is in the State of São Paulo. This is an extensive state with a large population. In this sense, the idea of dividing it into two electoral districts would be reasonable, so that each of them would have the number of deputies proportional to its electorate, according to the rules of the Constitution.

To implement this idea, it would be necessary to break the paradigm, present in many federal states, that each constituent unit constitutes a single electoral district. This procedure would encounter great difficulty, as it would depend on a constitutional amendment, with approval by three-fifths of each chamber of the parliament. In addition, all electoral legislation, based on organs within each state, would have to be modified.

5.4 *The National Deputy*

Breaking the same paradigm, and going beyond the more obvious ideas, there is the suggestion of the *national deputy*. The idea would be to allow candidates to have votes in all states, forming a single voting list across the country. This would end the limitation of the electoral district to the state. In my view, this procedure would be compatible with the idea that the lower house should represent the entire population, not the states.

In today's world, communication among citizens occurs mainly in virtual environments, such as television and the internet, which do not observe territorial barriers. It is common for a person to be known and admired throughout the country, regardless of territorial division into states. Thus, it seems fair that this person can receive votes nationally, that is, by citizens of different states.

The adoption of this system as the only form of election of representatives could generate some apparently negative consequences, such as the fact that citizens of smaller constituent units would be represented only in the upper chamber. According to the approach of this work, this would not be real, since these citizens would always have some participation in the election of the national deputy, even when such a deputy comes from a state different from that of the voter. It is important to reinforce that the territorial division of Brazil does not correspond to the allocation of ethnic, religious, linguistic or any other minorities that require special protection from federalism. Furthermore, these minorities, spread across the whole country, could sum

votes nationally, in order to elect a representative and successfully have a voice in the parliament.

In Brazil, national minorities are also local minorities. In fact, if a minority group is scattered across the country, it is more likely to achieve some representation if it can elect a deputy nationally, uniting the votes of its members throughout the country. In this context, *invisible* minorities in the country, united by a common problem (for example, disabled people) could elect one or more representatives, adding their votes nationally. With the modern media and virtual communication, it is reasonable to assume that these groups could unite nationally, even though they are physically distant.

However, as a way of experiencing this novelty in a gradual way, a mixed formula would also be possible. In this way, part of the deputies would be elected by their states of origin and others nationally.

6 Conclusion

As seen in previous sections, the mainstream ideas in federalism point to a direct relationship between federalism and democracy. The *one person, one vote* principle, in turn, is usually pointed out as essential to the equal representation of citizens in a democratic regime. In this chapter, I developed a specific point, the distortion in the representation of citizens in the lower chamber of a federal state, looking at the Brazilian case.

The first point, quite evident, is that the existence of an upper chamber with identical representation of all states (without proportionality) already represents inequality, to the detriment of the inhabitants of the most populous states.

This inequality of representation in the upper chamber, however, brings some important advantages to federalism, such as stability between constituent units. In the federal states, the upper chamber plays an important role in ensuring stability and, ultimately, in maintaining federation cohesion.

However, even in the lower house, which should represent the population equally, the simple fact of dividing the population into electoral districts equivalent to the states is enough to create a distortion in the equality of representation.

Therefore, although under and overrepresentation can also occur in non-federal states, the limits of federal organisation (especially the election of representatives in the strict limits of a constituent unit), by itself, already causes inequality in representation of citizens.

The problem can still be aggravated, for several reasons, but mainly by the establishment of the minimum and maximum number of representatives. In the Brazilian case, this distortion is large and evident.

To reduce the problem, it would be advisable to eliminate the maximum of representatives and keep a minimum of one, establishing an almost absolute proportion, as far as mathematically possible. This would not necessarily mean an increase in parliament size. The idea here is to modify the division of chairs, without a maximum for each constituent unit (and the minimum of one), while maintaining the total number.

In addition, the adoption of bilateral discussion mechanisms can open important channels for dialogue. This would not eliminate distortion in representation, but it could give citizens of underrepresented states more voice. Also, the establishment of electoral districts different from the borders of the constituent units, in order to counterbalance differences in population density, would mitigate the problem.

Finally, a possible proposal would be the idea of the *national deputy*, elected with votes from all over the country, without being limited to a state. This formula could be used for the entire lower chamber, or, in different degrees, in mixed formulas, where part of the deputies would be elected by their states of origin and others nationally.

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CHAPTER 12

Equality and Inequality in Bosnia and Herzegovina

Soeren Keil

1 Introduction

Bosnia and Herzegovina (BiH) is a peculiar federal state.[1] Some have referred to it as a confederal state;[2] others call it a loose multinational federation.[3] This author has described Bosnia as an imposed federal system, which is internationally administered by outside intervention in the political decision-making process.[4] These different definitions and labels already demonstrate the complexity that is inherent in Bosnia's federalism and federation – namely the fact that it is hard to label and characterise the political system through the use of established terminology within the field of comparative federalism.[5]

This chapter discusses one aspect of this complexity: the issue of constitutional equality in Bosnia and Herzegovina. According to the 1995 Constitution, 'Bosniacs, Croats, and Serbs, as constituent peoples (along with Others), and citizens of Bosnia and Herzegovina' determine the Constitution.[6] However, while the Constitution includes a focus on non-discrimination between different ethnic groups, it also introduces power-sharing mechanisms between Bosniaks, Serbs and Croats, to ensure their peaceful cooperation after the end of the war in 1995 and to address their desire to have a strong stake in the state. This includes, for example, the existence of a three-person Presidency, including one Bosniak and one Croat (elected in the mainly Bosniak-Croat Federation of Bosnia and Herzegovina) and one Serb member, elected in the Serb part of

1 The terms Bosnia, BiH and Bosnia and Herzegovina will be used interchangeably and always refer to the whole territory of the country known as Bosnia and Herzegovina.

2 Mirjana Kasapović, "Bosnia and Herzegovina: Consociational or Liberal Democracy?," *Politička misao* 42, no. 5 (2008): 3–30.

3 Florian Bieber, *Post-War Bosnia, Ethnicity, Inequality and Public Sector Governance* (Basingstoke, Hampshire: Palgrave Macmillan, 2006).

4 Soeren Keil, *Multinational Federalism in Bosnia and Herzegovina* (Farnham: Ashgate, 2013).

5 For a more general debate on this see Aleksandra Zdeb, "A Federation like No Other: The Case of Bosnia and Herzegovina," *50 Shades of Federalism* (2018), https://50shadesoffederalism.com/case-studies/federation-like-no-case-bosnia-herzegovina/.

6 Preamble of the Bosnia and Herzegovina Constitution of 1995. On this topic also *Federal Equality in Multinational Bosnia and Herzegovina* by Dejan Vanjek (chapter 13).

Bosnia (Republika Srpska). Hence, equality is split between the equality of the three constituent peoples and the equality of the two entities in Bosnia.

Bosnia's Constitution also includes a long list of human rights provisions, which ensure the equal treatment of all people in Bosnia. As a result of this obvious contradiction between the rights of certain ethnic groups and all citizens of Bosnia, the European Court of Human Rights (ECHR) found in December 2009 that Bosnia discriminates against 'Others', because certain institutions in the state (i.e. the Presidency and the House of Peoples) only foresee representation for Bosniaks, Serbs and Croats. The judgement was the result of a complaint by a Bosnian Roma and a member of the Jewish community. However, to date it has not resulted in fundamental constitutional change. Yet, it is worth thinking about the very practical implications of this judgement, namely that a key element for ensuring peace in post-war Bosnia – ethnic power-sharing – might be modified and indeed questioned. This could also have potential consequences for the territorial division of Bosnia and the role of the constituent peoples and all other citizens of Bosnia and Herzegovina.

In order to demonstrate the complex – and contradictory – nature of equality (and inequality) in Bosnia's constitutional framework, I proceed as follows: in the first part, a discussion of the federal political system in Bosnia, its origins as a result of the war (1992–1995), and its development in the post-war era will be outlined, with the aim of demonstrating the multiple facets of equality (and inequality) within the different constitutional frameworks (at state, entity, cantonal and local level) in the country. In the second part, I discuss the origin of the Sejdić-Finci judgement of the European Court of Human Rights (ECHR) and outline the judgement and its meaning for Bosnia's constitutional reality. Finally, in the third part, I demonstrate why this judgement is so important for Bosnia, but also why the judgement has still not been implemented by Bosnian elites – more than ten years after the Court's original ruling.

2 Federalism and Federation in Bosnia and Herzegovina – A Question of Equality?

Bosnia's unique, and highly complex federal political system is the result of a three-and-a-half-year long conflict that devastated the country between 1992 and 1995. In the wake of the dissolution of Yugoslavia and after the independence declarations of Slovenia and Croatia, Bosniaks and Croats pushed for Bosnian independence as well. As a result of the independence declaration in April 1992, Serb elites, with the support of the Yugoslav army and paramilitary troops, began to establish zones of Serb autonomy, which were later united

under the banner 'Republika Srpska' – the Serb Republic. The idea of the political project led by Radoslav Karadžić and military organised by Ratko Mladić[7] was to create a coherent and united territory in Bosnia, in which all non-Serbs would be ethnically cleansed so that a homogenous Serbian territory could declare independence from Bosnia and later join Serbia or rump Yugoslavia.[8] In addition to the conflict between Bosniaks and Croats on the one side, and Serbs on the other side, in 1993 a conflict broke out between the Bosniak army and Croat fighters, when Croat paramilitaries, with support from Croatia, fought for the secession of the Herzeg-Bosnia territory in the East of Bosnia, and its inclusion into Croatia.[9] This conflict came to an end in early 1994 when, as a result of American pressure, the Presidents of Croatia and Bosnia signed the Washington Agreement. The Washington Agreement would create a military alliance between the two countries, and a Federation of several cantons in those territories of Bosnia which were under the control of the Bosniak and Croat militaries. Fighting eventually came to an end in Bosnia in late 1995 as a result of the Dayton Peace Agreement (DPA), which included a comprehensive peace plan for Bosnia and its future political organisation. Bosnia's current Constitution is included in the DPA as Annex IV. The DPA was the result of extensive US pressure on all parties in Bosnia, and would lay the foundations of the political developments in Bosnia that have played a key role until today.[10]

2.1 *The Dayton System*

The Bosnian state that the DPA created was one characterised by a number of contradictory principles.[11] The federal system portrayed elements of both, an ethnic federation in the style of the Ethiopian federation,[12] and a more

7 Both were later indicted and sentenced by the International Criminal Tribunal for the Former Yugoslavia (ICTY) for their role in ethnic cleansing campaigns, war crimes and genocide.

8 More generally on the dissolution of Yugoslavia see Laura Silber and Alan Little, *The Death of Yugoslavia* (London: Penguin Books and BBC Books, 1996). More specifically on Bosnia and Herzegovina see the excellent discussion in Steven Burg and Paul Shoup, *The War in Bosnia-Herzegovina: Ethnic Conflict and International Intervention* (Armonk, London: M.E. Sharpe, 1999).

9 Attila Hoare, "The Croatian Project to Partition Bosnia-Hercegovina, 1990–1994," *East European Quarterly* 31, no. 1 (March 1997): 121–138.

10 On the role of the USA in Bosnia see Richard Holbrooke, *To End a War* (New York: The Modern Library, 1999); Ivo Daalder, *Getting to Dayton – The Making of America's Bosnia Policy* (Washington D.C.: Brookings Institute, 2000).

11 Jens Woelk, "Bosnia and Herzegovina: Trying to Build a Federal State on Paradoxes," in *Constitutional Dynamics in Federal States – Sub-national Perspectives*, eds. Michael Burgess and Alan Tarr (Kingston, Montreal: McGill-Queen's University Press, 2012), 109.

12 On ethnic federalism in Ethiopia see David Turton, ed., *Ethnic Federalism: The Ethiopian Experience in Comparative Perspective* (Martlesham, Rochester: James Currey, 2006).

classical European and North American federation, based on territorial, rather than ethnic principles.[13] The federal system created was based on two territorial units, known as 'entities' – one of them, the Federation of Bosnia and Herzegovina (FBiH), was further sub-divided into ten cantons, while the other, the Republika Srpska (RS), was highly centralised. In addition to these two entities, the Brčko District in the North East of the country was put under international administration and later through arbitration became an independent District, which belonged to both entities but was governed by neither neither (Figure 12.1, below).[14]

The FBiH was to control 51 % of Bosnian territory, while the RS controlled 49 % of the territory, with the borders between the two very much reflecting the cease fire line established between the enemy armies in the late summer of 1995. However, since 1999, both entities had to give up territory when the Brčko District was formed as an independently administered unit within this complex federal system.[15]

All territorial units within the federation are based on ethnic criteria, with the exception of Brčko District and the two mixed cantons in the FBiH, in which mainly Bosniak and Croats live. A census in 2013 confirmed the homogenous nature of the different territories in Bosnia, with 92.11 % of all Serbs in Bosnia living in the RS, as well as 88.23 % of all Bosniaks and 91.39 % of all Croats in Bosnia living in the FBiH.[16] The ten cantons within the FBiH themselves are more or less ethnically homogenous, with five of them having a clear Bosniak majority, three having a clear Croat majority, and only the Central Bosnia and the Herzegovina Neretva cantons having a mixed population, mainly consisting of Bosniaks and Croats.

Yet, while the territorial organisation of the country might indicate the installation of a federal system based on exclusive ethnic criteria, this is not

13 On territorial federalism, and particularly the European tradition of federalism see Michael Burgess, *Comparative Federalism: Theory and Practice* (Basingstoke, New York: Routledge, 2006), 162–191.

14 A Map of Bosnia's complex federal system, published by the Office of the High Representative in Bosnia and Herzegovina on 7 October 2003, can be found at http://reliefweb.int/map/bosnia-and-herzegovina/federation-bosnia-and-herzegovina.

15 For the final decision of the Arbitration Tribunal see Office of the High Representative, *Arbitral Tribunal for Dispute over Inter-Entity Boundary in Brcko Area, Final Award*, 5 March 1999, http://www.ohr.int/?ohr_archive=arbitral-tribunal-for-dispute-over-inter-entity-boundary-in-brcko-area-final-award.

16 Rodolfo Toe, "Census Reveals Bosnia's Changed Demography," *BalkanInsight*, 30 June 2016, http://www.balkaninsight.com/en/article/new-demographic-picture-of-bosnia-finally-revealed-06-30-2016.

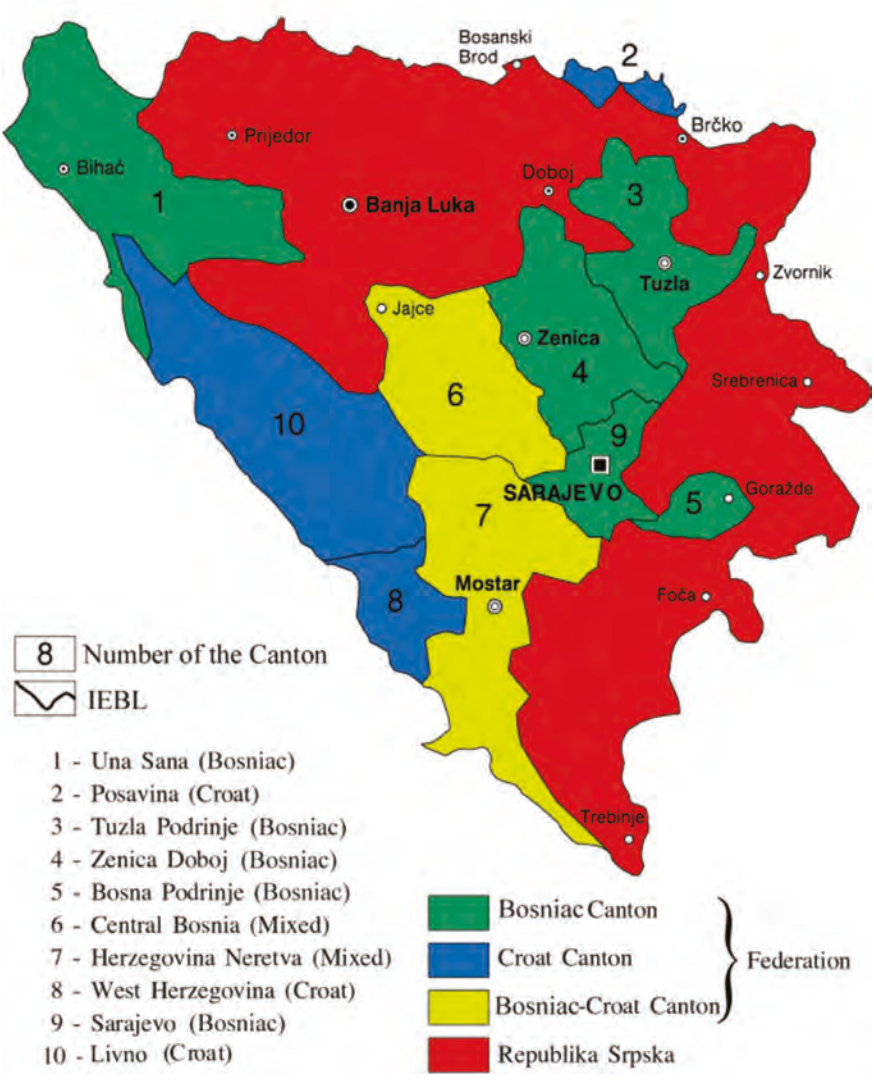

FIGURE 12.1 Map of Bosnia's complex federal system
The name of canton ten has been declared illegal by the Constitutional Court of the FBiH, because 'Herceg Bosna' refers to the Croat statelet that tried to secede from Bosnia during the war. The canton has since been referred to as Canton 10.
SOURCE: OFFICE OF THE HIGH REPRESENTATIVE IN BOSNIA AND HERZEGOVINA (SEE FOOTNOTE 14)

completely the case.[17] An important ruling by the Bosnian Constitutional Court in 2000 established that the two entities cannot claim to represent one (or two) of the constituent peoples exclusively, as was the case until then. The RS claimed in fact to represent 'the Serbs in Bosnia and Herzegovina', while the Constitution of the FBiH referred only to Bosniaks and Croats as constituent peoples until then. The Constitutional Court found this practice to be a breach of the Bosnian Constitution, which outlines Bosniaks, Serbs and Croats (along with Others) as constituent peoples, hence – so the Court ruled – they also have to be constituent peoples in all territories of the country.[18] This creates a legal situation in which Bosniaks, Serbs and Croats are recognised as constituent peoples in the whole country, and in each of the entities and in the Brčko District, while in terms of demography it can clearly be argued that certain territorial units represent only one (or two) of these groups. This has very complicated and indeed negative consequences for the institutional representation of these three groups in the different territories of Bosnia, as will be discussed below.

In addition to this complex federal system, the DPA also established a federal political system that was highly decentralised. Indeed, in 1995 the Constitution only assigned the following responsibilities to the institutions of BiH: foreign policy, foreign trade policy, customs policy, monetary policy, finances of the institutions; regarding the country's international obligations, it assigned federal government immigration, refugee and asylum policy, international and inter-Entity criminal law enforcement, establishment and operation of common international communication facilities, regulation of inter-Entity transportation and air traffic control.[19] All other competences, including military and defence, policing, taxation and tax collection, economic and social welfare policies, amongst others, were given to the entities. Article III.3a of the Bosnian Constitution states specifically: 'All governmental functions and powers not expressly assigned in this Constitution to the institutions of Bosnia and Herzegovina shall be those of the Entities.'[20] Bosnia, in other words, became one of the most decentralised federal systems in the world. This situation has not changed fundamentally to this day, despite some processes of

17 Soeren Keil, "Mythos und Realität eines ethnischen Föderalismus in Bosnien und Herzegowina," *Südosteuropa Mitteilungen* 50, no. 1 (2010): 76–86.

18 Constitutional Court of Bosnia and Herzegovina, Judgement no. U-*5/98,* 'On Constituency', para 55, 60, available at http://www.ccbh.ba/odluke/). The judgement is however more widely known as ' Constituent Peoples Case '.

19 Bosnian Constitution, Art. III.1 a-j.

20 Bosnian Constitution, Art.III.3a.

centralisation taking place[21] over the last twenty years, in particular through the creation of a centralised Defence Ministry, through the Indirect-Taxation Authority, and the centralisation of border security provisions.[22]

In addition to the high degree of decentralisation, it needs to be pointed out that Bosnia is a nearly perfect example of Arend Lijphart's consociational democracy model.[23] Strict power-sharing applies to all of Bosnia's central institutions. In the Executive, the semi-presidential system is characterised by a rotating presidency consisting of three members: one Bosniak and one Croat who are elected in the FBiH, and one Serb who is elected in the RS. The government therefore consists of two-thirds of Ministers from the FBiH and one-third of Ministers from the RS and is called Council of Ministers.[24] In the legislative branch, there are two chambers of parliament. The House of Representatives, which is elected through proportional representation, consists of two-thirds of MPs from the FBiH and one-third of MPs from the RS. The second chamber, the House of Peoples, consists of fifteen members: five Bosniaks and five Croats elected from the FBiH parliament, and five Serbs elected from the RS assembly.[25] In the judiciary branch, the Constitutional Court consists of nine judges: four are appointed from the FBiH and two are appointed by the RS, while three judges are appointed by the President of the European Court of Human Rights. These last three are international judges who cannot be citizens of Bosnia or any of its neighbouring countries.[26] Decisions require a majority in both houses, and due to complex veto regulations, Bosniak, Serb and Croat parties have to work together in order to establish the required

21 It is worth mentioning that all these centralisation efforts were driven by external actors rather than Bosnian elites. This is why I referred to Bosnia as an internationally administered federation earlier.

22 For an assessment of the developments within Bosnia's political system see Soeren Keil and Valery Perry, "Introduction: State-Building and Democratization in Bosnia and Herzegovina," in *State-Building and Democratization in Bosnia and Herzegovina*, eds. Soeren Keil and Valery Perry (London, New York: Routledge, 2015), 1–14; as well as Soeren Keil and Anastasiia Kudlenko, "Bosnia and Herzegovina 20 Years after Dayton: Complexity Born of Paradoxes," *International Peacekeeping* 22, no. 5 (2015): 471–489.

For a more recent discussion of some of the disfunctionalities of the system and how they feed into public unrest see Jasmin Mujanović, *Hunger and Fury – The Crisis of Democracy in the Balkans* (London: Hurst and Co., 2018).

23 On Lijphart's model see Arend Lijphart, *Democracy in Plural Societies* (New Haven: Yale University Press, 1977).

24 Bosnian Constitution, Art. V: Presidency.

25 Bosnian Constitution, Art. IV: Parliamentary Assembly.

26 Bosnian Constitution, Art. VI: Constitutional Court.

majorities and prevent any vetoes.[27] This complex power-sharing architecture is also applied to the entities, cantons and even in municipalities. However, as mentioned above, most of these units are ethnically homogenous, and since ethnic identity is based on self-identification, it is easy for the ruling parties in certain territories to have self-declared Bosniaks, Croats, Serbs and Others on their party list and fill the seats reserved for these groups by loyal party members. There is no institutional provision for example to prevent a Serb in the RS supporting the dominant Serb party to declare themselves as a Croat and take one seat reserved for Croats in the government of the RS. While this does not happen at central level, it is a very common practice in the cantons of the FBiH, and also at municipality level, where seats are either filled by loyalists to the dominant group (through self-declaration), or seats reserved for other groups remain empty, because there are no representatives of these other groups in these municipalities.

2.2 *The Equality Question*

The Dayton system introduced a political framework, which attempts on the one hand to find a balance between equality and power-sharing between Bosniaks, Serbs and Croats, and on the other hand, the protection of individual liberal (non-ethnically focused) rights. For example, while the discussion above has demonstrated the complex power-sharing nature of Bosnia's political system, the Constitution, in Article II, provides a long list of Human Rights and Fundamental Freedoms. It goes as far as stating in Article II.2 that '[t]he rights and freedoms set forth in the European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols shall apply directly in Bosnia and Herzegovina. These shall have priority over all other law.' In light of Article II and its link to Bosnia's human rights and fundamental freedoms' regime, it could be argued that Bosnia probably has one of the most advanced human rights regimes, and one of the most extensive protections for human rights and fundamental freedoms, not least because the provisions in Bosnia's Constitution are linked to the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECtHR) of the Council of Europe, which in case of conflict, has priority. This embedded rights protection is connected with a clear commitment to non-discrimination, as stated in Article II.4 of the Bosnian Constitution:

27 On the complex veto system in Bosnia see Birgit Bahtić-Kunrath, "Of Veto Players and Entity Voting: Institutional Gridlock in the Bosnian Reform Process," *Nationalities Papers* 39, no. 6 (2011): 899–923, https://doi.org/10.1080/00905992.2011.614224.

> The enjoyment of the rights and freedoms provided for in this Article or in the international agreements listed in Annex I to this Constitution shall be secured to all persons in Bosnia and Herzegovina without discrimination on any ground such as sex, race, color, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

On paper, therefore, BiH seems to be one of the most advanced countries when it comes to the protection of human rights and fundamental freedoms. Yet, when looking at international monitoring organisations such as Freedom House, Bosnia scores as partially free overall, with a 4 out of 7 score for freedom rating, 4 out of 7 for political rights and 4 out of 7 for civil liberties.[28] Likewise, the Bertelsmann Transformation Index in its 2018 report for BiH places the country in the category of a 'defective democracy'.[29] This contrast between extensive protection of human rights and fundamental freedoms on the one side, and poor performance in the indexes of international think tanks on the other side is rather puzzling.

One explanation can be found in the above-mentioned contrast between ethnically based power-sharing and the provisions for human rights and fundamental freedoms. These seem to be in direct and obvious conflict. For example, one could wonder how the rights of Bosniaks and Croats in the RS can be protected, when the RS understands itself – and indeed until 2002 referred to itself in its Constitution – as the entity of Serbs in Bosnia. The FBiH did the same, by only mentioning Bosniaks and Croats (amongst Others). Hence, until the above-mentioned judgement of the Constitutional Court in 2000, the equality of Bosniaks, Serbs and Croats (and of Others) was not ensured throughout the territory of Bosnia, and the Constitutions of the entities allowed the positive discrimination of the majority ethnic group(s). This exclusion mechanism can also be found in a less formalised and less radical way in other federal states, such as Canada, where Quebec can discriminate against immigrants based on its own language laws, and in Belgium and Switzerland, where the territoriality principles also favour one language group over others in a certain territory. In BiH, this form of exclusion was found illegal by the Constitutional Court in

28 In Freedom House's scale, 1 means most free, 7 means least free. Bosnia's 2018 report and scores are available at Freedom House, "Freedom in the World 2018, Bosnia and Herzegovina," https://freedomhouse.org/report/freedom-world/2018/bosnia-and -herzegovina.

29 "Bertelsmann Transformation Index, Bosnia and Herzegovina 2018," https://atlas.bti-project.org/share.php?1*2018*CV:CTC:SELBIH*CAT*BIH*REG:TAB.

reference to its Constitution, which clearly states that the three ethnic groups (Bosniaks, Serbs and Croats) have to be treated equally across the whole territory of Bosnia and Herzegovina. It took until 2002, and extreme pressure by international actors, before the entities were to change and amend their Constitutions in order to comply with the judgement of the Court.[30] However, while this judgement dealt with the question of equality between the three constituent peoples across the territory of Bosnia and Herzegovina, it did not engage with the strange constitutional status of 'The Others' – which are mentioned in brackets in the Constitution, but which are excluded from many of the power-sharing arrangements in the country. This question would only be dealt with nine years later in the famous Sejdić-Finci judgement of the ECHR.

3 Equality and the Sejdić-Finci Judgement of the ECHR

The 2009 judgement of the ECHR in the case of Sejdić-Finci vs. Bosnia and Herzegovina[31] was the result of a complaint by Dervo Sejdić, a leading Roma activist and Jakob Finci, a public intellectual and prominent member of the Bosnian Jewish community. They originally complained about their inability to stand for election to both the House of Peoples and the Presidency of Bosnia and Herzegovina, based on their Roma and Jewish origin, referring to Articles 3, 13 and 14 of the ECtHR, as well as Article 3 of Protocol No. 1 and Article 1 of Protocol No. 12 – in short claiming that this constituted a form of discrimination based on racial/ethnic self-identification, which is not in line with the ECtHR. The Bosnian Constitutional Court immediately referred the case to the ECHR, because the claim was based on the ECtHR, which has priority over all Bosnian laws, as discussed above. The Court indeed ruled that a violation of Article 14 of the ECtHR in conjunction with Article 3 of Protocol No. 1 in relation to the House of Peoples could be found, as well as a violation of Article 1 of Protocol No. 12 in relation to the Presidency. The Court therefore established

30 For a wider discussion on the Constituent Peoples Case see International Crisis Group, "Implementing Equality: The 'Constituent Peoples' Decision in Bosnia and Herzegovina," *ICG Balkans Report*, no. 128 (Sarajevo, Brussels: 2002); Peter Neussl, "The Constituent Peoples Decision of the Constitutional Court and the Sarajevo-Mrakovica Agreement – A 'Milestone Product' of the Dayton Concept?," in *Dayton and Beyond: Perspectives on the Future of Bosnia and Herzegovina*, eds. Christophe Solioz and Tobias Vogel (Baden-Baden: Nomos, 2004), 65–73.

31 European Court of Human Rights, Grand Chamber, *Sejdić and Finci v. Bosnia and Herzegovina* (application nos. 27996/06 and 34836/06), judgment of 22 December 2009, hereafter Sejdić-Finci case.

that Bosnia discriminated against both complainants on the basis of their ethnicity without 'objective and reasonable justification'.[32] What is more, the Court established that the relevant constitutional provisions in Bosnia in relation to the Presidency and the House of Peoples, as well as the accompanying electoral laws would have to change in order to address and eliminate this form of discrimination. It is worth highlighting that the judgement of the ECHR was not unanimous, and that discrimination in the election of the House of Peoples was agreed by 14 judges (against 3) and for the Presidency of Bosnia by 16 judges (against 1). In their opinions, the dissenting judges highlighted the need to take more strongly into account the historical evolution of Bosnia's complex power-sharing system, which was first and foremost an instrument of peace-building after the war in the country. Within academia, the judgement has also been criticised by those supporting power-sharing regimes in post-conflict societies, who have argued that the judgement is a threat to enforced cooperation and consensus that is often key in post-conflict countries, and it threatens to undermine the legitimacy of international courts, when these intervene in the internal affairs of states to such a drastic extent.[33] Many academics, however, argued that the judgement could be a chance for Bosnia to promote human rights over selected group rights and break open some of the strict power-sharing rules in order to make the system more flexible and enhance its democratic credentials.[34]

Despite the original window of opportunity that was opened as a result of the ECHR's judgement in the Sejdić-Finci case, implementation has since been lacking. There has been no major revision of the Bosnian Constitution since 1995, and BiH has been pushed by the Council of Europe, the European Union (EU) and other international agencies to implement the judgement urgently. However, the failure to implement this court judgement highlights another key feature of Bosnia's complex political system – although nobody is really happy with the Dayton provisions, there is a complete lack of agreement on what should be changed and the direction these changes should take. Bosniak, Serb

32 Sejdić-Finci case, p. 32.

33 See here particularly Christopher McCrudden and Brendan O'Leary, *Courts and Consociations* (Oxford, New York: Oxford University Press, 2013).

34 Amongst many see Elyse Wakelin, "The Sejdic and Finci Case: More Than Just a Human Rights Issue?," *E-International Relations* (October 2012), http://www.e-ir.info/2012/10/31/the-sejdic-and-finci-case-more-than-just-a-human-rights-issue-for-bosnia-and-herzegovina/; Lindsey Wakely, "From Constituent Peoples to Constituents: Europe Solidifies Fundamental Political Rights for Minority Groups in Sejdic v. Bosnia," *North Carolina Journal of International Law and Commercial Regulation* 36, no. 1 (Autumn 2010): 233–254.

and Croat elites have very different visions of the Bosnian state, and they all have their own interests to protect; therefore, they favour the current status quo over any change that might harm their current position in the system.[35] Likewise, the many suggestions about reform possibilities that emerged from political parties and civil society organisations after 2009 have so far failed to gain wider recognition, as well as the local and international support needed for a push for wider reform of this complex institutional architecture.[36] What all these different proposals have in common is a contested notion of equality – any form of judgement implementation has in recent years become a battleground for all ethnic groups in the country to claim that they are discriminated against and disadvantaged by the Dayton provisions. Bosniak elites feel that as the representatives of the majority population they are constrained in a system in which the rights of smaller communities (such as the Serbs and Croats) are disproportionally protected and undermine the 'one person, one vote' principle. Likewise, Serb elites feel that the rights of the RS, and of Serbs in Bosnia generally, need to be protected and enhanced, and that processes of centralisation since 1995 have undermined the originally guaranteed autonomy of Serbs in the Bosnian state. Finally, Croat elites, representing the smallest of the three constituent peoples, argue that the current institutional provisions disadvantage them, because they see themselves as a junior partner to Bosniaks in the FBiH, and instead demand the creation of a third – Croat – entity to ensure that each ethnic group would have their own territory with guaranteed autonomy provisions.[37] The political debate on the Sejdić-Finci judgement has therefore shifted since 2009, as it is no longer about implementing a judgement which at its heart complained about ethnic discrimination of 'the Others' in Bosnia's complex system at the expense of power-sharing between elites representing the former warring groups of Bosniaks, Serbs and Croats; instead, the debate

35 Kurt Bassuener, "The Dayton Legacy and the Future of Bosnia and the Western Balkans – House Foreign Affairs Committee Hearing," *Written Statement for the Congressional Record* (April 2018), http://www.democratizationpolicy.org/pdf/Bassuener_US_Congressional_Hearing_Written_Statement_4_18.pdf.

36 Valery Perry, "Constitutional Reform Processes in Bosnia and Herzegovina: Top-Down Failure, Bottom-Up Potential, Continued Stalemate," in *State-Building and Democratization in Bosnia and Herzegovina*, eds. Soeren Keil and Valery Perry (London, New York: Routledge, 2015), 15–40.

37 For a wider discussion on these constitutional debates and their legal quagmire see Valery Perry, "Constitutional Reform in Bosnia and Herzegovina: Does the Road to Confederation go through the EU?," *International Peacekeeping* 22, no. 5 (2015): 490–510; Soeren Keil and Valery Perry, "Introduction: Bosnia and Herzegovina 20 Years after Dayton," *International Peacekeeping* 22, no. 5 (2015): 463–470.

is now about the extent to which the Dayton system should be reformed so these three groups, and especially the elites that represent them, can have a stronger stake in the country, and how equality amongst them can and should be implemented through means of both institutional and territorial (meaning creation of new federal units) engineering. This has, once again, resulted in a complete ignorance of the main aim of the judgement, namely, to make the system less ethnically exclusive and to allow all Bosnian citizens to access its core institutions.

4 Learning from Bosnia? Wider Theoretical and Empirical Implications of the Sejdić-Finci Judgement and Its Aftermath

The discussion surrounding the state-building and federalisation experience in BiH, now over twenty years after the war ended and with the installation of the federal system, questions federalism and its understanding, as well as power-sharing, equality, and the processes of peace- and state-building. After the extensive discussion on Bosnia's institutional framework above, and the arguments surrounding the Sejdić-Finci case and its impact on equality, it is necessary at this stage to return to the overall theme of this book – namely the question of equality in federal states. In order to do this, a number of areas need to be considered in further detail, and the theoretical and empirical implications of the Bosnian case for these areas need to be teased out.

4.1 *Power-Sharing as Peace-Building and the Question of Equality*

As demonstrated above, the power-sharing arrangements within Bosnia's political system are extremely complicated. Yet, the provisions for the Presidency, which exclusively allow Bosniaks and Croats from the FBiH, and Serbs from the RS, to stand in elections, and the provisions for the appointment of the House of Peoples (five Bosniaks, five Croats appointed by the FBiH parliament, and five Serbs appointed by the RS Assembly) had in particular been heavily criticised, even before the Sejdić-Finci judgement.[38] The ECHR judgement in the Sejdić-Finci case confirmed previous concerns about unjustified ethnic discrimination. Yet, critics and indeed the dissenting judges at the ECHR have pointed out that the power-sharing provisions in Bosnia, while nominally

38 For one of these critiques see European Commission for Democracy through Law (Venice Commission), *Opinion on the Constitutional Situation of Bosnia and Herzegovina and the Powers of the High Representative* (CDL-AD (2005)004), 11 March 2005, https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2005)004-e.

discriminating, serve a greater good, namely the protection of peace in a post-war society.[39] The paradox that emerges from this debate can be found in the following question: is it justified that in post-war countries institutional mechanisms might exclude some communities from certain institutions, when these arrangements serve the purpose of uniting and bringing together former enemies and therefore contribute to peace-building? In other words, is it acceptable to build in discriminatory mechanisms into specific institutions if these mechanisms serve the greater good of keeping the peace? Answers to this question vary, with some authors vehemently arguing for discriminatory practices within power-sharing arrangements, claiming that these mechanisms ultimately serve to protect peace. These authors have also highlighted that in the case of Bosnia, both Sejdić and Finci could have run for the Presidency, had they chosen to self-identify as Bosniaks or Croats (both were living in the FBiH at the time). Hence, it was their choice to identify as Roma and as a member of the Jewish community, which they knew would lead to their exclusion from the elections for the Presidency.[40]

The counter-argument is that democracy in post-war societies cannot be built if certain groups, irrespective of their size and political importance within the country, are systematically (and also constitutionally, which is especially the case in BiH) excluded from political participation in key state institutions. This, so the argument goes, only lays the foundation for future conflicts, and undermines any aspirations to build an inclusive liberal democracy.[41] While critiques to this approach would argue that politics in post-conflict countries is not about liberal democracy but about preserving peace by ensuring inclusion of the major groups in decision-making and therefore promoting the idea of consociational, rather than liberal majoritarian democracy, it can be argued in return that any system that puts human rights on the back foot is ultimately doomed to fail.

At the heart of these debates lies a moral dilemma – namely the need to make a value judgement. In countries such as Bosnia and Herzegovina, which

39 For a wider discussion on this topic see Stefan Graziadei, "Democracy v Human Rights? The Strasbourg Court and the Challenge of Power Sharing," *European Constitutional Law Review* 12, no. 1 (May 2016): 54–84, https://doi.org/10.1017/S1574019616000043.

40 For a discussion on identity and peace-building within power-sharing systems see Brendan O'Leary, "Power Sharing in Deeply Divided Places: An Advocate's Introduction," in *Power Sharing in Deeply Divided Places,* eds. Joanne McEvoy and Brendan O'Leary (Philadephia: University of Pennsylvania Press, 2013), 1–66.

41 Specifically for Bosnia on this issue see Valery Perry, "More Ethnic Politics and Virtual Partition will not Help," *Bosnia Daily*, 30 May 2016, 9–10, http://www.democratizationpolicy.org/pdf/BDaily_Perry%20US%20Congress%20hearing_5-30-16.pdf.

have experienced extensive violence, and in which ethnic relations are characterised by antagonism and mistrust, can the focus on preserving peace through stable power-sharing institutions be considered more important than the focus on fundamental freedoms and human rights of each and all individuals? The ECHR judgement clearly answered this question by arguing against this focus on stability and pushing forward the importance of human rights in post-conflict societies. The inability of Bosnian elites to implement this judgement demonstrates that this debate might have been decided by the ECHR, but Bosnian elites are reluctant to give up their monopoly of power, and they are unwilling to create a shared vision for the future of the state, in which those citizens that do not self-recognise as Bosniaks, Serbs or Croats would also be included, recognised and have equal access to the state and its institutions.

4.2 *The Federalisation Process – Countering or Embracing Ethnic Division?*

Bosnia's federalisation since 1995 has been characterised by a slow, externally driven centralisation process, the undermining of ethnic-exclusivity of the entities (and cantons) through the Constituent Peoples Case judgement of the Bosnian Constitutional Court, and by countering forces, principally the elites from the three constituent peoples, who have pushed the interpretation of Bosnia's federal system ever-closer towards the idea of an ethnic federal system. Demands by Bosnian Croat elites for a third – Croat – entity in Bosnia clearly fit this pattern.[42] The language of the political elites of the three constituent peoples has been one characterised by exclusivity and at times bordering on hate speech.[43] Ethnic relations, in other words, remain full of tensions more than twenty years after the end of hostilities. The conflict, as some have argued, has become frozen, and is now continued through the means of politics, in which each side attempts to push for their own benefits and their own vision of Bosnia, which resultantly creates a situation of permanent paralysis in the institutions and stasis in terms of political progress.[44]

42 Florian Bieber, "Croats in Bosnia and Herzegovina," in *Bosnia-Herzegovina since Dayton: Civic and Uncivic Values,* eds. Ola Listhaug and Sabrina Ramet (Bologna: Longo Editore Ravenna, 2013), 309–328.

43 As an example see Gerard Toal, "'Republika Srpska Will have a Referendum': The Rhetorical Politics of Milorad Dodik," *Ethnopolitics* 41, no. 1 (2013): 166–204.

44 Valery Perry, "The Elephant in the Room – Bosnia and Herzegovina's unmentionable Constitutional Disability," *Transconflict* (July 2014), http://www.transconflict.com/2014/07/elephant-room-bosnia-herzegovinas-unmentionable-constitutional-disability-097/.

What this means for federalism in Bosnia is that the very idea of federalism remains contested in the country. Federalism has different meanings, not only for different academics as demonstrated in the introduction, but also for the peoples in Bosnia. This is not per se surprising, as multinational federations are characterised by competing versions of what the state is and why it is federal (and what the nature of federalism is).[45] This can also be found in well-established Western multinational and bi-national federations such as Canada and Belgium, where federalism as an idea is contested and where the federal institutional architecture serves different purposes for the different groups in the country.[46] Yet, where Bosnia is different to these countries is that the very nature of federalism itself is contested, as a result of the contestation of the whole state. Serb and Croat elites continue to flirt with ideas of separation and secessionism, while Bosniak elites despise the idea of federalism as they see it as a form of ethnic division of the country. In other words, rather than just having different interpretations of what federalism is and why it was chosen as an organisational principle for the country, elites in Bosnia dispute the very nature of Bosnia as a federal country.[47] William Riker teaches us that the creation of a federal system is always based on a compromise between elites representing the centre and those representing the units within the future federal system.[48] In Bosnia, representatives of the international community need to be added to this equation[49] – as they played a key role in the DPA and have been a major driving force for the federal system, which explains why it remains so contested to this day by local elites. Despite the Constituent Peoples judgement of the Bosnian Constitutional Court and the Sejdić-Finci judgement of the ECHR, not much has changed in the wider dynamics of Bosnian federalism – it remains very much a zero-sum game between the elites of the three recognised constituent peoples, at the expense of any political progress.

45 Michael Burgess, "Multinational Federalism in Multinational Federation," in *Multinational Federalism – Problems and Prospects*, eds. Michel Seymour and Alain-G. Gagnon (Basingstoke, New York: Palgrave MacMillian, 2012), 23–44.

46 Raffaele Iacovino and Jan Erk, "The Constitutional Foundations of Multination Federalism: Canada and Belgium," in *Multinational Federalism – Problems and Prospects*, eds. Michel Seymour and Alain-G. Gagnon (Basingstoke, New York: Palgrave MacMillian, 2012), 205–230.

47 For a more detailed discussion on this see Keil, *Multinational Federalism*, 125–176.

48 William Riker, *Federalism: Origins, Operation, Significance* (Boston: Little Brown, 1964).

49 Bermeo refers to federal systems which have been installed through international intervention as imposed federalism. See Nancy Bermeo, "The Import of Institutions," *Journal of Democracy* 13, no. 2 (April 2002): 96–110.

This raises a number of fundamental questions about the use of federalism in post-conflict societies. As discussed above in the case of power-sharing, one must ask whether giving territorial autonomy to elites representing groups that have used violence to promote their case will in the long-term be rewarding, especially if this autonomy comes at the expense of the rights of other groups in these territorial units.[50] There is now an established body of literature discussing the 'paradox of federalism', namely the fact that while federalism might be able to overcome demands for secession, it also provides institutional mechanisms which enhance minorities' abilities to declare independence at a later stage.[51] Yet, while we know about some of the challenges linked to the implementation of a federal political system as a tool to overcome ethnic tensions, overall we still know very little about the uses and dangers of federalism as a tool for conflict resolution in ethnically divided, war-torn societies. Having said this, there are some lessons that can be learnt from Bosnia in this regard. For example, while the complex federal system might have been a necessity in 1995 in order to end the war and bring the warring groups to the negotiation table, the rigidity of the Dayton Constitution has made any changes in the post-war period impossible. What is more, in a contested system such as Bosnia, where ideas of ethnic federalism rival those of territorial conceptions of autonomy, ethnic federalism will prevail if the system is dominated by ethnic elites who see the whole political game as a continuation of the conflict over territory and group dominance. Finally, an important lesson to learn from the federal experience in Bosnia is that these post-war institutional arrangements do not organically change and reform themselves over time. While Bosnia's territorial and institutional arrangements reflect the necessity for cooperation, compromise and ethnically homogenous territories that were a precondition for the successful conclusion of the Dayton Peace Conference, today it can clearly be argued that the same arrangements have become a symbol for the permanent crisis of the political system and its lack of progress, liberalisation and democratisation.[52] Having said this, what has become obvious in the previous discussion is that it has become relatively easy to identify the ills in Bosnia's system, but the question of how to correct them and how to prevent similar

50 This issue is discussed in more detail in Paul Anderson and Soeren Keil, "Federalism: A Tool for Conflict Resolution?," *50 Shades of Federalism* (2017), http://50shadesoffederalism.com/federalism-conflict/federalism-tool-conflict-resolution/.

51 See for example Jan Erk and Lawrence Anderson, eds., *The Paradox of Federalism – Does Self-Rule Accommodate or Exacerbate Ethnic Divisions?* (Abingdon, New York: Routledge, 2010).

52 Vedran Dzihic, "Bosnien und Herzegowina in der Sackgasse? Struktur und Dynamik der Krise fünfzehn Jahre nach Dayton," *Südosteuropa* 59, no. 1 (2011): 50–76.

mistakes in other post-war countries remains largely unanswered and much more research is needed on this issue.

4.3 *What about Equality?*

In the debates about the future of federalism and power-sharing in Bosnia, the question of equality remains of fundamental importance. Elites of the three constituent peoples feel that their ethnic groups are disadvantaged and discriminated by the DPA and the current institutional provisions. They therefore argue that reforms are necessary in order to address their perceived (more so than real) discrimination and unequal treatment. Likewise, the Sejdić-Finci judgement highlighted that beyond the three main ethnic groups that are identified as constituent peoples, there are other people(s) in Bosnia, who are constitutionally excluded from certain institutions, and who have become marginalised in the wider political discourse. In other words, the multinational state that is Bosnia and Herzegovina is a good example of the multifarious dimensions involved in questions about equality. Discussions in Bosnia highlight the importance of equality between different ethnic groups, particularly those that have previously been involved in fighting over inclusion and exclusion in the state. But the political debate in Bosnia also demonstrates the need for a consideration of equality beyond these ethnic groups, and the elites that represent them. The focus on the main groups might alienate other smaller groups. It might also discriminate against those citizens that refuse to identify with any group; in Bosnia there are no institutional protections and guarantees for those considering themselves as 'Bosnian' for example. Squaring the circle between these different understandings of equality, as well as the wider philosophical and theoretical implications, has been discussed in the academic literature,[53] but its application in post-war states remains highly controversial and indeed very difficult. While federalism, as used in BiH to accommodate different groups and end a violent conflict, can make a contribution to ensuring peace and bringing in a certain degree of democracy and equality, there is no guarantee that it will fundamentally overcome ethnic rivalries and ongoing tensions, including feelings of discrimination. In Bosnia, however, this discrimination is not only one of perception; as demonstrated in the case of Sejdić-Finci, it

53 Ferran Requejo, "Three Theories of Liberalism for the Three Theories of Federalism: A Hegelian Turn," in *Multinational Federalism – Problems and Prospects*, eds. Michel Seymour and Alain-G. Gagnon (Basingstoke, New York: Palgrave MacMillian, 2012), 45–68. See also Ferran Requejo, "National Pluralism, Recognition, Federalism and Secession (or Hegel Was a Clever Guy)," in *Understanding Federalism and Federation*, eds. Alain-G. Gagnon, Soeren Keil and Sean Mueller (Farnham, New York: Ashgate, 2015), 157–176.

is certainly very real with real political consequences for the affected groups. Therefore, finding a balance between giving rights and autonomy to territorially organised groups (through federalism), while at the same time preventing discrimination against other groups remains a key challenge for any federal system.[54] Innovative institutional mechanisms need to be employed to ensure that the inclusion of certain groups through power-sharing and territorial autonomy does not result in the exclusion of certain other groups. One of the key reasons why the implementation of the ECHR judgement in Sejdić-Finci has been lacking until today is the fact that its implementation allows the elites of the three constituent peoples to focus on their perceived discrimination and consequently demand wider reforms to improve their situation in the political system. In other words, implementation of the ECHR judgement would not only threaten the whole basis of the Dayton Agreement as a peace-building mechanism, but it would also open up the question of minority inclusion in Bosnia and undo all institutional arrangements, without any compromises and agreements in sight on future provisions amongst the ruling elites. Sejdić-Finci implementation is complex, because Bosnia's system is complex, and Bosnia's system is complex because it attempts to bridge two contradictory principles – the protection of group rights and power-sharing amongst ethnic elites on the one side, and the protection of human rights and fundamental freedoms for all Bosnian citizens on the other.

5 Conclusion

Bosnia and Herzegovina remains one of the most complicated political systems in the world. It combines a multidimensional federal system with power-sharing amongst the elites from the three constituent peoples. Yet, as the discussion above demonstrates, it also remains a political system that is deeply contested by its leading political agents. The institutional framework deployed at Dayton served multiple purposes, first and foremost to end the war that engulfed the country from 1992 to 1995. But it also laid the foundation for elite cooperation and federalisation, in order to provide a political and institutional compass for the post-conflict era, thereby contributing to both democratisation and state-building.

54 On this issue see Ronald Watts, "Can Federal Political Systems Accommodate National Minorities?," in *States Falling Apart? Secessionist and Autonomy Movements in Europe*, eds. Eva Maria Belser et al. (Bern: Stämpfi Verlag, 2015), 37–46.

When looking at the question of equality in multinational states, the Bosnian experience teaches us a number of important lessons. It comes as no surprise that equality, like democracy and federalism, is a contested concept in multinational states, and that the different groups and their representatives are very aware of the dangers of exclusion and discrimination. This is particularly important in a post-conflict context, such as Bosnia, in which ethnic relations remain strained and distrust remains. Another important lesson to learn from Bosnia is that the inclusion of some groups (in Bosnia's case the three constituent peoples) might lead to the exclusion of other groups, and thereby institutions designed to ensure equality and inclusion can become exclusive and discriminatory. The discussion on the Sejdić-Finci judgement of the ECHR has highlighted this point in detail. Thinking about institutional design in post-war societies therefore requires a degree of innovation and flexibility that allows the protection of major groups, particularly those that were involved in the fighting, while at the same time preventing the exclusion of other, often smaller, groups. Mechanisms for this exist, such as North Macedonia's reference to 'majority' and 'non-majority' communities rather than referring to fixed ethnic groups. A final lesson to learn from Bosnia is that post-conflict states need time to adapt, but also flexibility to change over time. Bosnia has changed substantially since 1995, but this change has mainly been driven externally, and has not resulted in a fundamental revision of Bosnia's Constitution. The constitutional provisions that served as a tool of peace-building in 1995 have proven to be a straightjacket when one looks at democratisation and state-building. In order to address this in other post-conflict situations, constitutional mechanisms need to be precise and protect certain rights, but constitutional provisions must also be allowed to change and evolve over time.

In summary it can be said that Bosnia offers a fascinating case-study in terms of equality (and inequality) in a multinational, post-conflict country. Countries discussing federalism as a tool of conflict resolution, such as Ukraine, Syria and Myanmar, can learn from the Bosnian experience, both in terms of what worked and what did not work.

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CHAPTER 13

Federal Equality in Multinational Bosnia and Herzegovina

Dejan Vanjek

1 Introduction

This chapter re-examines Bosnia and Herzegovina (BiH) as a multinational federation and focuses on the self-rule/shared-rule principles as tools for assessment of the equality of the three constituent peoples – Bosniaks, Serbs, Croats – and 'Others'. The category of 'constituency' in the BiH Constitution implies full normative-statutory equality of the three constituent peoples as state-creating subjects. Therefore, by examining the level of symmetric distribution of the two federal principles amongst them, across key institutional-political structures, hotspots of their inequality can be unravelled. The relevant finding is that, for different reasons addressed in this chapter, there are factual institutional inequalities and asymmetries in place that depart from the normative constitutional equality. This chapter's main claim is that these factual institutional inequalities and asymmetries must be dealt with in order to achieve the constitutionally required symmetric positioning of the constituent peoples on the level of the overall political system and its executive and legislative bodies.[1]

In an introductory theoretical section, we will further elaborate on the self-rule and shared-rule principles, their significance, mutual interaction and general relevance for maintaining the equality of the constituent political entities in multinational federal political systems. The second section consists of a disclosure of key constitutional and structural hallmarks of BiH as a multinational federation, with and beyond standard structural and formal descriptors. The focus will be set on the fundamental constitutional values, i.e. the 'hermeneutics' by which these values can be read and projected into the political

1 Institutions designed for collective representation of the constituent peoples, namely the House of Peoples, as an upper chamber primarily designed to account for the democratic political will of the constituent peoples, and tripartite Presidency composed of three members – Croat, Serb and Bosniak.

system. In the third section, after having established the normative criteria for the relational measurement of the equality of the three constituent peoples, correlative to the BiH constitutional and legal-political setting, the chapter further overviews its institutional, legislative-political system. Thus, it inspects and discloses the key structural, institutional and representative aspects of (in)equality, filtered through the self-rule/shared-rule principles and their (a)symmetric distribution amongst the constituents. Such a path allows us to identify and unveil the case of institutional-political (in)equality in BiH's multinational federation in terms of the relative or full deprivation of, discrimination in, or limitations of access to political participation in BiH's political system. We will focus on the executive and legislative institutions on the various levels of governance in BiH as well as on the electoral provisions, which are the key prerequisite of a just and fair democratic representation. The electoral provisions, along with the consociation contrivances, are accentuated as a prerequisite to a thorough equalisation of the political position of the three constituent peoples.

Finally, as the BiH Constitution operates both with the constituent peoples and the category of 'Others', namely minorities and citizens who do not fall in the 'constituents' category, one must refer to individual equality adjudicated by several subsequent rulings of the European Court for Human Rights against BiH.[2] The rulings are then juxtaposed with the traditional provision of the BiH constitutional norm of 'constituency', which is primarily in place to safeguard communal political rights of the three constituent peoples, their mutual equality and symmetric statutory positioning. The intention is to indicate directions in which the equilibrium between individual and communal rights can be pursued in line with all the specificities and given value-normative contents of the BiH Constitution. The interest of such an approach is to broaden the lens for further consideration and understanding of the two-dimensional problem of (in)equalities in BiH.

2 European Court of Human Rights, *Sejdić-Finci v. Bosnia and Herzegovina* (application nos. 27996/06 and 34836/06), Strasbourg, Judgment of 22 December 2009; European Court of Human Rights, Pilav v. Bosnia and Herzegovina (application no. 41939/07), Strasbourg, judgment of 9 June 2016; European Court of Human Rights, Zornic v. Bosnia and Herzegovina (Application no. 3681/06), Strasbourg, Judgment of 15 July 2014; European Court of Human Rights, Slaku v. Bosnia and Herzegovina (Application no. 56666/12), *Strasbourg, Judgment of 26 May 2016*. Closer analysis of some of these cases is provided in the last section of the chapter. On this topic also *Equality and Inequality in Bosnia and Herzegovina* by Soeren Keil (chapter 12).

2 The Principles of Shared-Rule and Self-Rule

2.1 *Shared-Rule and Self-Rule as Key Criteria of Federal Equality*

Multinational federations, unlike nation-states and national federations, connect the liberal conception of justice not only to individual civic rights, but also to group rights.[3] On the value-based level they combine both liberal and communitarian principles[4] which are then further fine-tuned and balanced across the system of governance. In fact, the entire conception of multinational federalism and its contrivances are bound to assure equality, harmonise diverse identities and create unity by regulating and balancing needs and particularities of inner federal constituencies. Whereas nation-states are willing and often prone to sacrifice their diversity to force unity, multinational federations do not know or practice such a trade-off. However, this entails the need for a much higher level of pacifism, voluntarism,[5] and, foremost, generalised trust in the power of political deliberation and rational action. Namely, it requires a specific political culture based on 'win-win' values of compromise and consensus, instead of the 'winner takes all' approach, which is typical for the classic majoritarian political reasoning.

Undoubtedly, in multinational constitutional systems designed to unite and accommodate diverse identities, the visibility and relevance of group equality increases. However, its implementation and assessment can be very challenging, especially because it can be relativised or manipulated via different political arguments or burdened by imperfections of the constitutional text, by a lack of consensual tradition and political culture, disparities of the real social, economic and political power of the constituent entities, etc. For these reasons, it is important to use universal criteria for the assessment of equality in multinational federations, composed of at least two or more identity groups with constitutionally equal normative status and entitlements.[6]

If federalism is the broadest basic form that allows for constitutional entrenchment and accommodation of diversity by protecting both the equality of the individuals and the constituent entities, it is legitimate to consider its two core principles, the backbones of comprehensive and systemic measurement

3 Soeren Keil, *Multinational Federalism in Bosnia and Herzegovina* (London, New York: Routledge, 2016), 45.

4 Tomas Fleiner and Lidija Basta, *Constitutional Democracy in a Multicultural and Globalized World* (Berlin, Heidelberg: Springer-Verlag, 2009), 161.

5 Amongst others particularly emphasised in Nancy Bermeo, "The Import of Institutions," *Journal of Democracy* 13, no. 2 (April 2002): 96–110.

6 Bosnia and Herzegovina is clearly the example of such a multinational federation.

of federal equality. Self-rule and shared-rule can be deeply integrated into federal theory and, from there, into different policy and governance areas of federalism.[7] It is difficult to imagine any federal or even quasi-federal system that would not embed these principles naturally, with variance in methods, depths, and extents of their application. These are systemic categories present within all segments of the federal system and as such they predetermine the equality relations therein. Thus, John McGarry wrote that 'federal political systems is a descriptive catchall term for all political organizations that combine what Daniel Elazar called shared rule and self-rule'.[8] Ronald Watts acknowledged that federalism 'refers to the advocacy of multi-tiered government combining elements of shared-rule and regional self-rule'.[9] However, the most comprehensive definition of federalism, which accounted for both its vertical and horizontal systemic dimensions and equality as its key inherent ingredient, expressed the idea of federal equality in the following way:

> In the federal model, polities are established by equals who come together do so by design in such a way to protect the respective integrities of the founders even while they join together to form a new body politic. Rule is the rule of equals by equals and is designed to maintain that basic principle.[10]

Elazar's definition reflects a deep understanding of federalism as a system which clearly incorporates a group dimension and equally involves both 'shared governance rule' and 'self-governance rule', whereby the former expands to all areas relevant for peace and stability, and the latter has a clear purpose to 'allow all parties to preserve their respective integrities'.[11] Equally important

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7 This was strongly recognised by Preston King who noticed that 'Federalism is a normative political philosophy that recommends the use of federal principles i.e. combining joint action and self-government'; Preston King, *Federalism and Federation* (London: Crom Helm, 1982).

8 John McGarry and Brendan O'Leary, "Federation as a Method of Ethnic Conflict Regulation," *forumfed.org* (2004): 1, http://www.forumfed.org/libdocs/Misc/0401-int-McGarry-OLeary.pdf.

9 Ronald Watts, *Comparing Federal Systems* (Montreal, Kingston: McGill-Queen's University Press, 2008), 8.

10 Daniel J. Elazar, *Exploring Federalism* (Tuscaloosa: University of Alabama Press, 1987), 10. Elazar's definition particularly resonates with BiH's constitutional framework and its fundamental ingredient, the *constituent people Bosniaks, Serbs and Croats,* as legitimate primary agents of the respective federal constitutional order. As such, they are entitled to dispose with equal/symmetric shared and self-rule capacities in both common and autonomous spheres.

11 Ibid.

and necessary to sustain a federal balance of equality, they are not concurrent and do not meet identical goals and needs. However, they do serve the same purpose, which is to assure the stability of a federal order by harmonising internal positions and relations of constituent subjects. Balance is maintained by carefully tailoring, dosing and balancing the shared-rule/self-rule binomial across the whole political system. Furthermore, Elazar's definition positions self- and shared-rule both in their horizontal societal form and transfers them to a constitutional wording and vertical framework. As such, they are further formalised through adequate structuring of the federation and application of correspondent organisational principles, regulatory frameworks, and complementary institutions. In other words, only in multinational federations can self-rule/shared-rule be read as systemic principles that permeate all layers and spheres of the federal political system, which is the reason why they can be identified and used as reliable criteria for a systemic assessment of the equality of relations. As such, they must be accounted in the design of multinational federations, but can also be used for their in-depth examination, including major equality relations.

2.2 *Federal Balance and (A)Symmetric Application of Self- and Shared-Rule*

For a thorough reading of Elazar's all-encompassing definition, it is also necessary to accentuate the organic connection between self-rule and shared-rule contained therein. Namely, the integrity of the constituent entities is not only protected by self-rule, but also through shared-rule. If we take the integrity primarily shielded by self-rule as the form of political subjectivity and a precondition for all participatory action within the political system, then integrity as subjectivity must be respected and ensured in the shared-rule segment as well. For example, if a dominant group attempts unilaterally to alter the electoral procedures and processes or to undermine consociation rules leading to a situation where the integrity of a minority nation is gravely affected, such actions would not only impair the rights of said minority nation, but also the balance of equality across the entire system of governance, therefore destabilising it. From the opposite side, shared-rule shields self-rule by preventing unilateral decisions at the centre, which could undermine the position of weaker federation members. Hence, shared-rule also provides space to build in the will of all the constituencies into overall decision-making. That political will is then an expression and extension of their right to autonomy and the constituent status, which implies that disruption of shared-rule leads to a violation of the political will and the undermining of constitutional rights of the constituents.

Therefore, self-rule and shared-rule are two interdependent and complementary principles, and neither of them can work without the other. Namely, self-rule empowers shared-rule, whereas shared-rule, in return, guarantees the protection of the autonomy expressed through the self-rule competencies of the constituent members in a multinational federation. Such an intricate balance of the two federal principles, based on their organic interdependence, enables normative and factual equality of the constituent entities regulated through their continuous observance, management, and application. In multinational federations, both principles converge more than elsewhere, as the relevance and role of the shared-rule increases.[12]

A balanced application of the two federal principles on the level of the overall socio-political system helps to consolidate structural equality.[13] That balance is based on the ratio of dispositions of all self- and shared-rule provisions across the federal system, its institutions, and regulatory framework, against each one of the constituent/constitutional subjects.[14] In other words, the only relation that matters more than the ratio of overall application of the two principles throughout the legal-political system is their equal, i.e. symmetric, allocation to all the constituents. In that sense, symmetric scale and volume of autonomy as well as shared access and influence on co-decision-making by all the constituencies represents the backbone of multinational federal equality and determines its objective quality.

Federal balance in the sense of symmetric disposition of the self-rule and shared-rule powers amongst the constituents plays an important role in the stability and sustainability of multinational federations. Symmetric structural distribution of federal principles allows both vertical and horizontal fine-tuning of the system, predominantly through a combination of classic federal and consociate organisational, regulative, and governance techniques.[15] However, their structural symmetric application does not always lead to equality. It is more often the case that asymmetry is used to empower national minorities in multinational federations and, in that way, to converge systems closer to general standards of equality. Such a form of equality then relates specifically to social and political realities where the liberal notion of civic

12 Ronald Watts, "Multinational Federations in Comparative Perspective," in *Multinational Federations*, eds. Michael Burgess and John Pinder (London: Routledge, 2007), 232.

13 Michael Ignatief, *The Right Revolution* (Toronto: House of Anansi Press Ltd, 2001), 84.

14 Watts, "Multinational Federations," 231–232.

15 Vertical in the sense of necessary alignment of the institutional and legal-political system with the constitutional norms and principles, and horizontal in terms of harmonisation of intergroup relations.

equality must be expanded with the recognition of the right to be different.[16] Multinational federations tend to recognise such realities by accommodating the constituent and constitutional status of different identity groups and nationalities, and try to reconcile and harmonise them.[17] To that purpose, both symmetry and asymmetry can be used to bolster equality in multinational federations, dependent on the specifics of the social, political, and constitutional setting.[18] Moreover, asymmetry is better seen as an efficient equaliser than as a means to achieve full-fledged equality.[19] As such it is often considered and used to empower minority groups beyond their actual demographic potential in the face of actual power of other dominant groups. However, asymmetric solutions are more prone to protect differences than to establish intergroup equality.[20] For that reason, they can never create a system of full group equality, but rather serve as an efficient 'equalisation' tool applied to bust self-rule capacities of the respective minority groups and increase the general level of their relative equality.[21]

Moreover, asymmetric arrangements are usually negotiated between the central government and a nation that seeks more self-rule to better protect its identity and economic self-sufficiency in the specific territory. This kind of relation requires daily compromise, but not consensus, as it is up to the centre in the end, namely its political establishment and institutions, to decide how to manage the claims of the claimant. On the other side, symmetry is a key precondition for equality in multinational federations composed of at least two constituent entities that share an identical constitutional (constituent) status and where equality of the constituent entities is implicit to the constitutional

16 Thomas Fleiner and Lidija Basta Fleiner, *Constitutional Democracy in a Multicultural and Globalised World* (Berlin, Heidelberg: Springer - Verlag, 2009), 573.

17 Brendan O'Leary, "Debating Consociational Politics: Normative and Explanatory Arguments," in *From Power Sharing to Democracy: Post-Conflict Institutions in Ethnically Divided Societies,* ed. Sid Noel (Montreal, Kingston, London, Ithaca: McGill-Queen's University Press, 2005), 272.

18 Some authors prize asymmetry over symmetry as an intrinsic federal value, e.g. Alain Gagnon, "The Moral Foundation of Asymmetrical Federalism: A Normative Exploration of the Case of Quebec and Canada," in *Multinational Democracies*, eds. Alain Gagnon and James Tully (Cambridge: Cambridge University Press, 2001), 319–327.

19 Michael Burgess, *Comparative Federalism: Theory and Practice* (London, New York: Routledge, 2006), 221.

20 Ibid.

21 The reasoning outlined here is inspired by the experience of BiH multinational federalism and its social, political and constitutional conditions. As such, it does not represent a general critique of asymmetry, but rather one of novel perspectives and understandings resulting from the case of BiH.

wording. Such are polities in which constituent entities are, in fact, state-creating subjects.[22] Their constitutional equality can only be expressed if symmetrically transferred to the key legislative and governance institutions, as well as the correspondent political practices within the self-rule/shared-rule segments. The basis of such polity then is a composite political community in which the central government is not an independent governance entity but shared by the constituents. For this reason, within them there cannot be a self-sufficient, sovereign centre independent from the will of its constituencies. In other words, without participation of all the constituencies there cannot be a centre in the sense of a central government functioning independently from its constituencies. Such a multinational 'centre' is closer to a 'shared order of governance', which operates based on thorough symmetric application of the will of the constituent entities through shared-rule.

Therefore, unlike multinational federations with constitutional asymmetries, dynamics in multinational federations with embedded constitutional symmetry must also be regulated horizontally, in between different yet statutorily equal constituent entities (groups, units, peoples etc.). Though such relations can be read as confederate, they also tell us about how different power-sharing concepts (confederal, federal, consociate, etc.) can meet and intersect within the same constitutional-legal political system. From here, we delve into a closer examination of Bosnia and Herzegovina's constitutional system that incorporates both symmetric and asymmetric elements.

3 Reflections on the Nature of the BiH Multinational Federation

The foundations of the current constitutional order in Bosnia and Herzegovina are based on two peace agreements and the constitutions derived from those agreements. The first peace agreement is the Washington Agreement, signed on 18 March 1994. It ended an intense year-long Croat-Bosniak conflict in Bosnia-Herzegovina, and further set military and political preconditions for ending hostilities in the whole country. The subsequent signing of the General Framework Agreement for Peace in Bosnia and Herzegovina, better known as the Dayton Peace Agreement (DPA), established the current dyadic two-entity federal structure (the Republika Srpska (RS) and the Federation of Bosnia and Herzegovina (FBiH)).[23] As such, Bosnia and Herzegovina is a post-conflict

22 Constituent peoples as constitutional/state-creating units in Bosnia and Herzegovina.

23 The war and said peace treaties were predeceased by a referendum which took place on 29 February and 1 March 1992, based on which BiH was declared an independent

society that requires incentives for inter-ethnic cooperation and strong guarantees that its political system can safeguard equal constitutional positions of the three constituent peoples (Serbs, Croats, and Bosniaks) as well as other citizens, including different minority groups and individuals.

In principle, the DPA's constitutional order of Bosnia and Herzegovina has already been designated by eminent scholars as a multinational federation,[24] based on its key formal and structural criteria.[25] Such a specific account was provided by Michael Burgess who defined Bosnia and Herzegovina as a dyadic, multinational federation: one state, two entities and three ethnonational communities.[26] This succinct formula informs the key elements of the BiH Constitution and its political organisation. However, it does not say anything about their individual, normative weight, namely, how they define the nature of the BiH constitutional order and how corporate (constituent peoples) and territorial (entities) components mutually correlate: which of them take precedence over the other and for what normative reasons? These questions become even more relevant if we look at the following diagnostic assessment:

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state, followed by the abstinence of the Serb constituent people and the rejection of its results by their political leaders. International recognition soon followed, but the relations within the state were becoming increasingly tense and very soon led to a war, which lasted from 1992 to 1995 and resulted in a massive loss of lives and destruction. Diplomatic and military pressure by the international community under the leadership of the USA, which brokered the Dayton Peace Agreement signed on 14 December 1995 in Paris, ended the war. The Agreement verified internationally recognised borders, sovereignty, territorial integrity and introduced a new territorial organisation of the country.

24 Although it must be said that there are also assessments of BiH as a confederal state. In that sense see Sujit Choudhry, "Bridging Comparative Politics and Comparative Constitutional Law: Constitutional Design in Divided Societies," in *Constitutional Design for Divided Societies: Integration or Accommodation?,* ed. Sujit Choudhry (Oxford: Oxford University Press, 2008), 12.

25 For such qualification with an accompanying set of supportive arguments it suffices to single out Soeren Keil, "Federalism as a Tool of Conflict-Resolution: The Case of Bosnia and Herzegovina," *L'Europe en formation,* no. 1 (2012): 205–218. Another similar definition of BiH as a multinational federation was provided by Michael Burgess, "Territorial and Non-Territorial Identities: Multinational Federalism in Multinational Federation," *Paper prepared for the conference 'Multinational Federalism in Perspective: A Viable Model?', Université du Quebec à Montreal (UQAM), Montreal, Quebec, Canada, 25–27 September 2009* (Canterbury: Centre For Federal Studies, Rutherford College, University of Kent, 2009), https://www.academia.edu/14712890/Territorial_and_Non-Territorial_Identities_Multinational_Federalism_in_Multinational_Federation.

26 Burgess, "Territorial and Non-Territorial Identities," 19.

> The centripetal forces for unity and integration are weaker than the centrifugal interests represented by the existing entities that see very few incentives to support the state. Consequently, BiH is for the purposes of our survey a remarkable case study of a potential multinational federation without multinational federalism. In short, it exhibits federation without federalism.[27]

This argument complements the thesis that BiH, as a federation, is missing a nexus to its fundamental constitutional values and hence lacks supportive federal political culture, which would energise its federalism and internal federalisation process. The role and importance of multinational federalism as the internal animating force of a multinational federation has been widely acknowledged as such.[28] Drawing further on the thought of Preston King that there cannot be a federation without federalism as its inner mover, Michael Burgess developed the idea of a federalist spirit and enumerated federal values.[29] Since federal culture and its values are inseparable from federalism, the (in)existence of such a culture strongly influences the level of respect and harmonised understanding of fundamental constitutional principles amongst relevant political, institutional, social, and scientific authorities that could further shape all subsequent (mis)perceptions of BiH as a multinational federation.[30] Thus, for the correct reading of its constitutional values, the answer to the question on the nature of BiH's constitutional order must be expanded via pathways of 'constitutional hermeneutics' to ascertain which principles constitute BiH as a multinational federation.

4 Federal Principles in the BiH Constitution

The DPA Constitution of Bosnia and Herzegovina explicitly entitles the constituent peoples Bosniaks, Serbs and Croats as titulars of state sovereignty.[31]

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27 Burgess, "Territorial and Non-Territorial Identities," 24.

28 Burgess, *Comparative Federalism*, 2–3.

29 Michael Burgess, *In Search of the Federal Spirit: New Theoretical and Empirical Perspectives in Comparative Federalism*, (Oxford: Oxford University Press, 2012).

30 Keil, *Multinational Federalism*, 144–147.

31 A notion self-evident from the constitution but also undisputed and confirmed by scholars and professional authorities such as Sheri P. Rosenberg, who argued that 'constituent peoples' essentially amounts to 'state creating' peoples. See Sheri P. Rosenberg, "Promoting Equality after Genocide," *Tulane Journal of International and Comparative Law* (2007): 329.

Specifically, the Preamble of the Constitution provides that 'Bosniaks, Croats, and Serbs, as constituent peoples (in community with others), and citizens of Bosnia and Herzegovina hereby ascertain Constitution of Bosnia and Herzegovina.' This is a fundamental constitutional premise that defines the constituent peoples and 'Others' (national minorities' et al.) as bearers of BiH's sovereignty. The top hierarchical constitutional position of the 'constituency' was also reaffirmed in the decision of the BiH Constitutional Court ref. U-5/98 delivered in the year 2000, where it was elaborated as an overarching constitutional category superimposed to all constitutional principles, laws, and regulations.[32] Moreover, even in all earlier pre-Dayton constitutions from the socialist period when BiH was part of the larger Yugoslav pseudo-federation, Serbs, Croats, and Bosniaks were entrenched as primary constitutional subjects and bearers of sovereignty upon which BiH statehood was founded. This fact informs us that BiH was a multinational country even before the DPA Constitution in 1995, by which its federal-like organisation and structure were introduced and formalised.

While some critiques question the legitimacy of the BiH federation as artificial and imposed,[33] the fact remains that BiH was a quasi-federal society even before it acquired visible institutional, structural, and organisational hallmarks of federation. If these facts are neglected, logical outcomes can hardly be other than misleading. For this reason, it is necessary to go beyond basic formal structural criteria and resort to constitutional hermeneutics and phenomenology in search of 'ground zero' of a BiH constitutionalism. After doing so, it will be legitimate to conclude that the dyadic organisation of the country cannot be taken as a central argument in support of BiH's multinational character. Rather, the hierarchy of principles outlined in the Constitution imply that the 'constituent' status of Serbs, Croats, and Bosniaks is superior to the administrative-political organisation and as such it precedes organisational principles of the State.[34] Namely, the case is that the substance and nature of BiH as a multinational federation is not of territorial, but of corporative-communitarian character. This is crucial for a thorough understanding of the BiH multinational federation.

32 Constitutional Court of Bosnia and Herzegovina, Judgment no. U-5/98, 'On Constituency', 26, Sarajevo, 30 January 2000; available at http://www.ccbh.ba/odluke/.

33 The legitimacy of BiH is in fact questioned because its Federalism was considered as imposed by an external force and could not develop from within. See Burgess, *In Search of the Federal Spirit*, 275.

34 As clearly outlined in the CC BiH judgment 'On Constituency' no. U-5/98, 'On Constituency', 26, Sarajevo, 30 January 2000; available at http://www.ccbh.ba/odluke/.

It follows that the key elements of BiH's constitutional order are in fact the constituent peoples, which are of utmost importance for a further accurate and consistent approach to the BiH constitutionalism. Clearly, neither any abstract citizen nor a non-existent singular political people (i.e. demos) of Bosnia and Herzegovina, or its current two entities (FBiH and RS) constitute BiH. On the contrary, it is evident that BiH and its Constitution were ascertained by the constituent peoples Serbs, Bosniaks, and Croats as the three distinctive and sovereign 'demoi'. As state-creating subjects, they have agreed through their representatives in Dayton to uphold the dyadic organisation of the country, but not at the expense of their constituent status and their equality. In fact, they have agreed to the existent dyadic-asymmetric organisation in good faith, with reasonable expectations that such organisation would safeguard their particular and shared interests.

As such, the constituent status[35] assigned to each of the three peoples in the DPA Constitution produces far-reaching implications beyond formal constitutional analysis and framing. Namely, it implies belonging to a larger whole, made up of equal constituent members, whose subjectivity is directly conditioned and determined by their belonging to a larger political community beyond which their subjectivity is unimaginable and undeliverable.[36] Is the 'constituency' specific to Bosnia and Herzegovina or a unique practical constitutional stronghold unknown to political sciences theory? It is neither, because even in countries where there is a singular political community or nation (demos), the constituent status is immanent to the core group, i.e. populous or '*Staatsvolk*'. For that reason, there is no need for its explicit emphasis. However, in a compound state comprised of more than one people and of a plurality of political identities with explicit and unequivocal constitutional expression, the 'constituency' accentuates the multinational character of the country, as well as its related equal constitutional position and the status of all the constituent peoples.[37]

35 The constituent status can also be interpreted as 'cultural pluralism', by which ethnic groups are designated as political units instead of individuals. See Patrick J. O'Halloran, "Post-Conflict Reconstruction: Constitutional and Transitional Power Sharing Arrangements in Bosnia and Kosovo," in *From Power Sharing to Democracy: Post-Conflict Institutions in Ethnically Divided Societies,* ed. Sid Noel (Montreal, Kingston, London, Ithaka: McGill-Queen's University Press, 2005), 108.

36 In line with the principle of 'constituency' as a BiH primary constitutional category that must be channelled through adequate power-sharing solutions which provide a friendly environment for unimpeded growth of both unity and diversity.

37 Dejan Vanjek, "Predstavnici i pripadnici konstitutivnih naroda – pitanje konstitutivnosti i legitimiteta," *Institute for Social and Political Research* (Mostar: IDPI, 2014), http://www.idpi.ba/konstitutivnost-legitimitet/.

Thus, in political terms 'constituency' represents a form of political subjectivity and autonomy of 'a people'. In Bosnia and Herzegovina, as a multinational compound state with more than one constituent peoples, it implies equality in two key federal dimensions:

– Self-rule as autonomous decision-making on the issues relevant for preservation of integrity (self-sufficiency) of the constituent peoples (cantons and entities) and other citizens;
– Shared-rule in the sense of co-deciding powers in shared matters for all three constituent peoples.

These two dimensions basically articulate and formulate the political needs of the constituent peoples, met and managed through the application of self-rule/shared-rule principles in the federal political system. Since the constituent status belongs to each of the three peoples, it means that they should have identical or at least analogous capacities in both aspects of self- and shared-rule. Therefore, the 'constituency' is about equality, which means that without equality there can be no constituency. This further implies that any negation of equality equals the negation of constituency and therefore of the BiH Constitution, as well as of the DPA of which the current Constitution is a part. Without equality, the three peoples cannot be constituent, which annuls the DPA and its Constitution. Consequently, if equality remains unobserved and unassured for all the constituencies through the democratic procedures and laws, those procedures will themselves become undemocratic and unconstitutional.[38] The category of 'constituency' is therefore inherent to BiH's multinational federal Constitution and supplies its underlying foundation and substance. It is a term deliberately used to emphasise group equality and assure its firm constitutional entrenchment. As such, it generates the need to align the entire constitutional and legal-political system with the principle of 'constituency' as the primary federal principle, which predetermines the multinational federal character of the country. Bosnia and Herzegovina as a post-conflict, compounded, multinational society is clearly in need of such an alignment.[39]

From there on, it is legitimate to consider actual institutional-regulative dispositions of shared- and self-rule and their overall distribution across

38 This primarily refers to the electoral law as the second most important act after the Constitution, which must assure that the electoral will of all constituent peoples meets fair and equal treatment.

39 Ivan Vukoja and Milan Sitarski, eds., *Bosnia and Herzegovina Federalism, Equality, Sustainability: A Study of BiH Redesign to Secure Institutional Equality of Constituent Peoples* (Mostar: IDPI, 2016), 207.

the system of governance. It is up to the constituency, which is inherent to shared- and self-rule, to convert constitutional equality into institutional equality across the political system. That said, it remains to be seen how self- and shared-rule are distributed within the institutional framework in Bosnia and Herzegovina, with special emphasis on the issue of fair and equal representation of its constituent peoples. The easiest way to approach this terrain is to scrutinise key branches of governance: parliamentary and executive, and thereto related electoral provisions that have a fundamental relevance for the legitimacy of shared institutions.

5 Major Institutional Dispositions of Shared-Rule/Self-Rule in BiH

The case of Bosnia and Herzegovina gives insight into how organisational asymmetries can deviate from the constitutionally ordered equality and, moreover, how the quest for symmetry can be the impetus to enhance equality and its internal balance. Already on the basic organisational level, we encounter the first prominent problem related to collective (in)equality in BiH's multinational federation. One of its two entities has a dominant Serb population (the RS) and the other one (the Bosniak-Croat FBiH) a Bosniak ethnic majority, where there is an additional cantonal sublevel introduced to preserve balance of power amongst the two constituent peoples.[40]

Clearly, due to inherent structural deficiencies, the right to self-governance is unevenly allocated to the three-constituent peoples. Based on the principle of constituency, each people should dispose of similar administrative-territorial autonomy and powers in self-governance, which is currently not the case. Two entities provide institutional space and basis for the self-rule and autonomy of both Serbs (RS) and Bosniaks (FBiH), but not for the Croats who are capable of autonomous decision-making only in three cantons in which they are the majority within the FBiH. Nevertheless, cantons are positioned below entity level and as such have considerably narrower competences.[41] While there is nominal balance on the federal state level, entity and cantonal levels disclose

40 Ten cantons, five with Bosniak majority, three with Croat majority and two mixed bi-ethnic cantons.

41 Competences of all orders in Bosnia and Herzegovina are regulated by constitutions of RS, FbiH and BiH, available in English language at the OHR's web page, http://www.ohr.int/laws-of-bih/constitutions-2/.

an obvious asymmetry, which is again particularly evident with respect to the political participation of Croats.[42]

The FBiH entity, which initially originated from the Washington Peace Agreement, had many protective mechanisms based on clear-cut consociation rules and procedures, such as vital national interests and veto powers, pre-allocation of highest positions, parity of ministers and top executive positions, and proportional representation.[43] However, since March 1994 and until the end of 2008, a total of 109 amendments were enforced to its Constitution.[44] It is highly concerning that only 36 of 109 amendments were adopted upon proposal of local administration and a successful compromise in the Parliament of that entity. All other amendments (73) were imposed by the Office of the High Representative (OHR).[45] Thus, most of the decisions were arbitrary, as many of them have never been verified in the Parliament of the FBiH entity.[46]

Amongst other interventions in the Government of the FBiH, the abolition of ministerial parity, as well as the imposed changes of shared decision-making procedures in that body through OHR[47] amendments in 2002, can be

42 For a recent comprehensive analysis of the political position of Croats in post-Dayton Bosnia and Herzegovina see Valentino Grbavac, *Unequal Democracy: The Political Position of Croats in Bosnia and Herzegovina* (Mostar: IDPI, 2016).

43 Some of the key changes which have affected the balance between these two groups, as well as its federal character – by undermining the number of power sharing instruments, checks and balances – concern: the abolition of vital national instruments, the abolition of a number of ethnic based positions (notably deputies of ministers), the introduction of majority voting instead of consensus, interference with the election process of the entire executive in the FBiH, foremost president and deputies of the FBiH, deviations from the principle of bicameralism whereby the upper chamber (the House of Peoples) saw less authority in deciding on the executive and in terms of constitutional changes. The judiciary was also affected. In fact, while initially the composition of the Supreme Court of the FBiH and the prosecution office relied on parity between judges of Croat and Bosniak nationality, this was later eliminated by the Office of the High Representative (OHR). See Borjana Krišto and Bariša Čolak, "Inequality of Croats in Federation of Bosnia and Herzegovina," in *Hrvati Bosne i Hercegovine – nositelji europskih vrijednosti?, Interdisciplinary Conference With International Cooperation,* eds. Dejan Vanjek and Ivo Čolak (Neum: The Cabinet of the Croat Member of the Presidency BiH, 2017), 521–522.

44 Krišto and Čolak, "Inequality," 518.

45 Ibid.

46 Ibid.

47 International body authorised under the DPA to overlook its implementation. In 1997, OHR powers were extended to pass laws, form new institutions on the state level, alter the constitution and even dismiss officials and politicians. These practices were abolished in 2006 after numerous critiques of their colonial dispositions and failure to support proper democratic development of the country: 'The current dependence upon the OHR means that in practice the most important and powerful institution in the state is the only one

considered as interventions in the system which are particularly harmful for equality. The consequences were that Croat ministers could not participate nor co-decide on equal footing with their Bosniak peers. In addition, many other executive functions were terminated, such as powers of ministers in the Federal Government, which supplied overall power-sharing balance, as well as the role of Government ministers in the protective mechanism of vital national interest (VNI).[48] In essence, OHR impositions favoured majoritarian principles and thus undermined the position of Croats as significantly less numerous people in the FBiH. OHR also intervened in the election law and competences of the House of Peoples, which were initially equal to those of the House of Representatives based on direct civic vote and mixed electoral units.

However, the most destructive interventions for equality and constituency were the amendments of the High Representative (HR) Robert Barry and his successor Wolfgang Petritsch in their involvement with electoral provisions.[49] Their amendments to the Constitution of the FBiH, as well as the election law, targeted the House of Peoples (HoP), the upper chamber of the FBiH, designed for representation of the constituent peoples and equal power sharing amongst them within the FBiH entity. Barry decided that the delegates to the HoP and its Serb, Croat, and Bosniak representatives would be elected indirectly from the ten cantonal assemblies in the FBiH Federation. He also introduced the provision that all members of cantonal assemblies can vote for all delegates who are supposed to represent Croats and Bosniaks in the HoP. Due to the numeric dominance of Bosniaks and their clear majority in five of ten cantons, this broadened their influence on the decision-making process at the expense of Croats. Namely, under those provisions Bosniak delegates and parties in Cantonal Assemblies could elect Croat delegates who were also members of dominant Bosniak parties. Barry's decision had such an impact that in 2000 it enabled the formation of a new government called the 'Alliance for Change' in the FBiH, characterised by the total absence of any representatives of the Croat constituent people. Impositions were made under the authority of the OSCE at the time, and as such they were beyond reach of BiH's Constitutional Court.[50]

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that is not subject to any form of democratic accountability'; Burgess, "Territorial and Non-Territorial Identities," 23.

48 Krišto and Čolak, "Inequality," 521.

49 A detailed account of their constitutional inpositions and interventions is provided in Vukoja and Sitarski, *Bosnia and Herzegovina Federalism, Equality, Sustainability*, 242.

50 Faults of the external approach to BiH state-building were rather well highlighted by Sumantra Bose who noticed that international officials very often, judging by their choice of terminology, were oblivious and insensitive to basic questions such as the nature of

Barry's successor Wolfgang Petritsch continued in the same manner. He further changed the composition of the House of Peoples of the FBiH and devalued the constituent peoples' representation in that body. Basically, he allocated quotas to the Federation cantons. Those quotas enabled parties voted for by Bosniaks in the cantons in which Bosniaks form a clear majority to elect a two-thirds majority (12 of 17) of the Bosniak representatives, a two-thirds majority (12 of 17) of the Serb representatives, and five of seven representatives of 'Others'. This situation enables the Bosniaks a full control (by a two-thirds majority) of two of the constituent nations in the House of Peoples of the FBiH, the Bosniak and the Serb, and 5 of 7 representatives of 'Others'.[51] The result of the impositions was not only to disrupt power-sharing, constituency and equality, but also to produce constant political crises in the FBiH entity.[52] Those crises then radiated to the state level and

statehood and nationhood. They have rather referred to BiH as a national federation, whereas the reality and recent violent history suggested that it should have been treated right from the outset as a multinational federation in which three constituent peoples represent genuine agents of the federal order, in which their 'constituent' constitutional status implies the need for their full normative and practical socio-political equality. See Sumantra Bose, *Bosnia after Dayton: Nationalist Partition and International Intervention* (London: Hurst & Co., 2002), 93. The similar experience of involvement and the role of international community in BiH fits also into the empirical observation encapsulated by John McGarry and Brendan O'Learry: 'Early consociational theory also neglected the possibilities for positive roles for outsiders both in the implementation and in the active operation of power sharing settlements'; John McGarry and Brendan O'Learry, "Consociation and its Critics: Norther Ireland after the Belfast Agreement," in *Constitutional Design for Divided Societies: Integration or Accommodation?*, ed. Sujit Choudhry (Oxford: Oxford University Press, 2008), 381.

51 Croats, however, cannot influence the composition amongst the Bosniak representatives because the cantons with a Croat majority only elect three of seventeen Bosniaks. In addition to their control on the election of the Bosniak, Serb and 'Others' representatives, Bosniaks can influence the composition amongst the Croat representatives. In fact, six Croat representatives are elected from the cantons with Bosniak majority, whereas only five Croat delegates are elected from the cantons with a Croat majority and six from the 'mixed ones'. Hence, from their 'own' cantons Croats can elect less than one-third of the total number of the Croat delegates (5 of 17). Altogether, this means that through this method of election, Bosniaks alone can elect the Government in the FBiH, as well as the President and two Vice-presidents, which requires only one-third of support per each constituent people in HoP. See Vukoja and Sitarski, *Bosnia and Herzegovina Federalism, Equality, Sustainability*, 242.

52 Barry's amendments and modification of the election rules motivated the Croat political leadership in the Croat National Council to declare self-rule on 28 October 2000, in Novi Travnik. The self-rule was intended as a protective mechanism to the constituent status of Croats. Ante Jelavić, then Croat BiH Presidency member was elected Head of Self-rule. After that, High Representative Wolfgang Petritsch used his 'Bonn powers' to

affected overall functioning of the state. Gradual elimination of consociation contrivances, which effectively guaranteed relatively fair share of power and co-allocation of public resources amongst Croats and Bosniaks, paved the way for further centralisation that could then be unimpededly streamlined by majority ethno-political elites without external support.[53]

Another unparalleled phenomenon of violation of the principle of equality was the election, dominantly by Bosniak parties and voters, of the Croat member to the tripartite Presidency of BiH, designated for representatives of the three constituent peoples. While the Serb member is elected by Serb voters from the RS entity, the Croat and Bosniak members from the Croat-Bosniak FBiH entity are almost entirely elected by Bosniak votes.[54] This was enabled by the fact that the FBiH entity represents a single electoral unit with a disproportionate number of Bosniak and Croat voters (approx. 75:22 %), thus allowing Bosniaks to elect both the Bosniak and Croat member of the Presidency, and thus to gain two-thirds control of that collective institution. At the time this was the most obvious case of institutional inequality legalised by illegitimate electoral provisions inconsistent with the constitutional norm of equality of the constituent peoples.[55]

5.1 *On the Pathway toward Full Institutional Equality*

Following key innate and imposed inequalities, the essential challenge now is understanding how to catalyse constitutional normative symmetry of rights and entitlements within such an asymmetric organisational, institutional and electoral setting. Should the structure be altered, or should there be changes to the accepted norms? The option of dismantling 'constituency' would imply that BiH no longer has a multiplicity of 'demoi' but one 'demos', in which case

dismiss Jelavić from the Presidency on 7 March 2001. See Vukoja and Sitarski, *Bosnia and Herzegovina Federalism, Equality, Sustainability*, 239–240.

53 Bosniak politicians pursue majoritarian politics, advocate centralisation and thus tend to negate federalism in BiH. The most prominent example is a resolution from March 2017 voted by Bosniak delegates in the House of Representatives of the Parliament of the FBiH, by which they condemned the call for federalisation previously launched in the Resolution of the European parliament: See European Parliament, *European Parliament resolution of 15 February 2017 on the 2016 Commission Report on Bosnia and Herzegovina (2016/2313(INI))*, last updated 5 April 2018, http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P8-TA-2017-0037+0+DOC+XML+V0//EN. These tendencies are well explained in Keil, *Multinational Federalism*, 172.

54 Vukoja and Sitarski, *Bosnia and Herzegovina Federalism, Equality, Sustainability*, 258.

55 The political dialogue between Bosniak and Croat political representatives has been without success for several years, which is a latent threat to the democratic functioning and stability of the FBiH and BiH.

majoritarian democracy would appear as a logical choice. The suspension of constituency would then unlock transformation of the country from a federal to a unitary setting, but also pave the way for domination of numerically dominant people(s). Still, even unitarisation of the constitutional framework could not alter BiH's multinational character on a societal level, nor could it alter the three already formed co-nations[56] – Bosniaks, Serbs and Croats.

In legal terms, radical transformation of the constitutional setting would require overwhelming support and mutual consensus of all three constituent peoples, which is unlikely to happen. In fact, while it could be attained through coercion which might then lead to violence, it is rather difficult to imagine that structured social groups should self-willingly accept deprivation of their political subjectivity, constitutional status, existence and identity. Also, a thorough reorganisation of the country would be very complex and demanding for BiH as a post-conflict society. In fact, BiH is characterised by a significant lack of common understanding of the shared political community, as well as a lack of political will and culture needed to overcome the power asymmetries embedded within the existent legal-constitutional and institutional framework. Such an agreement or consensus between the representatives of the constituent peoples has proven to be a hard case.[57]

For said reasons, it is more advisable to pursue another scenario and re-examine the relation of the key constitutional norms with everything that lies below, namely to align and harmonise the entire legal-political system with the Constitution and its fundamental category of the 'constituency/equality'. The previously described asymmetry in the applicative capacities of the three constituent peoples' right to self-governance suggests that there should be an applied symmetry to support balancing a highly asymmetric system. But what tools are available to bolster symmetry and equality without engaging in a structural redefinition of the whole arrangement, which is basically a locked peace treaty that is extremely hard to replace by a new constitutional contract? The least challenging and least disturbing pathway would be to follow what is already implicit to the existent Constitution and its underlining peace agreements – the pathway of constituency and institutional equality. This means

56 Term used to denominate the three constituent peoples in Mile Lasić, "Konsocijacija ne znači podjelu zemlje kako tvrde neuki," *Digitalna demokracija* (2018), https://digitalna-demokracija.com/2018/06/22/mile-lasic-konsocijacija-ne-znaci-podjelu-zemlje-kako-tvrde-neuki/.

57 There were several unsuccessful attempts to change the constitutional framework with the assistance of the international community, resulting in failed initiatives for constitutional reforms (April – 2006, Prud – 2008, Butmir – 2009).

that it is only through the advancement of symmetry within the shared institutions in which all constituencies meet, interact, cooperate and co-decide, that BiH's locked structural inequality expressed through its organisational asymmetry (two entities – three constituent peoples) could be rectified or mitigated. In that sense, the focus on institutional equality could efficiently compensate for the present structural deficiencies, which were embedded through peace agreements primarily designed to stop the war, but not to protect equality.

If the main purpose is to avoid reorganising the structure of the country and avoid interventions to the substance of the Washington and Dayton peace agreements, the pathway to compensate the overall asymmetry would be a re-enhancement of the position of 'minorities' through consociational contrivances such as targeted functions, rules, procedures and regulations. A first step in that respect would be to conduct a thorough analysis of the constitutionally controversial international impositions, and consequently the revision and reversal of all those that purportedly undermine constitutional equality in terms of symmetric allocation of self-rule capacities between the constituent peoples. That would entail re-examining and reemploying the following protective measures in support of constitutional equality: 1. a guaranteed minimum representation, 2. veto power and an effective protection of the vital national interest,[58] 3. a broad and inclusive coalition, required

58 Vital national interest (VNI) is constitutionally regulated mainly on the State level and it defines the role of the Parliamentary Assembly of Bosnia and Herzegovina. More specifically, it is assigned under auspices of the House of Peoples of the Parliamentary Assembly of BiH and includes detailed procedures: ' Protection of the vital national Interest [:] A proposed decision of the Parliamentary Assembly of BiH in the House of Peoples can be declared destructive to the vital national interest of the Bosniak, Croat, or Serb people by a majority votes from the Bosniak, Croat or Serb delegates. Such a proposed decision has to be approved by the House of Peoples by a majority of Bosniak, Croat, and Serb delegates who are present and voting. In case the majority of Bosniak, Croat or Serb delegates object to an invocation of the vital national interest, the Speaker of the House of Peoples will immediately convene a Joint Commission consisting of three delegates, each elected amongst Bosniak, Croat, and Serb delegates, in order to resolve the issue. If the Commission fails to resolve the issue within five days, the case will be transferred to the BiH Constitutional Court which will review the procedural correctness of the matter, under emergency procedure. ' See Article IV of the Constitution of Bosnia and Herzegovina, available at http://www.ohr.int/ohr-dept/legal/laws-of-bih/pdf/001%20-%20Constitutions/BH/BH%20CONSTITUTION%20.pdf.

Furthermore, under the Constitution of the FBiH entity, the issue of VNI is more clearly specified, including: 'Exercise of the rights of constituent peoples to be adequately represented in legislative, executive and judicial authorities; identity of one constituent people; constitutional amendments; organization of public authorities; equal rights of constituent peoples in the process of decision-making; education, religion, language,

to maintain stability of interethnic relations and prevent conflicts, 4. a consensual decision-making or decision-making through supermajorities of all three constituent peoples representatives (most of all in BiH Presidency and the House of Peoples – both in the federated entity, as well as on BiH's federal level), 5. a proportional representation on the professional administrative level, 6. parity on higher administrative levels, and 7. an electoral law whose design protects and ensures faithful representation of each of the constituent peoples following the relevant decision of the BiH Constitutional Court.[59] This would preclude potential governments deprived of democratic legitimacy, i.e. prevent the possible exclusion of any of the three constituents in participating and co-deciding in shared-rule matters.

The premise is that the synchronised application of fair electoral provisions will enable the operationalisation of the shared-rule principle in line with 'constituency', creating what is colloquially known as institutional equality.[60] This strategy would compensate structural-organisational asymmetries ascertained in the segment of self-rule, by relying on already existent constitutional principles of BiH's multinational federation. The key instrument of transposition of those principles into the reality of political life is electoral law. Electoral law must thus protect the integrity (autonomy) of each constituency and assure its participation in any key decision-making process. While the constituent peoples are the primary agents of BiH's multinational federal order, the entities and cantons have an organizational role, which is to provide a fair and functional system of governance capable of protecting equality of the three constituent peoples and 'Other' citizens. In order to do so, the state's legal-political life and the political organisation need, however, to faithfully reflect their political will. It stems from this that there must be a

promotion of culture, tradition and cultural heritage; territorial organization; public information system and other issues treated as of vital national interest if so claimed by 2/3rd of one of the caucuses of the constituent peoples in the House of Peoples. ' Procedures are somewhat different than in the case of the State level HoP.

For detailed references, see Constitution of the Federation of Bosnia and Herzegovina Articles 17. and 18., available at http://www.ohr.int/laws-of-bih/constitutions-2/.

59 Democratic legitimacy by standards and merits of the BiH Constitution and Constitutional Court imply the right of each constituent people to elect representatives of its political will: '[T]he Election Law must follow the logic of legitimate representation of the constituent peoples, in particular when it comes to the houses of peoples, i.e. that body of power which is intended to protect and articulate specific interests and needs of each constituent peoples'; Constitutional Court of Bosnia and Herzegovina, Judgment no. U-23/14, 'Ljubic', Sarajevo, 1st December 2016, http://www.ccbh.ba/odluke/.

60 Vukoja and Sitarski, *Bosnia and Herzegovina Federalism, Equality, Sustainability*, 272.

clear correlation between the Constitution, the laws, all bodies of governance and the 'constituencies'. Such relations must be set forth unambiguously in the electoral law.

This point is best seen in the example of the still unimplemented[61] decision of BiH's Constitutional Court U-23/14 ('Ljubić').[62] The central issue the appeal tackled was the problematic provisions regulating the composition and methodology of the election of the delegates representing the Bosniaks, Croats and Serbs of the House of Peoples of the Parliament of the FBiH. The Court ruled that 'the election law violates the principle of the constituent status of peoples, i.e. leads to inequality between any of the constituent peoples, thereby violating Article I(2) the Constitution of Bosnia and Herzegovina'.[63] There was an ascertained mismatch of the number of Serb, Croat and Bosniak delegates in the HoP, indirectly elected in ten cantonal assemblies, and the ethnic composition of the cantons from which they were elected. The fixed delegate quotas reserved for each of the constituent peoples in the cantons caused huge disproportions between the size of 'constituent peoples' and the number of seats allocated to them. This resulted in cases of both overrepresentation and underrepresentation, which undermined the democratic legitimacy, as well as the federal principle of equality. Thus, the Court concluded 'that the principle of the constituent status of peoples in the Federation, in the context of House of Peoples, may be realized only if a seat in the House of Peoples is filled based on precise criteria that should ensure full representation of each constituent people in the Federation.'[64]

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61 Since 2016, it has been the subject of unsuccessful interparty negotiations between the two largest national parties of Croats and Bosniaks in the FBiH entity, the Croatian Democratic Union of Bosnia and Herzegovina (HDZ) and Bosniak Party of Democratic Action (SDA).

62 On 20 September 2014 Dr. Božo Ljubić, the Speaker of the House of Representatives of the Parliamentary Assembly of Bosnia and Herzegovina at the time of the submission of the request ('the 4 applicant'), filed with the Constitutional Court of Bosnia and Herzegovina ('the Constitutional Court') a request for a review of the constitutionality of Articles 10.10, 10.12, 10.15 and 10.16 of the Subchapter B of the Election Law of Bosnia and Herzegovina (*Official Gazette of BiH*, 23/01, 7/02, 9/02, 25/02, 4/04, 20/04, 25/05, 52/05, 65/05, 77/05, 11/06, 24/06, 32/07, 33/08, 37/08, 32/10, 18/13, 7/14 and 31/16, hereinafter: 'the Election Law') and the provisions of Article 20.16A under Chapter 20 – Transitional and Final Provisions of the Election Law. See Constitutional Court of Bosnia and Herzegovina, Judgment no. U-23/14, 'Ljubic', 2, Sarajevo, 1st December 2016, http://www.ccbh.ba/odluke/.

63 Constitutional Court of Bosnia and Herzegovina, Judgment no. U-*23/14,* 'Ljubic', 26, Sarajevo, 1st December 2016, http://www.ccbh.ba/odluke/.

64 Constitutional Court of Bosnia and Herzegovina, Judgment no. U-23/14, 'Ljubic', 26, Sarajevo, 1st December 2016, http://www.ccbh.ba/odluke/.

Furthermore, the Court extended the principle of democratic representation of constituent peoples to all administrative-political levels,[65] as a general requirement of the electoral process in BiH, understood as a multinational country. It had also related the term of 'legitimate representation' of constituent peoples to all institutions designed to meet the specificities of Bosnia and Herzegovina, foremost the country level HoP and the tripartite Presidency of BiH.[66] This was entirely the opposite of the earlier considered impositions made by HR s Barry and Petritsch, which blatantly bypassed the principles of constituency, equality, and legitimacy with regard to the representation of the three constituent peoples.[67] As a matter of fact, the Court unequivocally contested and overruled Petritsch's impositions simply by referring to the 'constituency' and the right of each constituent people to elect its political representatives pursuant to the democratic right to free and fair elections. This further implied that the electoral provisions had to be brought into line with the principle of 'constituency', the latter being understood as an overarching constitutional principle with primacy over all other laws and regulations.[68]

5.2 *How to Fit the Rights of 'Others' into the BiH Constitution*

The BiH Constitution unites both the communitarian principle of 'constituency' and liberal human rights norms, given the fact that the European Convention on Human Rights is part of BiH's constitutional framework. At first glance they seem to be incompatible. In fact, the norm of 'constituency' and equality appear as exclusive attributes of the three constituent peoples, leaving thereby all other minorities and citizens unprotected and deprived of their political rights. A society in which there are privileged and disadvantaged groups is naturally unacceptable from the point of view of the liberal notion of fairness and justice. Thus, it appears that 'Others' is the only constitutional category of BiH's population which is unprotected in the social-political life of the country. Since BiH does not fully protect the rights of 'Others', there is a need

65 '[T]he connection between those who are represented and their political representatives at all administrative-political levels is actually the one that gives the legitimacy to community representatives. Therefore, only the legitimacy of representation creates a basis for actual participation and decision-making'; Constitutional Court of Bosnia and Herzegovina, Judgment no. U-23/14, 'Ljubic', 24, Sarajevo, 1st December 2016, http://www.ccbh.ba/odluke/.

66 Constitutional Court of Bosnia and Herzegovina, Judgment no. U-23/14, 'Ljubic', 24, Sarajevo, 1st December 2016, http://www.ccbh.ba/odluke/.

67 Already examined interventions in the electoral regulative by HR Wolfgang Petritsch.

68 This has been already laid down with the Constitutional Court of Bosnia and Herzegovina in its Judgment no. U-5/98, 'On Constituency', http://www.ccbh.ba/odluke/.

for stronger involvement of international authorities, such as the European Court of Human Rights (ECHR).

But who are the 'Others' in the BiH Constitution? Under the 2013 population census, 'Others' appears as a heterogeneous category which comprises less than 3% of the total population.[69] It incorporates minority groups and citizens unaffiliated to any of the constituent peoples who have declared their identity in some other way. It also comprises seventeen national minorities recognised under the existent Law on national minorities,[70] as well as citizens with versatile self-denominations e.g. Bosnians, Herzegovinians, humans, or Martians. Although heterogeneous in regard to all the identities it comprises, 'Others' is still an explicit constitutional category. As such, the rights of its members must be protected both under BiH's Constitution and under laws and external instruments. In that sense, the rights of 'Others' are not entirely unprotected in an administrative sense: there are preassigned formal quotas in civil service for them, anti-discrimination laws and institutions (e.g. Ombudsman) which treat them as well as any other citizen of BiH; there is also a Council of National Minorities within the Parliamentary Assembly of Bosnia and Herzegovina, and reserved seats for them in cantonal assemblies.[71]

However, the neuralgic point of discrimination and inequality of 'Others' resides in the domain of political participation, especially within the specific consociate institutions primarily designed to represent constituent peoples and to assure power-balance amongst them. In this respect, there have been several decisions by the ECHR against Bosnia and Herzegovina, in which it was found that minorities were discriminated against and prevented from running for or being elected to BiH's Presidency and country-level upper chamber, the House of Peoples. The ECHR found roots of this inconvenience in articles IV and V of BiH's Constitution, which were copied to formulate the election law and reserved the right to candidacy only for Croats, Serbs and Bosniaks. The Court found that it was incompatible with Article 14 of the European Human Rights Convention and its Protocols 1 and 12.[72]

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69 See Agency for Statistics of Bosnia and Herzegovina, "Census of Population, Households and Dwellings in Bosnia and Herzegovina: Ethnicity/National Affiliation, Religion and Mother Tongue", Sarajevo, 2019, 23.

70 Adopted by the Parliamentary Assembly of BiH at the session of the House of Representatives held on 20 June 2002 and the House of Peoples at its session held on 12 April 2003; available in English at https://advokat-prnjavorac.com/legislation/LAW_ON%20RIGHTS_OF%20NATIONAL_%20MINORITIES_BOSNIA.pdf.

71 But not in all ten cantonal assemblies, and not at all in municipality councils.

72 However, the implementation of the relevant ECHR judgments is still pending, mostly due to stand-offs between Croat and Bosniak political representatives in resolving these

The most prominent case adjudicated by the ECHR is *Sejdić-Finci v. BiH*. In this case Mr. Dervo Sejdić, as a Roma, and Mr. Jakob Finci as a Jew, both belonging to the constitutional category of 'Others', filed a complaint with the Constitutional Court of BiH (CC). In its reply the CC ascertained that there was no violation of the Constitution, justifying it with its competences in due relation to specificities related to BiH as a post-conflict society and its power-sharing arrangement. After that, the *case* was delegated to the ECHR, which targeted provisions of the Constitution and the election law requiring that candidates to country level HoP and the Presidency BiH could only be members of the three constituent peoples who reside in the specific administrative/electoral units (FBiH or RS entities). This further implied that there was, and still is, discrimination against 'Others' both on the grounds of their identity and place of residence.[73] In yet another case, *Pilav v. BiH,* the same problem of discrimination and human rights violation was also ascertained for members of constituent peoples and their 'dislocated' minority communities.[74]

However, the ECHR's elaboration in *Sejdić-Finci* contains an interesting section, which provokes wider deliberations on general prospects of coexistence between human rights and power-sharing norms within the same constitutional framework:

> When the impugned constitutional provisions were put in place a very fragile ceasefire was in effect on the ground. The provisions were designed to end a brutal conflict marked by genocide and 'ethnic cleansing'. The

matters. For years they have been entrenched in opposite positions on how these decisions should be implemented in conjunction with the constitutional principle of democratic representation of the constituent peoples.

73 The place of residence as discriminatory was central in the case *Pilav v. BiH* because, under the current provisions, a member of BiH's Presidency from the territory of the Republika Srpska entity must be an ethnic Serb. Since Mr. Ilijas Pilav declared himself as a Bosniak, his candidature was rejected by the Electoral Committee and by the Court with the same arguments as in the case of *Sejdić-Finci*. The other two prominent cases are *Zornic v. BiH* and *Slaku v. BiH*, but they are analogous to the *Sejdić-Finci* case as both Ms. Zornic and Slaku could not be accepted as candidates for the election in the HoP and the Presidency, because they are not members of the constituent peoples.

74 'There is no dispute that the provision of Article V of the Constitution of Bosnia and Herzegovina, as well as the provision of Article 8 of the Election Act 2001 have a restrictive character in a way that they restrict the rights of citizens with respect to the candidacy of Bosniaks and Croats from the territory of the Republika Srpska and the Serbs from the territory of the Federation of Bosnia and Herzegovina to stand for election as members of the Presidency of Bosnia and Herzegovina.'; Constitutional Court of Bosnia and Herzegovina cited in European Court of Human Rights, *Pilav v. Bosnia and Herzegovina* (application no. 41939/07), judgment of 9 June 2016, 14.

> nature of the conflict was such that the approval of the 'constituent peoples' (namely, the Bosniaks, Croats and Serbs) was necessary to ensure peace. This could explain, without necessarily justifying, the absence of representatives of the other communities (such as local Roma and Jewish communities) at the peace negotiations and the participants' preoccupation with effective equality between the 'constituent peoples' in the post-conflict society.[75]

The general critique of ethnic power-sharing and consociation is implicit to this statement, which might be seen both as excessive and superfluous in the attempt to explain the causes of the specific problem brought before the ECHR. Such a reaction is not unexpected or surprising as it comes from a court designed to deal with violations of human rights. If the ECHR had asked for assistance from a neutral expert organisation such as the Council of Europe's Venice Commission, this might have contributed to a better understanding of the specifics of BiH's constitutional, legislative and institutional settings, and would have perhaps discouraged such a statement in the first place. The Venice Commission would have probably declared what it had previously said, which was to acknowledge the multinational character of the country and its specifics, e.g. by saying: 'But, the concepts of equal voting power do not apply to the special parts of the BiH legislature, since they are to represent constituent peoples – and hence are designed to meet the unique specificities of BiH'.[76] In fact, hardly any post-conflict arrangement with elements of consociation and ethnic federalism could be entirely exempted from human rights critique.[77] For those reasons, the ECHR's statement is more precarious than it seems at first glance. If power-sharing arrangements are bound to be abandoned one day, then it is hard to expect that anyone would accept them in the future as an interim tool. This point is highlighted by Christopher McCrudden and Brian O'Leary who state that:

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75 European Court of Human Rights, Grand Chamber, *Sejdić and Finci v. Bosnia and Herzegovina* (application nos. 27996/06 and 34836/06), judgment of 22 December 2009, 33.

76 European Commission For Democracy Through Law (Venice Commission), *Opinion 862/2016 on the mode of election of delegates to the House of Peoples of the Parliament of the Federation of Bosnia and Herzegovina* of 29 September 2016, 12.

77 For closer reference please see subtitle 'Consociations and Human Rights Standards' in Christopher McCrudden and Brendan O'Leary, "Courts and Consociations, or How Human Rights Courts May De-stabilize Power-sharing Settlements," *The European Journal of International Law* 24, no. 2 (2013): 484/485, available at https://doi.org/10.1093/ejil/cht020.

> [A]lthough the Court's decision indicates one possible trajectory of human rights courts' reactions to consociations, this would be an unfortunate development because it leaves future negotiators in places riven by potential or manifest bloody ethnic conflicts with considerably less flexibility in reaching a settlement. That in turn may unintentionally contribute to sustaining such conflicts and make it more likely that advisors to negotiators will advise.[78]

Both approaches need to be accounted for and neither of them discarded in order to avoid potentially disturbing effects, which are inevitable in cases where human rights authorities scrutinise power-sharing systems. Both the authority of Courts and internal stability of post-conflict power-sharing arrangements should be protected. Not doing so would jeopardise not only the success of conflict resolution and management, but also human rights instruments. But how is it possible to reconcile two norms appearing to be incompatible within one single constitutional framework? To pursue either one or the other could lead to outcomes which could in a post conflict-riven society such as BiH, undermine the consolidation of its constitutional framework.[79] Thus there must be a 'third' way to escape this perilous liberal-communitarian conundrum and open the path for convergence of these two opposed normative poles. First, from a practical point of view, human rights decisions should be narrowed down as much as possible to a specific problem. Therefore, any criticism to federalism should not simplistically state that power-sharing is hostile to human rights, which would be redundant and counterproductive. Instead, a proper critique should start by acknowledging that in its decision, the ECHR processed individual requests of applicants prevented from being candidates – as members of minority groups – and in that way were prevented from exercising their human, civic and political rights. Each judicial problem requires concrete solutions and as such it should be treated with due sensibility, without engaging in broader ideological and political controversies. It is thus untenable and unforeseeable to search for ready-made solutions in past human rights trials, as this can affect prospects for successful accommodation

78 Christopher McCrudden and Brendan O'Leary, "Courts and Consociations", 477.

79 The difference between collectivist and individualist approaches has been well explained in Will Kymlicka, *Multicultural Citizenship, A Liberal Theory of Minority Rights* (Oxford: Clarendon Press, 1995), 47. Kymlicka calls their fight over primacy 'an old and venerable in political philosophy, but unfruitful'. Neither can individual rights be reduced or consumed entirely through those of the group, nor can group rights be reduced and consumed through individual ones.

of human rights within a delicate power-sharing setting. A minimum of awareness about the peculiarities of each individual social-political system must be considered as proceeding from its own ideological construction. A context-insensitive approach might, though perhaps unintentionally, undermine the core principles upon which peace and stability are founded.[80]

On the other hand, power-sharing systems must be flexible and open to human rights but not at the expense of the core constitutional values that hold the system together. This further implies the need for a careful reading and full respect of the fundamental constitutional values, also by means of constitutional hermeneutics and teleology, if necessary. The affirmation of constitutional values does not only support constitutionalism as such and the rule of law, but it also makes way for accommodation of key ECHR requirements. In BiH, such constitutional principles are constituency/equality, institutional equality via symmetry, the credible and faithful democratic representation of the three constituent peoples and the political inclusion of 'Others'. Those values and principles must be interconnected and justifiable under the 'constituency' as a superimposed constitutional value. The traditional constitutional principle of 'constituency' as such must be kept and mirrored in all the structures of governance and institutions designed for collective representation, as we already debated for the HoP and the Presidency. It means that the ECHR rulings can be fulfilled, without destroying the entire power-sharing system, only under the condition that the 'constituency' and the 'democratic representation' of the constituent peoples as bearers of BiH's constitutional order are fully respected.[81]

Thus, in practical terms, the 'mid-path' between power-sharing and human rights in BiH would require shifting focus from an ethnic-based participation towards a democratic representation of the constituent peoples, as provided in the U-23/14-ruling ('Ljubić'). De-ethnicisation of the executive and legislative positions in Presidency and the HoP would eliminate the problem of identity-based discrimination and assure that any citizen could be a candidate and be elected as a member of collective institutions.[82] Conversely, institutional

80 Questioning core constitutional principles upon which an entire legal-political order is based is precarious in many ways, both for that order and the involved external authority.

81 Ivan Vukoja and Milan Sitarski, "Constitutional, Legal and Political Algorithm of the Electoral Reform in Bosnia and Herzegovina," *Mostariensia – Journal of Social Sciences and Humanities* 22, no. 1 (May 2018): 519.

82 Which is exactly what the ECHR requested in its key judgments v. BiH. For instance, amongst others, the ECHR judgment in the prominent Sejdić-Finci case highlights the obligation of Bosnia and Herzegovina as a member of the Council of Europe to amend its constitution in view of replacing the mechanisms of ethnic representation by representation based on the civic principle. See European Court of Human Rights,

equality between the constituent peoples would also be protected by allowing them to connect to collective institutions through an unhindered projection of their political will in elections. Each of them would still retain ownership over preassigned positions in the collective bodies of the Presidency and the HoP, but unladen with any current requirement of ethnic identification as current mandatory criteria for entering these positions.[83] It means that the Serb, Croat and Bosniak members of the Presidency, as well as the Serb, Croat and Bosniak delegates in the respective ethnic group in the HoP, could become candidates supported either directly by their respective constituency (for members of the Presidency), or indirectly by the representatives of the constituent people in the cantonal assemblies (for the HoP delegates). The 'Others' could then be free to be a candidate or vote for any of the said positions they chose to. Since there are already fully worked-out concrete solutions and proposals leading in this direction,[84] this chapter has not focused on this option in detail.

This all points out, on the one hand, the merits of the decision of BiH's Constitutional Court on the 'legitimate representation' of constituent peoples (U-23/14, 'Ljubić') and, on the other hand, that the ECHR's judgments can be fulfilled within the current power-sharing arrangement.[85] In essence, they are not necessarily contradictory but complementary, and as such they can simultaneously coexist and develop within the existent BiH constitutional framework. The benefit of such a conjunctive strategy is that it retains the integrity of the constitutional framework by affirming its corporate-federal dimension (Constituency of the Constituent Peoples) at the expense of the explicit-consociate (ethnically preassigned public-political positions), without, however, usurping the essence of power-sharing agreement as defined in the Constitution and preceding peace treaties. This could be a sound alternative to any biased or exclusivist approach pointed either against group or individual rights, which would then lead to an insurmountable constitutional deadlock. Therefore, the only requirement for the success of this strategy is a deep reading of BiH's Constitution and its values in conjunction with relevant decisions of BiH's Constitutional Court and vice versa. That is the prerequisite

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Sejdić-Finci v. Bosnia and Herzegovina (application nos. 27996/06 and 34836/06), Strasbourg, *Judgment of 22 December 2009,* 16.

83 This approach is reflected and applied in a most meaningful way to the issue of BiH's electoral reform by the Institute for Social and Political Research (IDPI) in the article "Basic Principles, Models and Proposals for BiH Election Law Reform", Mostar – BiH, April 5th 2018, available in English at http://www.en.idpi.ba/basic-principles-models-and-proposals-for-bih-election-law-reform/.

84 Vukoja and Sitarski, "Constitutional, Legal and Political Algorithm," 505–521.

85 Vukoja and Sitarski, "Constitutional, Legal and Political Algorithm," 519.

of a non-invasive implementation of the ECHR's decisions, and the path enabling the reconciliation of individual and group rights in the BiH multinational federation.

6 Conclusion

It follows that an impasse of the asymmetric structural deficiencies, embedded in BiH dyadic two-entity territorial organisation (three constituent peoples – two entities), ought to be compensated through other available means of the soft, i.e. non-structural, power-sharing contrivances, in order to affirm equal political participation in the decision-making processes of all the BiH constituents regardless of their size, demographic positioning, or political or economic power. The effects and consequences of the structural inequalities embedded in the Dayton Peace Agreement and further developed during its internationally supervised implementation could be remedied via adequate compensational policies in the institutional-regulative sphere. This could be achieved by re-affirming the electoral and consociate rules for the empowerment of minorities and betterment of their overall institutional position under a given constitutional setting. To honour mandatory constitutional norms of equality of all the constitutional-political entities,[86] optimal standards of relative symmetry and connected institutional equality must be advanced.

Two key aspects of inequality in the BiH multinational federation have been examined in this chapter. The first predominantly relates to equality between constituent peoples (Serbs, Croats and Bosniaks), and the second to the position and equality of 'Others'. Regarding the first aspect, the constituent peoples are in fact constituent members and the backbone of the BiH multinational federation. They are the founding basis of BiH's current power-sharing arrangement. Thus, the concept of 'constituency' as a key constitutional principle supersedes all other constitutional provisions and laws. As such it presupposes the equality of the constituent peoples (Croats, Bosniaks and Serbs) and the corresponding symmetric application of their rights both in the shared- and self-rule segments. Self- and shared-rule as federal principles are implicit to 'constituency', and as such play a crucial role in delivering equality in the BiH multinational federation. After an overview of the participative and co-decision-making capacities of the three constituent peoples, it was ascertained that in the current situation and on multiple levels of BiH's

86 In the case of BiH, three constituent peoples and other citizens.

governance apparatus, the executive and legislative powers do not faithfully reflect, as they should, the constitutional principle of symmetry, embedded in the principle of 'constituency'. There are conspicuous asymmetries within the power-sharing system which deviate from the constitutional norm of 'constituency'. This essentially refers to Croats who are the least numerous community in BiH and hold significantly lower self- and shared-rule capacities than the other two constituent peoples. In that respect, BiH's electoral law is still controversial as it does not guarantee Croats from the FBiH, or minorities in both entities, the election of their representatives to BiH's Presidency and HoP. The examined cases of inequality require a revision of power-sharing mechanisms so that constitutional symmetry and equality in the segment of shared-rule can become an institutional reality and thus compensate embedded structural asymmetries. Another aspect of inequality, related to human rights and the still unimplemented ECHR decisions against BiH, indicates that minorities and individuals from the category of 'Others' are also discriminated against on the grounds of their identity and place of residence. To resolve those pertinent problems of inequality in both collective and individual dimensions, it is necessary to respect both the BiH Constitution and the traditional value of 'constituency', which implies that collective equality and human rights norms from the European Convention on Human Rights are integrated into BiH's constitutional framework. Consequently, BiH must implement the 'Ljubić' decision of the Constitutional Court on legitimate representation of the constituent peoples and revise the asymmetric distribution of public positions between their political representatives. It must also implement ECHR decisions targeting problems of discrimination of minorities and 'Others' as non-constituents. In order to do so, it must abandon ethnic identity as the criteria for candidacy in collective representation institutions – BiH Presidency and the House of Peoples. The key point is that both individual and group equality can be fixed only under the auspices of the extant constitutional framework and its key value – 'constituency'. Human rights norms can be accommodated without overall disruption of the power-sharing balance created under the DPA and the appertaining Constitution. This is the only way to avoid continued perilous and unpredictable trade-offs between stability and democracy.

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CHAPTER 14

In the Name of Diversity

The Disenfranchisement of Citizens in an African Federation

Yonatan Tesfaye Fessha

1 Introduction

The empowerment of ethnic communities is the cornerstone of the constitutional arrangement of the Federal Democratic Republic of Ethiopia. The Constitution organises the state along ethnic lines by using ethnicity as the primary basis to demarcate its internal boundaries. Ethnically defined autonomous subnational units are the basis for the organisation of the federation. At the same time, the Constitution, like many other contemporary Constitutions, provides for a vast array of individual rights. It declares equal commitment to both individual rights and the right of ethnic communities to autonomy.

Despite the constitutional commitment to equally uphold the autonomy of ethnic communities and individual rights, the constitutional practice, this chapter argues, seems to give more weight to autonomy rights and frustrates claims based on the right of an individual to equal treatment. This chapter discusses the status and treatment of individuals that belong to ethnic minorities in a context of a case that was decided by the House of Federation (HoF), the body that is responsible for interpreting the Constitution. The case revolved around the constitutionality of the use of a mandatory language requirement as a condition to be eligible for election. Although the HoF, in its decision, affirmed the rights of individual applicants to stand for elections, a closer scrutiny reveals that the HoF failed to protect the individual's right to stand for election regardless of their linguistic abilities. In fact, the decision of the HoF has the effect of disenfranchising a large number of the population in most urban areas of the different subnational units, undermining the constitutional commitment to equal respect for individual and communal rights and creating a feeling of exclusion among individuals that are deemed not to belong to the empowered group(s).

The chapter is structured in five related parts. The next section introduces the basic architecture of the Ethiopian federation and, particularly, the self-rule aspect of the federation. This is followed by a section that discusses how the Constitution seeks to reconcile autonomy with individual rights. It then

moves to the main business of the chapter and discusses how the Constitution has, in practice, attempted to reconcile autonomy with the principle of equality. It does so by focusing on the case brought before the HoF pertaining to the mandatory language requirement to stand for election. The decision of the HoF is analysed both from the perspective of equal rights as well as from the point of view of the autonomy of ethnic communities that the mandatory language requirement purportedly seeks to advance. The chapter concludes that the decision of the HoF inflicts harm not only on the principle of equality but also onto the commitment of the Constitution to promote the autonomy of ethnic communities.

2 Autonomous Ethnic Communities: The Building Blocks of the Ethiopian Federation

The political map of the Ethiopian federation betrays its major foundation: ethnicity. Unlike other federations, where geography or administrative conveniences have been used to draw internal boundaries, Ethiopia has opted to take ethnicity as the point of departure for the remaking of the Ethiopian state.[1] Although unusual, it was not totally unexpected. The forces that sat around the national table in July 1991 and negotiated the reordering of the Ethiopian state were ethnic based political movements and liberation fronts. For them, the primary question that needed to be addressed in post-Derg[2] Ethiopia was what is usually known as the nationalities question – the claim that the making of the Ethiopian state was predicated on the suppression of the cultural and political aspirations of ethnic communities that inhabit the country. Ethnicity, they declared, should be the basis for the reorganisation of the Ethiopian state.[3] It is that consensus, often touted by its proponents as 'the bold experiment' in Africa, which found its way into the current Constitution.[4]

1 This is clearly stated in the Constitution: 'States shall be delimited on the basis of the settlement patterns, language, identity and consent of the people concerned'; see Article 46 of the Constitution of the Federal Democratic Republic of Ethiopia, 1995 (hereafter the Constitution).

2 Derg was the name given to the military government that ruled Ethiopia from 1974 to 1991.

3 The Transitional Charter, which served as the constitutive document of the Transitional Government from 1991 to 1995, created 14 regions that were explicitly based on ethnicity.

4 Whether an experiment that is novel and bold is always a good thing is a different matter although that is what the proponents of the federation seem to suggest.

The 'bold experiment' saw the creation of nine states.[5] The ethnic foundation of the federation is particularly apparent in five of its nine states.[6] This is not only because of the fact that each of them is predominantly inhabited by one particular ethnic group. They are also named after the dominant ethnic group that inhabits the territory. The ethnic trait is not completely absent either in the makeup of the remaining four states. Although these states are not predominantly inhabited by one ethnic group, the designations of some of the states[7] and their internal organisational structure, that includes ethnic based local governments,[8] indicates that ethnicity is taken seriously in the political and organisational makeup of the states.

The decision of the Ethiopian state to take ethnicity seriously, perhaps too seriously, in the political and geographical reconfiguration of the country has undeniably promoted the cultural and political status of groups that were hitherto marginalised in the past. The cultural upliftment is particularly palpable. A country that for ages used only one language as a language of communication has now given way to a federation whose constituent units use different languages for the purposes of government business within their respective boundaries.[9] This has extended to the education sector where many languages are now used as the medium of instruction at least in the early stages of most primary schools. Perhaps the most visible and colourful manifestation of cultural upliftment comes in the form of the reintroduction of annual traditional celebrations that attract thousands of peoples and are taking the form of 'street festivals'.[10]

The political upliftment may not be equally palpable. Still, as I have alluded somewhere else,[11] the territorial structure of the federation gives ample

5 The nine states are Tigray, Afar, Amhara, Oromia, Benshangul/Gumuz, Southern Nations, Nationalities and Peoples (SNNPR), Harari, Somalia and Gambela; see Article 47 of the Constitution.

6 These are Tigray, Amhara, Oromia, Somalia and Afar.

7 Take, for example, the state of Harari, which is named after the numerically small but historical inhabitants of the area. The Harari account for less than 9 % of the state population.

8 This is the case, for example, with the SNNPR, which is home to numerous ethnic groups, but is composed of local governments that are defined along ethnic lines.

9 The Constitution, under article 5, leaves the power to decide language policy to each state government.

10 Ashenda, a cultural festival of young ladies in Tigray, Irreecha, a thanksgiving holiday in Oromia, and Fiche Chembelala, a new year festival for the Sidama people celebrated in SNNPR, are very good examples of annual cultural festivals that have gained prominence in the last few years.

11 Yonatan Fessha, *Ethnic Diversity and Federalism: Constitution Making in South Africa and Ethiopia* (Surrey: Ashgate, 2010).

opportunities for local communities to participate in the political structure of the state. In fact, local communities have now been able to benefit from receiving services from leaders that speak their language and share their culture even though the representativeness and autonomy of the leaders is often questionable. True and full empowerment of communities is yet to arrive.

The reconfiguration of the state, because it cannot and has not resulted in separate ethnically pure territorial units, has brought to fore new tensions. On the one hand, it has created a majority–minority tension at the level of the constituent units. Some ethnic communities have suddenly found themselves in a minority position in an area they have traditionally inhabited just because they are taken along with another group that happens to be numerically dominant. Those who find themselves in a minority often complain of political and economic domination by the regionally empowered group. They maintain that they, as a group, are entitled to equal recognition and protection. To their credit, the Constitution as well as the federal and state governments, through acts of parliament and state Constitutions respectively, have put in place few mechanisms to address the concerns of these internal minorities.[12]

The reconfiguration has also created tension between individual rights and communal interests. Protecting and accommodating the interest of communities is not always compatible with the interest of individuals, especially with those that do not belong to any of the groups that traditionally inhabit the area. Often referred to as non-indigenous or settlers, this group of individuals complains of their relegation to a second-class citizen status. They often complain that they are not able to access government services in their language and, more problematically, they are often discriminated against regarding education, employment and other benefits offered by state governments.

The resulting tensions are at the core of this chapter. As they result from the remapping of the state, this situation leads us to wonder how the Constitution envisages the reconciliation of these competing interests. This is a question about how a state can go about empowering groups that were marginalised in the past through autonomous arrangements without undermining its

12 The Constitutions of state governments have provided some mechanisms to accommodate the concerns of these groups. Some of the state Constitutions have also introduced a similar system, but at a lower level, in a form of ethnic based local government, to accommodate identity-related demands from intra-state minorities. Functioning as autonomous entities, these ethnically defined local governments provide intra-state minorities with the territorial space that is necessary to manage their own affairs. For more, see Yonatan Fessha and Christophe Van der Beken, "Ethnic Federalism and Internal Minorities: The Legal Protection of Internal Minorities," *African Journal of International and Comparative Law* 21, no. 1 (2013): 32–49.

commitment to respect and protect individual rights irrespective of the group they belong to.[13] Let us start with the Constitution.

3 The Communitarian Constitution?

One can easily be tempted to classify the Ethiopian Constitution as a communitarian one. With its elaborate list of provisions that presents ethnic groups as the subject of rights, the Constitution might be unparalleled in the attention it gives to ethnic communities. It might be difficult to identify a comparator from its contemporaries. This is not only because it presents ethnic groups as the subjects of rights (which, on its own, is not necessarily common) but also since it defines the Constitution as a compact amongst ethnic communities. It proclaims that it is the coming-together of ethnic communities that has given birth to the federation. In as much as one can easily dismiss this as a constitutional fiction, it is this constitutional premise that underlies the clauses that make up the Constitution. As noted by Kymlicka, '[t]he Ethiopian Constitution reads as if someone attempted simply to deduce the appropriate structure of the federal state from a set of first principles, in conjunctions with a census of ethno-linguistic groups'.[14] It is this preoccupation with ethnic groups and the rights of ethnic groups that has made many wonder whether there is 'a space for the individual' in the Ethiopian Constitution. Even if there is a space for individual rights, they argue, it is of secondary importance to group rights. '[T]he individual is relegated in the constitutional order.'[15]

Even if the unusual attention given to ethnic communities overshadows all other parts of the Constitution, it provides for a detailed list of individual rights. A whole chapter (i.e. chapter three of the Constitution) is dedicated to fundamental rights and freedoms. Part one of that chapter is dedicated to human rights. Part two focuses on what it calls democratic rights. Between the two parts, the Constitution provides for no less than two dozen individual

13 This is not a tension that is unique to the Ethiopian federation. Most multinational federations grapple with this dilemma.

14 Will Kymlicka, "Emerging Western Multinational Federalism: Are They Relevant for Africa?," in *Ethnic Federalism: The Ethiopian Experience in Comparative Perspective*, ed. David Turton (Addis Ababa: Addis Ababa University Press, 2006), 55. It has also led Kymlicka to observe 'the explicitness with which the Ethiopian Constitution affirms the principle of ethno-national self-government and the logical consistency with which it attempts to institutionalize that principle'.

15 See Berihun Adugna Gebeye, "Towards making a proper space for the individual in the Ethiopian Constitution," *Human Rights Review* 18, no. 4 (2017): 439.

rights, including the universal rights that are widely recognised by national Constitutions and international human rights instruments. Importantly, Article 25 of the Constitution declares the right to equality and prohibits discrimination on grounds of, amongst other things, race, nation, nationality, or other social origin, language, religion or other status. The Constitution mandates 'all federal and state legislative, executive and judicial organs at all levels [...] to respect and enforce [the fundamental rights and freedoms provided in the Constitution]'.[16]

Although the emphasis on group rights overshadows all other equally important provisions of the Constitution, respect for universal individual rights is given equal status, though not equal attention, to that of communal rights, or as the Constitution puts it, 'the rights of nations, nationalities and people'.[17] This is clearly stated from the outset in the preamble to the Constitution which emphasises the 'full respect of individual and people's fundamental freedoms and rights'.[18] It also declares the need to 'live together on the basis of equality and without any sexual, religious or cultural discrimination'.[19] The HoF, the body that is responsible for interpreting the Constitution, has also confirmed that the Constitution attaches equal weight to individual and communal rights. It declared that individual rights and group rights, as recognised by the Constitution, are 'interdependent, indivisible and equal'.[20] The right of ethnic communities to self-determination should not be given preference over individual rights. Similarly, it is not permissible to limit the right of ethnic communities to self-rule to ensure the realisation of an individual right. Both groups of rights must be seen in harmony with each other and must be enforced accordingly. The question is whether the constitutional practice reflects this equal commitment to communal and individual rights.

The commitment of the Constitution to respect individual and communal rights was at the centre of a case that was brought before the HoF.[21] The case stemmed from a petition that challenged the decision of the National Electoral Board that, according to the claimants, interfered with the right to stand as a candidate. The decision dealt with the use of language requirements

16 Article 14 of the Constitution.
17 Article 39 of the Constitution.
18 Preamble of the Constitution.
19 Preamble of the Constitution.
20 Benshangul/Gumuz case, House of Federation (12 March 2003) House of Federation (2008) 1 *Journal of Constitutional Decisions* 14–34 (Hereafter Benshangul/Gumuz case).
21 Decision of House of the Federation on 'Constitutional Dispute Concerning the Right to Elect and be Elected in Benishangul Gumuz Regional State', 13 March 2003 (Hereinafter the '*Benishagul Gumuz* case)'.

to stand for election in one of the nine states, namely the state of Benshangul/Gumuz. Before analysing the case in detail, a quick account of the socio-political demography of the state has to be provided, which, I believe, gives an insight into the developments that led to the legal battle that is the focus of this chapter.

4 The State of Benshangul/Gumuz and the Use of Mandatory Language Requirements

Unlike the five states, there is no single ethnic group that accounts for most of the population that inhabits the state of Benshangul/Gumuz. The largest ethnic group, the Berta, account for just less than 26 % of the population of the state, closely followed by the Amhara and the Gumuz, each of which account for just above 21 % of the population of the state.[22] Like the five states, however, the designation of the state gives an indication of the ethnic groups that are deemed to be 'owners of the state'. This is because the designation of the state is not ethnically neutral. It actually refers to the two ethnic groups that are deemed to have historically inhabited the area, namely the Berta and the Gumuz. In fact, the Constitution of the state reinforces this perception by singling out the two ethnic groups, along with the Shinasha, Mao and Komo, as the 'owners of the state'.[23]

Nearly half the population of the state does not, however, belong to the ethnic groups that are declared by the Constitution as the 'owners of the state'. In fact, an important feature of the demographic composition of the state is the presence of a large population that have migrated to the area. Many have moved to the state because of the resettlement programs that were undertaken by the military government in the 1980s following the famine that ravaged the northern part of the country. Although these individuals belong to different ethnic groups, more than half of them belong to the Amhara ethnic group, the second largest ethnic group in the country, whose culture and language has been historically dominant. This segment of the population, together with the Oromo and members of other ethnic groups, account for no less than 40 % of the population of the state.

22 The three other ethnic groups are the Shinasha (7.59 %), Mao (1.90 %) and Komo (0.96 %). See Population Census Commission, "Summary and statistical Report of the 2007 Population and Housing Census Results," accessed on 15 July 15 2018, http://www.ethiopianreview.com/pdf/001/Cen2007_firstdraft(1).pdf.

23 Article 2 of the Constitution of the State of Benshangul/Gumuz.

It was the decision of three individuals that belong to the so-called settlers group to stand for election to the parliament of Benshangul/Gumuz that ensued the legal battle that culminated in the HoF. Although the three individuals belong to different ethnic groups, they share the fact that all of them speak Amharic and wanted to contest the 2000 state legislature election. Their decision to contest the election, however, faced a strong objection from one of the local political parties that was vying for the control of the state parliament. An ethnic based party that claims to represent members of the Berta ethnic group petitioned the National Electoral Board of Ethiopia (NEBE) for the exclusion of the candidates from the state election because none of the three candidates speak any of the 'indigenous languages' and, in particular, Berta, one of the five 'indigenous languages' spoken in the state.

The NEBE agreed with the petition and struck off the individuals from the list of candidates. The NEBE based its decision on the electoral law that makes the right to stand for an election dependent on the ability to speak the working language of the region.[24] The individuals appealed to the HoF, objecting to the decision of the NEBE on the ground that the law is unconstitutional. The Council of Constitutional Inquiry (CCI), a standing body established by the Constitution to provide advisory opinion to the HoF,[25] concluded, on a majority vote, that the mandatory language requirement constitutes discrimination. It accordingly advised the HoF to declare the impugned legislation unconstitutional and invalid. The dissenting members of the CCI did not see incompatibility between the mandatory language requirement and the right to stand for election without discrimination.

The HoF reversed the decision of the NEB and affirmed the right of the three individuals to stand for election on the ground that the impugned legislation does not require the candidate to speak the 'indigenous languages' but the working language of the state government. However, the decision of the HoF, as we shall find shortly, fell short of entrenching the right of individuals to stand for an election irrespective of their linguistic ability. This is because the HoF held that the use of the working language of the state as a condition

24 Article 38 (19 (b)) of the Proclamation to make the Electoral Law of Ethiopia conform with the Constitution of the Federal Democratic Republic of Ethiopia (Proc. No. 111/1995), published in *Negarit Gazeta* TGE, 54, no. 9 (February 1995).

25 The CCI, composed of lawyers and politicians, has the powers to investigate constitutional disputes and submit its recommendations to the HoF. In particular, if federal or state law is challenged on the ground that it is unconstitutional, the Council shall consider the matter and submit its recommendations to the HoF. The HoF is not obliged to adopt the recommendations of the Council. See Article 84 of the Constitution.

to stand for election is not inconsistent with the Constitution as it does not constitute a violation of the right of a citizen to stand for election without discrimination.

In what remains of this chapter, I argue that the position of the HoF is problematic both from the perspective of the principle of equal rights and the principle of autonomy. From the perspective of equal rights, the decision to uphold the mandatory language requirement violates the right of an individual to stand for election without any discrimination. From the perspective of autonomy, it fails to effectively reconcile the tension between individual and group right that is inherent in many federal Constitutions which are designed to deal with the challenges of ethnic diversity. Let us start the discussion by focusing on the implication of the decision on the right to stand for election without discrimination.

5 The Equality Argument

The right to stand for election without discrimination is one of the most widely recognised rights, both internationally and nationally. Article 25 of the International Covenant on Civil and Political Rights (ICCPR) recognises and protects the right of every citizen to be elected.[26] All international agreements ratified by Ethiopia are an integral part of the law of the land,[27] making article 25 of the ICCPR a right that can be claimed by an Ethiopian citizen before local courts. Article 38 of the Constitution reinforces the commitment of Ethiopia to political rights by providing that '[e]very Ethiopian national, without any discrimination based on color, race, nation, nationality, sex, language, religion, political or other opinion or other status' has the right 'to be elected at periodic elections to any office at any level of government'.

Although not explicitly mentioned, the right to stand as a candidate cannot be without limitations. The international covenants to which Ethiopia is a party, and based upon which 'the fundamental rights and freedoms' provided in the Constitution must be interpreted,[28] state that the right to be elected

26 Article 25 of the International Covenant on Civil and Political Rights.

27 Article 9 (4) of the Constitution.

28 The Ethiopian Constitution provides that '[t]he fundamental rights and freedoms specified in this Chapter shall be interpreted in a manner conforming to the principles of the Universal Declaration of Human Rights, International Covenants on Human Rights and International instruments adopted by Ethiopia'. See Article 13 (2) of the Constitution.

can be restricted.[29] But the restrictions must be reasonable; it is unreasonable restrictions that are prohibited. Whether a restriction is reasonable or not cannot be determined abstractly, but only on a case-by-case basis. It requires one to consider the nature of the limitation and, in particular, the extent to which the restriction limits the right in question. The limitation must not be so extensive that it negates the 'very essence' of the right. Furthermore, the individual right must be weighed against the aims that the limitation seeks to achieve. The aims, in turn, must be legitimate. At the end of the day, restrictions must always comply with the requirements of proportionality. The means used to achieve the 'legitimate aim' shall not be disproportionate.

International law has not yet determined whether mandatory language requirements violate the right to stand for public office. In *Ignatane v Latvia*, the United Nations Human Rights Committee (UN HRC) was given an opportunity to address this specific issue.[30] In that case, the applicant, Ms. Ignatane, a Latvian citizen of Russian origin, was denied the right to stand for local election on the ground that she could not fluently speak Latvian, the official language of the country. According to the Law on Elections to Town Councils and Municipal Councils of 13 January 1994, an individual that does not have level 3 (higher) proficiency in the state Language cannot stand for election. All candidates, except those that completed their education in schools that use Latvian as a medium of instruction, must submit a copy of their language proficiency certificate, demonstrating 'higher level proficiency', along with 'the candidate's application'. In February 1997, the Riga Election Commission, which is responsible for organising elections in the district the applicant was contesting, removed her from the list based on an opinion issued by the State Language Board (SLB). The opinion declared by the SLB, which, in turn, was based on a report prepared by a single examiner, declared that Ms. Ignatane does not have the required proficiency in the official language. The applicant claimed that the decision to remove her from the list of candidates amounted to a violation of her right to stand for election without any discrimination. The State party, the government of Latvia, argued that the mandatory language requirement was consistent with article 25 ICCPR as it is a restriction based on objective and reasonable criteria. According to the State party, 'participation in public affairs requires a high level of proficiency in the State language and such a

29 Article 25 of the International Covenant on Civil and Political Rights states that the rights are granted to every citizen without unreasonable restrictions, suggesting that restrictions are acceptable if they are reasonable.

30 *Antonina Ignatane v. Latvia* (Communication no 884/1999), Views adopted on 31 July 2001, U.N. Doc. CCPR 72/D/884/1999.

precondition is reasonable and based on objective criteria, which are set forth in the regulations on the certification of proficiency in the State language'.

The UN HRC ruled that the action of the Latvian government violated Article 25 of the ICCPR. It believed that the way the proficiency of the applicant is determined was not based on objective and reasonable criteria. The decision of the Electoral Commission to remove the applicant based on a report issued by a single inspector and only a few days prior to the election is arbitrary and this is despite the fact that the applicant had been given a language aptitude certificate by a board of Latvian language specialists some years earlier. Accordingly, the Committee concluded that the decision of the Election Commission to strike off the applicant from the list of candidates on the basis of insufficient proficiency in the official language had prevented her from exercising her right to public participation as provided in article 25 of the Covenant in conjunction with article 2 of the Covenant.

Although the decision represents a victory for the applicant, it does not help much for those that find themselves in the same position as the applicant. This is because the Committee did not conclude that a mandatory language requirement per se violates the right to public participation without any discrimination. It rather ruled in favour of the applicant based on procedural grounds.[31] In so far as international human rights law is concerned, the question of whether a decision of a state to introduce a mandatory language requirement violates political human rights – irrespective of the way in which proficiency in the language in question is determined – remains unresolved.[32]

31 This is different from the position of the European Court of Human rights that, in an identical case involving Latvia, ruled that the power to determine the language of Parliament falls within the state's exclusive competence and legislation that requires candidates to be fluent in the working language of the parliament is not problematic as it is aimed at ensuring 'the proper functioning of parliament'. 'In particular, members of parliament needed to be able to take an active part in the work of the institution and to defend their electors' interests effectively.' The Court considered that its mandate is only to determine whether the means used by the state to achieve its 'legitimate aim' is proportionate. The Court ruled that the decision to strike off the applicant from the list of candidates was unacceptable. It based its decision, however, on procedural fairness (i.e. the way in which the proficiency of the candidate was determined) and did not find it necessary to examine whether the language requirement violates the right against non-discrimination. See European Court of Human Rights, *Podkolzina v. Latvia* (application no. 46726/99), judgement of 9 April 2002.

32 It must be mentioned that Latvia, under pressure from the European Union and NATO, amended its electoral law, in 2002, to remove the use of the use of language requirement to stand for election. This was welcomed by the UN HRC. See United Nations, *Report of the Human Rights Committee, Volume 1* (U.N. Doc. A/59/40), 1 October 2004, para 65 (4), https://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=A%2F59%2F40(Vol.%20I)&Lang=en. However, it must be noted that 'Parliament retained the right to remove any MP lacking command of the official language at the level

Back in Ethiopia, however, the HoF, as mentioned earlier, gave a definitive answer to the same question. The HoF ruled that the decision of the NEBE to strike off the three candidates from the list of candidates was inconsistent with the Constitution. To be precise, it did not do so because it believed that the mandatory language requirement is incompatible with the Constitution. Rather, the HoF found the decision of the NEBE unacceptable because the impugned legislation, despite the decision made by the NEBE, does not require fluency in any of the local languages. What is required is the ability to converse in the working language of the state government, which, in the case of the state of Benshangul/Gumuz, happens to be Amharic. The HoF, therefore, concluded that the decision of the NEBE to exclude the candidates from contesting the state parliamentary election is erroneous as the candidates are fluent in the working language of the state and are not required to be proficient in any of the other local languages.

According to the HoF, requiring a candidate to be versed in one of the local languages (other than or in addition to the working language of the state) is problematic. To use the language other than the working language of the state as a requirement to stand for election, according to the HoF, is to create discrimination based on language. It would also limit the constitutional right of citizens to elect and be elected. Such language requirement, the HoF held, is also problematic because, in addition to infringing constitutional rights, it undermines the constitutional commitment to create one political and economic community.[33]

More significantly, for our purpose, however, the HoF did not see a problem in the mandatory language requirement. It held that the electoral law that makes the right to stand for an election dependent on the working language of the state is not inconsistent with the Constitution. How did the HoF justify its position?

The HoF conceded that the Constitution prohibits the use of language as a ground to deny or limit the right to vote and to be elected. However, the mandatory language requirement, the HoF argues, does not differentiate between or amongst individuals based on their association with a (linguistic) group. It rather differentiates between individuals based on their

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necessary for the performance of professional duties', thereby undermining the amendment. See Jennie L. Schulze, *Strategic Frames: Europe, Russia and Minority Inclusion in Estonia and Latvia* (Pittsburgh: University of Pittsburgh Press, 2018), 199.

33 The preamble to the Constitution refers to the commitment 'to building a political community' and the determination to 'live as one economic community'; see Preamble of the Constitution.

capacity to speak the working language of the state. The law does not, therefore, interfere with the right of individuals to stand as a candidate without discrimination.

Pursuant to the HoF's decision, the mandatory language requirement does not exclude an individual from standing for political office because they belong to a particular group.[34] Excluded are individuals who cannot speak the working language of the state, irrespective of their group membership. An individual belonging to a particular group can be allowed to stand as candidate while another person from the same group may be disqualified if they are not proficient in the working language of the state. In the same way that an Amhara, who is not proficient in Oromifa, will not be allowed to contest an election for Oromia state parliament, an Oromo that does not speak Oromifa will not be allowed to stand as candidate for the same state parliament. Membership to a group is not used as the basis for differentiation. There is, therefore, according to the HoF, no basis to conclude that the law discriminates based on language or ethnic group.

5.1 *Direct and Indirect Discrimination*

On the face of it, the impugned legislation does not seem to discriminate based on membership to a group. The legislation 'lays down the same requirement and obligation for' all individuals that want to contest a state election, regardless of the ethnic or linguistic group they belong to. It treats 'equally all people who seek to' contest a state election. This may lead one to agree with the conclusion of the HoF that there is no discrimination. After all, discrimination begins when we treat two people or groups differently based on their association with a group (or a susceptible ground).

However, discrimination can be direct or indirect. The international jurisprudence has established that a differentiation which, on the face of it, does not seem to discriminate amongst groups on any susceptible ground might still be regarded as indirect discrimination. In *Althammer v Austria*, the UN HRC stated that 'a violation of Article 26 can also result from the discriminatory effect of a rule or measure that is neutral at face value or without intent to discriminate'.[35] This happens when the differentiation has discriminatory effect on a particular

34 The decision of the House seems to echo the advisory opinion given by the dissenting members of the CCI that, as mentioned earlier, did not find incompatibility between the language requirement and the right to stand for election without discrimination.

35 *Althammer v. Austria* (Communication no. 998/2001), Views adopted on 8 August 2003, U.N. Doc. CCPR/C/78/D/998/2001, para. 10.2.

group.[36] As noted by the UN HRC, 'such indirect discrimination can only be said to be based on the ground enumerated in Article 26 of the Covenant if the detrimental effects of a rule or decision exclusively or disproportionately affect persons having a particular race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status'. In other words, a law or measure that is not specifically directed at a particular group, and which appears to be neutral, may still be considered discriminatory if it has 'disproportionately prejudicial effects on a particular group'.

Arguably, the mandatory language requirement may have a discriminatory effect on individuals that do not belong to a particular ethnic group. This is particularly the case in the states that are dominated by a particular ethnic group whose language serves as the working language of the government. In those states, although the criterion seems to exclude all individuals that are not proficient in the working language of the state from contesting state elections irrespective of their group membership, it is clear that the criterion disproportionately affects individuals that do not belong to the numerically dominant ethnic group. In the state of Oromia, for example, where more than 90 % of the population belongs to the Oromo ethnic group, it is the 3.2 million individuals that inhabit the state but do not belong to the Oromo ethnic group that would be largely affected by this requirement. It is candidates that do not belong to the Oromo ethnic group that are mostly unable to communicate in Oromifa, the working language of the state government, and, as a result, would

36 Indirect discrimination has its source in the famous decision of the Supreme Court of the United States in *Griggs v Duke Power Company*. In that case, the impugned conduct was an employer's requirement that job applicants hold a high school diploma or pass an intelligence test for what was basically an unskilled job, for which even literacy was not necessary. The Court held that the requirement was discriminatory 'because it operated to exclude black applicants at a higher rate than whites, and was not substantially related to the applicant's ability to perform the job'. The Court, in what is perhaps the first formulation of the concept of indirect discrimination, stated: 'What is required by the Congress is the removal of the artificial, arbitrary and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial and other impermissible classification. The act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation. The touchstone is business necessity. If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited'; US Supreme Court, *Griggs v Duke Power Company* (1971, no. 124), judgement of 8 March 1971. There are, of course, those that trace the origin of indirect discrimination to 'some earlier emanations in pre-UN international law'; See Dagmar Schiek, Waddington Lisa and Mark Bell, *Cases, Materials and Text on National, Supranational and International Non-Discrimination Law* (Oxford: Hart Publishing, 2007), 333.

be excluded from the electoral process. The same is true in other states that are home to large numbers of so-called 'settlers' but have chosen the language of the numerically dominant group as the language of government business. The end result is that the mandatory requirement benefits those that belong to the regionally empowered ethnic group and disadvantages those that do not belong to that particular ethnic group. It can therefore be argued that the language requirement has a detrimental effect indirectly on grounds of ethnicity.[37]

5.2 *Based on Objective and Reasonable Criteria?*

As alluded earlier, it is not sufficient to conclude that the law adopted or the conduct in question is discriminatory because it has a disproportionately detrimental effect on a particular group. As problematic as it may appear, such action, on its own, does not constitute discrimination. It is necessary to investigate if the problematic action cannot be explicated by the aim it pursues and the means it uses to achieve the same. According to UN HRC, conducts or laws that have a detrimental effect exclusively or disproportionately on a particular group 'do not amount to discrimination if they are based on objective and reasonable ground'.[38] The remaining question is, thus, whether the mandatory language requirement is a restriction on the right to stand as a candidate that is based on objective and reasonable grounds. The HoF believes so.

The HoF argued that the ability to speak the working language of the state is essential if candidates are going to introduce and convince the electorate about the superiority of their respective political program or the program of the political party they represent. A command of the working language of the state, the HoF argued, is also crucial if a member of parliament is to engage fully and effectively in the debates and discussions of the state parliament. Speaking the working language is essential, if not indispensable, for the effective representation of the electorate in parliament, the HoF concluded.

Clearly, the mandatory language requirement is imposed to achieve a legitimate aim, namely the effective functioning of parliament. It is true that effective representation can be enhanced by the ability to speak the working language of the parliament. A member of parliament that does not speak the working language might be incapable of following the debates in parliament

37 See also Takele Soboka Bulto, "Wolf in Sheep's Clothing? The Interpretation and application of the Equality Guarantee under the Ethiopian Constitution," *Afrika Focus Journal* 26, no.1 (2013): 11–35.

38 *Althammer v. Austria* (Communication no. 998/2001), Views adopted on 8 August 2003, U.N. Doc. CCPR/C/78/D/998/2001, para. 10.2.

and its committees. That would not only undermine the representative capacity of the members of parliament, but it might also seriously hamper the functioning of parliament. But effective representation does not only depend on the capacity of the elected to participate in the works of parliament. It also depends on the capacity of the candidate to communicate with the electorate. Yet, the House, though it has mentioned both dimensions of what makes an effective representation, seems to disproportionately focus on the capacity of the candidate to participate in the activities of the parliament. This is evident from the fact that it did not consider it necessary for an individual that contests a seat in the federal parliament to speak the working language of the state they come from. Proficiency in the working language of the state, the House ruled, should not be a precondition to stand as a candidate for the federal parliament. In consequence, a person that does not speak Oromifa can stand as a candidate to represent an Oromifa-speaking constituency in federal parliament. Obviously, the capacity of the candidate to communicate with the electorate is not a key consideration. For the House, what matters most is that the elected understands the language of parliament and is able to participate in its activities. The House failed to emphasise the fact that effective representation, more than anything else, requires being able to effectively communicate with the electorate.[39]

Furthermore, the means that the law is using to achieve its objective of maintaining a well-functioning parliament, which is excluding candidates from the electoral process, is disproportionate. There are other mechanisms through which language constraints can be addressed. The provision of translation facilities can, for example, easily alleviate language constraints. In fact, the federal parliament uses translation services to facilitate the participation of members that do not have sufficient knowledge of Amharic, the federal working language.

Furthermore, the House has also not addressed the problematic nature of determining the proficiency of a candidate in a working language. What should be the procedure for assigning the proficiency of a candidate in the working language of the state? Who would be responsible for organising the test and determining whether a candidate has sufficient skills in the language of the state? Would the test be limited to oral examination? Or would the candidate be assessed also based on their writing skills, the breadth of vocabulary used and observance of grammatical rules? There is nothing in the electoral law or

39 This, at the very least, involves speaking the languages of the electorate or the constituency one seeks to represent.

any other law, for that matter, that outlines the procedure that must be followed in determining the proficiency of a candidate in a particular language. In the absence of clear procedures and guidelines, it is likely that the process that will be followed in determining proficiency in a working language of the state would in itself be arbitrary and without objective criteria and hence in violation of the right to stand as a candidate without discrimination.

6 The Autonomy Argument

One may argue that there are usually historical and political circumstances that might justify the adoption of such restrictive laws. In fact, the dissenting members of the CCI, who, as mentioned above, did not find incompatibility between the mandatory language requirement and the right to stand for election without discrimination, based their decision partly on the commitment of the Constitution to 'rectify historical injustices'[40] and the mode of federal arrangement Ethiopia has chosen. As mentioned at the beginning of this chapter, the Ethiopian federalism is primarily designed to accommodate ethnic diversity. Self-rule of ethnic communities is a central pillar of the federal order. In fact, the constituent units are designed in a manner that they embody the empowerment of ethnic communities. Most of them are demarcated in such a way that each of them is home to a particular ethnic group. Each constituent unit is free to determine its language policy. They are basically crafted in a manner that allows members of the concerned ethnic community to dominate the leadership structure of the state, thereby ensuring communities manage their own affairs. Without the language requirement, goes the argument, local institutions that are meant to empower local communities would be dominated by individuals from outside the group, thereby undermining the right of ethnic communities to manage their own affairs. This is particularly the case in areas where members of the dominant ethnic group have moved and settled in large numbers.

According to the dissenting members of the CCI, the manner in which the mandatory language requirement is formulated represents an effective way to reconcile the tension between the right of ethnic groups to administer their own affairs and the individual right to be elected. The electoral law, it is argued, does not exclude an individual from contesting an election in a particular state because they belong to an ethnic group that does not hail from the state. In

40 Preamble of the Constitution.

other words, the law does not enforce mirror representation and does not require that members of a particular ethnic or linguistic group must be represented by an individual that hails from the concerned group. It simply requires the person to speak the working language of the state. This, according to the dissenting members of the CCI, represents an attempt to protect the right of ethnic groups to administer their own affairs without infringing the right of the individual to stand for election without discrimination.

As argued elsewhere, the anxieties of members of 'indigenous communities' that were subjected to cultural and political marginalisation in the past must be taken seriously and addressed properly. These are legitimate concerns and it is particularly crucial considering that '[t]hey suffered as a result of exclusionary rules and institutions that favored members of ethnic communities to which the settlers belong to'.[41] A federal system that is designed to accommodate diversity must ensure that other mechanisms and processes do not undermine the commitment of the system to empower groups that were marginalised in the past. Otherwise, the constitutional commitment may turn out to be a hollow promise. The challenge is thus to ensure respect for individual rights without, at the same time, sabotaging the commitment of the Constitution for self-rule.

As it is clear by now, autonomy in the context of Ethiopian federation is basically about allowing members of a community to freely determine how and by whom they should be governed. Whether the candidate is in a position to effectively represent the community cannot and should not be determined by law, governmental authority or any other body. This should be left to members of the community that are eligible to vote. The electorate can either accept or reject a candidate based, amongst other elements, on their capacity to relate to the concerns and wishes of the community which they seek to represent in parliament. If a candidate not proficient in the working language of the state is elected, it is 'either because that person represents many people who are in the same situation or, in any event, because the electorate indicated that with their votes their confidence in his or her ability to represent their interests in the legislature'.[42] This would be an exercise in self-determination as opposed to the mandatory language requirement that predetermines for the community.

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41 Yonatan Fessha, "Empowerment and Exclusion: The Story of Two African Federations" in *Revisiting Unity and Diversity in Federal Countries: Changing Concepts, Reform Proposals and New Institutional Realities* eds. Alain-G Gagnon and Michael Burgess, (Brill, 2018), 57–78.

42 Fernand De Varennes, "Equality and Non-discrimination: Fundamental Principles of Minority Language Rights," *International Journal on Minority and Group Rights* 6, no. 3(1999): 307–318.

Furthermore, the electoral law could have tried to allay the fears and address the concerns of ethnic communities without undermining individual rights. As the United Nations Human Rights Committee ruled in the *Ballanyne et al. v Canada*,[43] it is not necessary for a state to undermine individual rights in order to protect the vulnerable position of a minority group. The law must endeavour to achieve the protection of vulnerable groups in ways that do not violate the individual rights of others. In this case, the law, in addition to avoiding mirror representation, could have found other ways of enhancing the presence and power of minority groups in the decision-making processes of the state. It could have enhanced their presence by, for example, allowing for the overrepresentation of minorities in major institutions of the subnational government. It could have reserved seats, including important offices, for members of the minority groups. On the other hand, it could have also enhanced the power of such communities by allowing them to block certain decisions that would threaten their interests. It could have given such minority groups veto powers over matters that affect them. In this way the state could have reconciled the fears and concerns of minority groups with the right of individuals to enjoy equal rights.[44]

Far from reconciling the tension between the right of an individual to stand as a candidate and the self-governance rights of ethnic communities, the legitimisation of the mandatory language requirement has, in fact, the effect of undermining the right of ethnic communities to administer their own affairs. In those ethnically diverse states where no one group is numerically dominant and, as a result, Amharic is adopted as the language of government business, the mandatory language requirement has the effect of excluding members of indigenous ethnic groups that are not proficient in Amharic from the electoral process. This is the case in the ethnically diverse states of Gambela, Benshangul/Gumuz and SNNPR. In these states, the mandatory language requirement in fact undermines the primary commitments made by the Constitution to respect and promote the right of communities to manage their own affairs, the very same objective that the mandatory language requirement seeks to promote.[45]

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43 *Ballantyne, Davidson, McIntyre v. Canada* (Communication nos. 359/1989 and 385/1989), Views adopted on 31 March 1993, U.N. Doc. CCPR/C/47/D/359/1989 and 385/1989/Rev.1 (1993), para. 11.4.

44 Some of these measures, some may argue, also violate individual rights and the principle of equality. But these deviations can often be easily justified.

45 The good news is that the government has mitigated the damage on self-rule by introducing an electoral amendment that rectifies this problem by stating that a candidate must be versed in the working language of the state or the area of his or her intended

7 Conclusion

The decision of the HoF to legitimatise the mandatory language requirement and, as a result, usurp a decision-making power that belongs to the electorate, inflicts a double harm to the Constitution. On the one hand, the language requirement, in addition to interfering with the right of an individual to stand as a candidate without discrimination, makes it impossible for the electorate to vote for persons that do not belong to the titular ethnic group who, often, are not proficient in the language of the state. By doing so, it undermines the primary purpose of the right to vote and to be elected without discrimination, which is to allow for 'the expression of the will of the people in a free and fair election'. On the other hand, it inflicts harm on the principle of autonomy that the Constitution espouses. It poses a threat to the right of ethnic communities to self-administration by excluding individuals who are indigenous to the state but not proficient in the working language of the state, from the electoral process.

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Concluding Remarks

Eva Maria Belser

At the beginning of the eighteenth century, nationalism started to imprint its mark on the globe. When the concept of the sovereignty of the people began to replace the sovereignty of the monarch, the state and its people became interlinked in entirely new ways: the people became the new source of the legitimacy of the state and transformed the old empires into modern nation-states. Most states, however, inherited rather centralised top-down structures and integrated new democratic ideas into these structures. Hence the classic nation-state was structured around the idea of a shared homogeneous national identity which was more often than not constructed, orchestrated top-down and enforced by assimilation policies. For a long time, it seemed necessary to view the sovereign people as one and to look at the national community as homogeneous, an attitude which involved ignoring or eliminating diversity. The created or claimed national identity appeared to be the mainstay of an individual's right to equality and a national concept of solidarity. States thus aimed at erecting the boundaries of their nation's political structure on what they believed to be the legitimate land of their national group, a major consequence of which was to render invisible the many nations and communities most countries contained. Other states settled with the boundaries inherited by history, war and peace, colonialism and decolonisation, boundaries which often did not match ethnic or cultural borders. As a nation able to sustain a nation-state within these borders did not exist, it had to be constructed – usually by making one of the numerous nations the dominant one. As a consequence, nation-building was often a rather violent process implying the generalisation and 'nationalisation' of one of the local identities and thus came at the price of annihilating and oppressing other identities.

During the nineteenth and twentieth century, numerous nationalist and independent movements led to the creation of new nation-states in Europe, the Americas, Africa and Asia and put an end to land and saltwater empires. While in the nineteenth century, some states were still formed by the aggregation of formerly independent units, the main trend since has been the carving out of new (nation-)states from larger units. Between 1900 and today, the number of states quadrupled and during the twentieth century, a new state was born every nine months. Most of these new states claimed to be nation-states and frequently took it on themselves to build the new state by empowering one of its communities while marginalising and neglecting all others. Since,

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the enthusiasm for new states has undoubtedly been curbed but there still are numerous entities identifying as nations and claiming a state of their own – contrary to the predictions of those who believe in the end of the nation-state or the state as such.

What is it that is so attractive about statehood? Amongst many other motives it is the quest of communities for equality and the promise to achieve it by forming a state. After all, the equality of all states has always been a principle of international public law. The principle of equality of nations within states, in contrast, does not benefit from such a guarantee. Whether nations living on the territory of a larger unit are treated equally depends entirely on the will of each state, a fact which not only raises fears when the state is run by an autocratic government or captured by elites, but also when the state is democratic but characterised by deep cultural, ethnic, linguistic or religious cleavages. When the majority group in such a state freely decides the fate of minorities, minorities have no interest in democracy. If small (ethnic) groups happen to be in power in a state, for instance because they have been the elites cooperating with the former colonial power and been able to keep the newly independent states to themselves, democratising the state appears to them as a frightening option. The majority could turn against the ruling class, outnumber it – and possibly take revenge for wrongs of the past. Ruling minorities hence are often spoilers of democratic processes, willing to stage regular elections but unwilling to accept free and fair ones.

While communities which are outnumbered by others feel at the mercy of other groups and experience or fear discrimination, communities having a state 'of their own' can rely on international guarantees of equality. The United Nations Charter was adopted to reaffirm faith in the equal rights 'of nations large and small' (preamble), and is led by the purpose of developing 'friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples' (Article 1). Such a promise of equality makes statehood attractive to peoples, groups and regions suffering cultural oppression, economic marginalisation, and social neglect. Statehood seems the key to equal rights and equal respect; experiences of new states unable to use this key to open the door ending inequality do not seem to alter this perception.

But what about equality within states? Most federations established by aggregation were built on the international public law principle of equality. All formerly independent units – large and small – enjoy equal rights and obligations. They are all equally represented in the second chambers of the national parliaments which are reminiscent of international organisations in which all members have the same say. Federal and other states have ventured to identify as multinational states and to overcome the legacies of the

dominant nation-state concept. The multinational state recognises a diversity of geographic and cultural constituent units brought or held together under the roof of one state, deals with internal diversity in various ways, in particular by federalising, decentralising or regionalising the state or by adapting autonomy regimes for specific regions or groups. With the increased attractiveness of multinational states to defuse tensions, came an important change of perception: diversity became a factor of union between the different units and communities rather than one of dissention and conflict. Federalism and other forms of vertical power-dividing and power-sharing appeared as the solution to organise those multinational states facing tensions between majority and minority groups. Multinational systems with federal arrangements made it possible to solve long-lasting conflicts while bringing the state closer to the people and making the political structure more democratic and accountable. Opening up to the idea of diversity allowed recognition and accommodation of claims of self-determination within and not outside of the state. Often separatist movements tuned down their requests when fair eye to eye talks and reliable autonomy were available within the territory of the state.

Multinational states comprise two or more nations or 'states' and contrast with the nation-state where a single nation – which often, but not always accounts for the bulk of the population – dominates in terms of culture, language and religion and treats communities of different culture, language or religion at best as protected minorities, at worst as foreigners, settlers or enemies of the state. If the different nations of the same state are to be guaranteed equal rights, features of federal systems occur. Autonomy allows smaller groups to be shielded from domination by the larger groups and to operate democratically, within the sphere of self-rule, without the fear of ending up as permanent losers, a fear which is exacerbated by ethnic cleavages. Shared rule guarantees that all nations equally participate in decision-making at the multinational level, and that majority rule is balanced by mechanisms of coordination and compromise.

However, as in international law and international relations, formal equality or input-equality does not necessarily lead to substantive or output-equality. Just like states, some nations or units within states are more populous, more prosperous, and more powerful than others, some enjoy an advantageous geographic location, host a wealthy capital or a profitable harbour, own or administer natural resources or are home to the (formerly) privileged group. Others are remote, landlocked, underdeveloped and populated by minorities or other disadvantaged groups and therefore are or feel 'less equal than others'. In addition, some units are well administered and effective when it comes to implementing the right to self-rule and impacting on shared rule, others struggle to

position themselves or are plagued by governance deficits, a crucial difference which aggravates other *de facto* inequalities.

Most federal systems, in particular those established by devolution, have inbuilt formal inequalities or asymmetries which relate to one or more aspects of the power-sharing arrangement. These asymmetries are either the result of unequal bargaining powers and mirror *de facto* inequalities or power relations, or are an attempt to overcome such inequalities and to create fair power relations where they did not previously exist. Most often, asymmetric federal systems are composed of elements of both and their respective relevance often changes over time. As Maja Sahadžić reminds us, such unequal relationships among regional units are not unproblematic. As she explains, constitutional asymmetry affects the principle of equality and can be seen – and often is seen – as a threat to the legitimacy and stability of a state. This link between asymmetry and equality is however not straightforward. The formal equality of subnational units often proves unable to cope with the complexity of social reality, fundamentally diverse. Managing diversity can lead to constitutional asymmetry, especially in multinational states in which different nations, large and small, powerful and weak, claim a right to self-determination. Constitutional asymmetry resulting from the implementation of such claims can have numerous and complex implications for the principle for equality. It can serve the principle of equality by allowing all nations, not just the majority group, to determine their fate autonomously and to have an equal say in the making of shared rule. Constitutional asymmetry can then help in implementing the principle of equality by equalising existing power relations and give all the nations a fair chance for effective self-governance and participation. At the same time, constitutional asymmetry can harm the principle of equality. Such is the case when it allows communities and regions, which enjoy a high level of bargaining power thanks to economic or political power, natural resources, military strength or support by neighbouring or kin nations, to negotiate rights and privileges other communities and regions do not have and cannot bargain for. Constitutional asymmetry then does not (only) compensate existing (cultural) inequalities on the ground, but has the potential to exacerbate (political, economic, and social) inequalities. Thus, constitutional asymmetry can enable a fine and often dynamic balance between equality and diversity. It can provide for just the right amount of different treatment to allow every nation within the federal system to be equal when it comes to autonomously determining local matters and contributing to the future of the country. When constitutional asymmetry is used to implement the right of self-determination of nations or national minorities, it can strengthen the coherence of the state and protect its territorial integrity. It can, however, degenerate into a system in

which solidarity no longer functions and in which one or several communities or regions use their bargaining power to obtain extra rights which are not compensated by extra duties and in which asymmetry does not equalise but rather increases inequalities.

But why do unitary states federalise in the first place or guarantee autonomy to units in order to respond to claims to self-determination? And why are these claims for (more) autonomy so vocal in numerous countries around the world? Federal systems, be they symmetric or – more often – asymmetric, are often implemented in order to allow for the accommodation of groups or territories with distinct identities, needs or priorities, designed to protect national minorities, and to enable diversity to coexist with unity. What drives trends to autonomy is usually a claim to be or to remain different or to revive and celebrate a cultural difference which has been supressed in the past. But just as in the international sphere, the quest for autonomy is often also one for equality. Like independence, autonomy not only holds the promise of distinctiveness, but is also seen as a key to equality. Separatist movements, whether they aspire to outright independence or internal autonomy, are generally characterised by complaints about inequality and unfair treatment which have to be overcome by more and better self-rule. Their supporters are usually inspired by the hope that real or perceived disadvantages, past or current injustices and discrimination and lack of chances and opportunities will end when one's own region or community is in charge.

Nico Steytler recalls that the quest for autonomy in many developing countries is driven mainly by the objectives of accommodating minority groups, limiting abusive centralised rule, and guaranteeing equitable development. Such quests are born out of practices and perceptions of racial, ethnic, linguistic and cultural discrimination, marginalisation and unequal development of different groups and regions within one country. He reminds us that strong centralised governments, often seen as guarantors of coherence, equality and solidarity within a country, in fact often serve a narrow partisan group. They centralise resources and redistribute them to themselves and those holding and keeping them in power. In this kind of system, even regions rich in natural resources and economic potential end up being deprived of fair development chances. Communities and regions experience material inequality with regard to access to basic state services, government jobs, and overall development. Such experiences and perceptions of inequality can become explosive when the frontiers between the privileged and the disenfranchised follow ethnic, cultural, religious and linguistic lines. Ostensible material inequality can even lead to new constructions or the strengthening of existing ethnic, cultural, religious and linguistic identities of little previous relevance. Once there is a

common conviction that one's personal disadvantaged positions and those of one's friends and family are not or not only the result of the actions and omissions of an ineffective or failed central government, of corruption or state capture, but a policy directed against a group or region, separatism is just around the corner.

Jayampathy Wickramaratne offers an imposing illustration of these mechanisms. For decades, successive governments have negotiated power and compromised with ethnic groups but later defied the constitutional vertical distribution of powers and taken back devolved powers thereby pouring oil on the fire of looming ethnic conflict. According to Jayampathy Wickramaratne, only the forging of a settlement which guarantees equality for the numerous ethnic minorities, most importantly the Tamil minorities, and the Singhalese majority – by way of guaranteeing all regions a right to local self-government and fair participation – would ensure the sustainable cohesion of the conflict-ridden state. Unfortunately, Sri Lanka's history, including direct foreign involvement, has made its population afraid of power-sharing, in particular when it carries the label of federalism. Nonetheless, devolution when enforced symmetrically served all of the nine provinces of the country, ensured their equal treatment and offered a chance for autonomous development, chances and opportunities which the central government now seems to be crushing without itself being able to mobilise the country's resources and serve its entire population.

Unfortunately, as Nico Steytler shows by drawing on the examples of the Solomon Islands as well as Trinidad and Tobago, the objective to end material inequality is not necessarily the only objective of marginalised groups. In both of the island states, constitutional proposals aiming at introducing federal systems are currently being debated. For the marginalised and underdeveloped islands – or at least their elites negotiating in the capital – the promise of greater autonomy is linked with the hope that this will improve the management of non-renewable natural resources, ensure a fairer distribution of wealth and increase equality between the different regions. In both of the islands, like in many other parts of the world, these demands for more autonomy are particularly salient because the regions claiming autonomy as a means to end economic neglect differ from the dominating group in the capital in terms of culture, language, religion and ethnicity. Such a situation easily allows for political mobilisation along these lines and can turn economic equalisation into a potentially explosive matter in which failure can lead to outbreaks of violence or threats thereof.

By sharing power, remote or marginalised regions or groups often hope to turn around history and implement a system which is not necessarily based on equality and solidarity throughout the country but allows them to take

their turn. There is sometimes a willingness to pay back for old injustice by holding back, for instance, all the natural resources the regions have access to or to retain preferential access to them. As a rule, regions calling natural resources their own are more prone to secessionist movements, a fact which often leads opponents to qualify these movements as egoist as they are less based on claims of (cultural) self-determination or seen as a remedy to oppression but are rather viewed as a way of calling off solidarity. Old inequalities are then fought by an attempt to create new ones. The claim to autonomy, as often expressed in recent constitution-making processes, is then not one for autonomy but one that allows role reversal. When implemented, such a system may for a time serve as a tool to overcome wrongs of the past but then runs the risk of marginalising others. The proposed move to autonomy, even when combined with fiscal equalisation, also risks never being implemented in the first place, because those in power refuse to share power, due – rightly or wrongly – to a fear of payback.

As a conflict resolution mechanism, federal arrangements are then confronted with two objectives which can be contradictory: they must guarantee self-government for minority groups while at the same time ensuring solidarity between subnational governments and their citizens. If the unity of the country is to be upheld, the very idea of equality of citizenship cannot be questioned. While there is a guarantee of autonomy, there must also be one of equivalent public services, irrespective of location and group belonging. But how can this be provided? If the central tier enforces equitable distribution and solidarity throughout the country, the very purpose of having a decentralised system risks evaporation.

As Yonatan Tesfaye Fessha shows, Ethiopia perfectly illustrates this dilemma. By empowering all ethnic communities, the dominance of one group over all the other groups of the multi-ethnic nation has been ended and the aim of constitutional equality for all peoples, nations and nationalities, which was crucial to guarantee peace after a long civil war along ethnic lines, has been fulfilled. But the equality of citizens has taken a serious blow. Despite a constitutional commitment to uphold both individual and collective rights, the constitutional practice gives more weight to collective rights and frustrates claims based on the right of an individual to equal treatment. When self-governing units implement a mandatory language requirement to stand for election or to work for the government, this requirement is discriminatory when it is adopted to exclude members of non-dominant groups from participating in self-governance. Constitutional norms or practices which do not prevent such practice, and which cannot effectively prevent minorities within minorities from suffering from the autonomy of the other people's right to

self-determination question the legitimacy as well as the stability of the system and the overall state. A constitution thus cannot be committed primarily to upholding the autonomy of ethnic communities but must leave enough room for individual rights as well – and provide effective constitutional mechanisms to enforce both. As at the federal level, federal systems must deal with majority-minority tensions at the level of constituent units and protect internal minorities, irrespective of where they live.

Very similar lessons can be drawn from multinational Bosnia and Herzegovina. As Dejan Vanjek recalls, federalism was introduced to guarantee the equality of the three constituent peoples – Bosniaks, Serbs, Croats – but created discriminatory effects for member of other groups. Whereas nation-states are willing and often prone to sacrifice their diversity to force unity, multinational federations do not know or practice such a trade-off. Instead of a 'winner takes all' approach, which is typical for the classic majoritarian political reasoning, multinational federations opt for a culture of compromise and consensus between the major groups. Such institutional arrangements, however, require a high level of pacifism, voluntarism, and, first and foremost, generalised trust in the power of political deliberation and rational action for 'win-win' values of compromise and consensus to operate effectively. The character of Bosnia and Herzegovina as a multinational federation is not territorial, but rather corporative-communitarian; however, because the federation has no strong and resilient commitment to its fundamental constitutional values and lacks a supportive federal political culture, which would energise its federalism and internal federalisation process, the constitutional promises have yet to be fulfilled. Due to inherent structural deficiencies, the constitutional right to self-governance guaranteeing all three constituent peoples equal administrative-territorial autonomy and self-governing powers is currently still unevenly allocated and the federal executive and legislative powers still do not faithfully reflect the constitutional principle of symmetry of the three nations.

While constitutional practice still struggles to fulfil the promise of equality of groups, its very design creates formal and substantial inequalities questioning the principle of individual equality for all. Soeren Keil makes this clear by discussing the 2009 Sejdić-Finci judgement of the European Court of Human Rights which has not yet resulted in fundamental constitutional change but perfectly illustrates the tension between collective and individual equality. The amendments which the ECHR wishes to see adopted question one of the key constitutional elements introduced to ensure peace in post-war Bosnia, namely the power balance it installed between the three major groups. The constitutional peace treaty guarantees equal representation to the

three most important groups at the price of excluding other groups and raises the fundamental question of whether institutional mechanisms in post-war countries might exclude some communities from certain institutions when these arrangements serve the purpose of uniting and bringing together former enemies and therefore contribute to peace-building. Is it allowed – and if so, for how long – to give preference to the protection of group rights and power-sharing amongst ethnic elites at the price of the protection of human rights and fundamental freedoms for all Bosnian citizens? For countries discussing federalism as a tool of conflict resolution, such as Ukraine, Syria and Myanmar, one of the lessons that can be learnt from the Bosnian experience is that finding a balance between giving rights and autonomy to territorially organised groups and preventing discrimination against other groups remains a key challenge for any federal system. It is also evident that post-war institutional arrangements do not always organically change and reform themselves over time. While Bosnia's territorial and institutional arrangements reflect the necessity for cooperation and compromise between ethnically divided territories which were a precondition for the successful conclusion of the Dayton Peace Conference, today it can clearly be argued that the same arrangements have become a symbol for the permanent crisis of the political system and its lack of progress in the field of human rights and democratisation. Both authors investigating equality in the highly complex federation Bosnia and Herzegovina hence conclude that innovative and unconventional institutional mechanisms need to be employed to ensure that the inclusion of certain groups through power-sharing and territorial autonomy does not result in the exclusion of other groups.

A similar conclusion can be drawn from the Brazilian experience where the tension between autonomy and equality is most controversial when it comes to the political representation of the citizens from the different units in the first, rather than the second chamber of parliament. While second chambers typically aim at balancing the equality of the subnational units with the majoritarian mechanisms of the first chamber, both chambers operate in the federal logic of equalising regions in the Brazilian system. Sérgio Ferrari claims that such a system distorts individual voting rights, undermines political equality among the country's citizens, and allows federalism to supersede democracy and the political equality for which it stands. He demonstrates that the division of federal states into electoral districts along the borders of the constituent units may not be the only or best solution and runs the risk of unduly compromising equal political representation, especially when the number of representatives assigned to each constituent unit is not re-evaluated regularly and adjusted if needed. If not, the elegant federal compromise of having one

chamber representing the equality of regions, and another one guaranteeing the equality of citizens is undermined and the inextricable link between democracy and equality overstretched.

The acceptance of self-rule of regions or communities is either the result of necessity or of a voluntary restraint by the majority, which views diversity positively, accepts the principle of subsidiarity or simply wants peace. Accepting the overrepresentation of smaller regions or groups is also a compromise, which usually does not come into being by a simple majority vote but through negotiations in which federal actors negotiate as equal partners. But what of the principle of solidarity in all this? As a fundamental constitutional value, solidarity affects both interpersonal as well as interregional and intergovernmental relations. Solidarity and equality are twinned; one cannot exist without the other.

By using the example of Italy, Erika Arban recalls that demands for federalism are often seen as comprising the unity of the state and opposing the principle of solidarity – and hence equality. This is in particular the case when these demands are raised in the wealthier parts of the country. Federalism can then be seen as or blamed for being a mechanism of limiting solidarity and accepting the risk that the inequality of regions further increases over time. Such fears can only be overcome when the constitution legally protects solidarity and establishes public service and social welfare systems which are equally accessible to all. Federal systems are therefore bound to find a fine balance between autonomy and solidarity and adapt it over time. Such balancing obliges wealthier regions, in the name of solidarity, to allocate a part of their income to other regions or to the central government which then has the duty of coordinating equalisation payments. While this kind of equalisation scheme is necessary to reconcile regional autonomy with solidarity, it must respect the right to self-rule and abstain from interfering excessively in regional autonomy.

Peter Hänni draws similar conclusions from an analysis of the Swiss fiscal federal system and the mechanisms of equalisation of financial resources and burdens provided for by the Swiss Federal Constitution. The far-reaching fiscal autonomy of cantons and communes, which includes the right to determine tax rates, leads to very diverse tax legislations and unequal tax burdens of Swiss citizens depending on where they live. At first sight, such a system has negative effects on equality. However, these effects are mitigated on the one hand by individual rights protecting taxpayers and by duties of equal treatment enforced by the Federal Supreme Court. On the other hand, there is a federal system of tax harmonisation and a financial equalisation scheme, both of which help to reconcile autonomy with equality. While the first limits the negative effects of tax competition, the second prevents a vicious cycle of

cantons, disadvantaged by geographical-topographical or sociodemographic conditions, becoming even less attractive for citizens and investors because of their need to levy higher tax taxes. The financial equalisation scheme thus does not only equalise the financial resources of cantons but also compensates extra burdens with which some cantons are confronted. Such a system, combining both horizontal and vertical equalisation, permanently navigates between a merely symbolic equalisation and full equalisation, seeking compromises between solidarity, autonomy and competition which is welcome when fair.

Giulia Maria Napolitano and Gabriella Saputelli illustrate the challenge of reducing tensions between centralisation and autonomy by examining the Italian social care policy, a policy field which is particularly relevant for social equality. They demonstrate that ongoing conflicts between the central government and the autonomous regions and the absence of a nationwide standard of essential social care services threatens unity and the principles of equality and solidarity within Italy. They also show that it is a dynamic but contradictory process of power-sharing and a lack of regional fiscal powers, coupled by the absence of adequate financial transfers, which prevents regions from providing essential services. Such a situation, harming equality in a central matter, also has the potential of undermining regionalism as such. Hence, the lack of solidarity potentially endangers the diversity the regional systems aims at protecting.

By analysing the Argentinian approach to 'equivalent development' Miguel Angel Asensio raises similar challenges. In fact, federalism in Argentina has failed to overcome uneven development of regions and to provide socioeconomic equality to its citizens. By highlighting the challenges and limits faced by the federal fiscal system in Argentina, he demonstrates that the complex problem of adopting a unified concept of 'development' has not yet been solved. Reliable data and new and innovative mechanisms at the national level would urgently be needed and would ideally be sourced by inputs, best-practices and knowledge gathered by regional authorities through locally implemented development mechanisms. Such a reformed system could provide for more even development changes for all regions and citizens without crushing the potential of bottom-up initiatives – and the right to self-government as such.

In fact, there are good reasons to insist on regional powers in the field of development and basic services despite the challenges such powers hold for equality. Based on a large comparison of European countries, Andrea Filippetti is able to show that citizens' satisfaction with local public services in heterogeneous populations increases when these services are provided by autonomous

regional and local actors. From the point of view of citizens living in diverse regions, access to public services is generally more satisfactory when these services are provided in a decentralised manner. The tendency of most EU states with increasingly heterogeneous population to bring the government and the people closer together and provide regions with more autonomy, in particular in the field of taxation, thus has the potential of providing better services in all the regions. Decentralisation is no panacea to poor service delivery and bears, amongst other things, the risk of decentralising corruption to regional governments. However, (re)centralisation is not the answer to such a problem as it is likely to reduce citizens' satisfaction. The presence of strong and independent regional media and a vibrant civil society are much more promising when it comes to dealing with the issue of regional and local state failures.

The fact that decentralisation allows for diversity in services and creates tensions with equal citizenship does not necessarily affect access to public services in negative ways. The fact that citizens' satisfaction with local services increases in heterogenous societies might hint at the fact that it is a value in itself that services are delivered by local actors seen as belonging to the region and one's own community; people then feel empowered to impact on service delivery. The common view that human rights and federalism associated with unequal human rights standards are incompatible is often equally erroneous. Diversity even in the sensitive field of human rights is not *per se* a problem to overcome but a situation to handle within the framework of national and international human rights obligations, as Eva Maria Belser claims. Autonomy and equality are just as much friends as they are foes. In fact, both federalism and human rights aim at improving governance and protecting diversity by constraining power. More importantly, both federalism and human rights seek to respect, protect and fulfil equality and self-determination. While the former strives to implement the principle of equality by empowering smaller or weaker regions or communities and by guaranteeing equality between majorities and minorities and amongst minorities, the latter focuses on the enforcement of equality amongst individuals. Human rights protect the equal dignity and value of each person by guaranteeing all humans a right to self-determine their lives by making their own choices in all relevant fields – speech, beliefs, family, profession – and rely on the constitution to entrench these rights and on courts to enforce them, even against the will of the majority. In federal systems, the same underlying logic can be found. The aim of the system is to protect the equal dignity and value of the diverse regions and communities of the country and to provide them with a right to self-determination in relevant fields – culture, religion, language, development. Federal systems also rely on the constitution to safeguard these competences and on a neutral umpire adjudicating

conflicts based on the constitutional power sharing system – even against an act approved by the majority.

Equality is at the core of liberal democracies, and it is often used to measure, evaluate and monitor the relation between the state and the individuals that constitute it. While equality was linked in classical nationalism to the existence of one nation and one national identity, acknowledging the fact that countries are often home to many nations and numerous national identities, and that each of these nations has a right to its own local political structure, challenges this concept of equality by giving the impression that the country is fragmented and equality thus impossible. While unitary states find it easier, at least in theory, to guarantee the equality of all their citizens, to effectively redistribute resources and to provide equal resources to all, they often fail in practice. When pondering the difficulties of federal systems to enforce equalities, one should thus not forget that factual differences between communities and regions of one and the same country challenge the cohesion of all states, be they unitary, regional or federal. In fact, unitary states do not seem to have a better record when it comes to equalising disadvantaging differences and guaranteeing equal chances to all. While it has been shown that centralised unitary states have empirically the most salient asymmetries, the predominance, even today, of classical national beliefs produces a perception among both people and political leaders that giving autonomy to some national groups leads to a fragmentation of equality and an increase in unfair inequalities. This perception, combined with other political considerations such as a strong fear of secession, often leads the majority to refuse any consequential devolution of power in favour of regional and local governments. However, reliable and well-implemented devolution of power in favour of regional and local actors has the potential of improving service delivery and ensuring a peaceful balance between majorities and minorities, and of weakening secessionist claims as regional and local governments find themselves enabled to address major local issues without depending on the central government or on the rest of the population. Such an arrangement does not hinder solidarity but can be a condition for it to function effectively. Federalism after all is not only about yielding autonomy, but also about fostering collaboration and solidarity between the different units that constitute the state.

The granting of autonomy does not by itself further fragment equality, increase inequalities or lead to new ones, neither does it necessarily question solidarity or threaten the unity of the state. Anna Gamper convincingly counters this predominant belief and demonstrates that federalism and equality are not principles which oppose each other. Quite the contrary, both principles, in fact, share a common narrative, namely *suum cuique tribuere* – to give

each their own. While federalism aims at guaranteeing diversity, and equality is mobilised to ensure homogeneity, the principle of *suum cuique tribuere* unites the two. In order to ensure justice, it considers the situation of each actor and attributes goods according to needs and priorities. This common principle of justice is essential to understanding the way federalism legitimises equal and unequal treatment of regions and persons living in different regions. While human rights organisations might regard the relation of federalism towards equality as flawed, asymmetries in federal states exist because federal systems consider everyone's situation, including their needs, aims and aspirations, in order to better guarantee justice – and to ensure not only formal but also substantive equality before the law and by the law. This objective can only be reached when factual differences – whether demographic, geographic, ethnic, cultural, social, political and economic – existing between different groups, regions or individuals are considered and used to justify, depending on the circumstances, either equality of treatment or compensatory inequality of treatment. Equality can then be carried out, as justice can be carried out, by balancing the rights and obligations of the one vis-à-vis the other and by respecting, protecting and fulfilling the potential of each – be it a state, nation, region, minority or individual.

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