Federal Power-Sharing in Europe
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Preface

This book is the result of a project carried out at the Research Centre on Federalism (https://www.uibk.ac.at/foederalimus/) at the University of Innsbruck. The project aimed to provide a comprehensive overview of federal and regional systems in Europe. Without question, there are a lot of individual and comparative studies on federalism in Europe. What was still missing, though, was an encompassing stocktaking of all countries with their respective properties and differences. In order to fill the void, the research centre managed to gather the best qualified scholars in federal research. The project has been going on for several years, and now the results are available.

In its German version, recently published by Nomos, the voluminous book (no fewer than 850 pages) covers each country with contributions from both constitutional law and political science perspectives. Drawing on a large body of empirical evidence, and of information on the design and operation of specific structures, genuine federations such as Austria, Germany and Switzerland (and, in a sense, Bosnia-Herzegovina, too), as well as quasi-federal, asymmetric countries—from Spain, Italy and the UK through to the autonomous islands—this book offers detailed descriptions and analyses of national properties.

The book presented here is to be understood as a follow-up to the German-language volume. It differs from the other book insofar that only political science contributions are covered. On the other hand, though, all country profiles have been updated and extended, now providing a broad picture of the making and implementation of politics in federal systems.

The description of the countries starts with Austria (Karlhofer), followed by Switzerland (Mueller and Vatter), Germany (Sturm), Belgium (Kohler and Petersohn) and Bosnia-Herzegovina (Keil and Woelk). In a second section, the focus is on quasi-federal states. With regard to Italy (Pallaver and Brunazzo), Spain (Colino and Hombrado), the UK (Harvey), the autonomous islands (Ackrén) and Serbia’s Vojvodina (Djordjević), the

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crucial issue of asymmetric federalism, which is frequently filled with tension, is discussed. What is noteworthy in this connection is that the European dimension (Piattoni) is a special matter.

The editors are indebted to all those who have contributed to this volume. Finally, we are grateful for the many helpful suggestions made by our colleagues at the research group when we worked closely together on the German version of the book.

Ferdinand Karlhofer and Günther Pallaver

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Part 1:
Federal States
Austria: Federal Politics within and beyond the Constitutional Frame

Ferdinand Karlhofer

I. Introduction

Given that federalism is essentially about the distribution of authority between central government and state governments (Bednar 2011: 270), Austria is among the countries which “describe themselves as federations while being so centrally dominated in design and practice as to be little short of unitary states” (Hueglin and Fenna 2006: 34). The fact that Austria is almost consistently regarded as a borderline case between federalism and unitarism is mainly due to inconsistencies in its foundation process, which have lived on to the present day. It is, first and foremost, the remarkable power asymmetry between its two houses of parliament that raises the question of whether the country is still to be considered a federal or rather a unitary country. Austria’s Federal Constitutional Law (Bundesverfassungsgesetz—B-VG) provides for the supremacy of the National Council (Nationalrat) over the Federal Council (Bundesrat), which is markedly expressed in Article 10 which assigns the exclusive federal authority in both legislation and administration to the former, thus leaving only marginal competences to the second chamber (Pernthaler 2010: 112). Besides a few exceptions, the Bundesrat possesses a merely suspensive veto in the federal legislative process, which can easily be overruled by the Nationalrat.

Indeed, given the nearly complete absence of constitutional veto points and, in addition, the federation’s prerogative to determine law, while, in contrast, the formal competences of subnational units are primarily confined to implementation, the question arises as to what category the country falls into. Viewed simply, Austria is positioned close to the edge of, yet still falls within, the parameters of federalism.

From a merely institutional perspective this argument is plausible. Closer inspection, though, reveals a more complex picture in that there are not only institutional provisions but also informal mechanisms and forces at work. As pointed out below, any approach which disregards the fact that...
the formal constitution is paralleled by a real one inevitably falls short in explaining Austrian federalism (Karlhofer 2010). Taking this into account, the approach chosen here draws upon the insights of historical institutionalism, which allows an assessment of the characteristics and workings of institutions with reference to historical origins and path-dependent developments (cf., e.g., Broschek 2011).

Accordingly, this country profile begins with an outline of the origins of the federal republic, which focuses on the foundational conditions that shape the system up to the present day. In the subsequent sections, institutional features and unwritten rules and arrangements that make up for structural shortcomings are described and analysed. The article concludes with an examination of continuity and change in state–substate relations, thereby shedding light on the chances of and obstacles to federal reform.

II. The making of the Austrian federation

Just like other federations, Austria derived its multilayered structure from a fundamental decision passed by a constituent assembly in the founding process of the republic. However, reconstructing the process of establishing federalism in Austria is not an easy task to undertake. The Habsburg Monarchy had been a multi-ethnic empire, with that multinational composition inevitably implying some federal tradition, particularly in the wake of the Austrian-Hungarian Ausgleich (“Compromise”) of 1867, through which the Dual Monarchy with Hungary had been fixed (Burgess 2006: 93). Notwithstanding this, Austria-Hungary was not a federation in a strict sense; rather the empire had moved in the direction of a decentralised unitary state (Weber 1997: 39). As a matter of fact, though, the Habsburg regime had increasingly had to cope with centrifugal forces fed by nationalist upheaval across the whole empire.\(^2\) Unsurprisingly, with the empire

\(^1\) For a more detailed description of the origins of Austrian federalism, see Karlhofer 2015a and 2015b.

\(^2\) It is noteworthy that the only political leaders who theorised about ways to federalise the multinational conglomerate came from within the ranks of an explicitly centralist force, namely the Social Democratic Party. Most prominent, though not adopted by the party leadership, was Otto Bauer’s work *Die Nationalitätenfrage und die Sozialdemokratie* (Vienna 1907).
in disarray as a result of the lost war, these peoples, with the support of the Entente, promptly founded sovereign states of their own.

What remained from the huge territorial superstate was no more than a small fraction of its original size of 677,000 sq. km. No wonder that scarcely anybody supposed the 84,000 sq. km rump state would be able to survive unless it joined a larger state. Thus, Austria’s founding process took place under two premises. First, as far as ethnicity was concerned, it was clear that the republic to be established would be confined to the German-speaking part of the former imperium (the expectation that German Bohemia and the Sudetenland would be included, too, soon turned out to have been a mere illusion). Second, and for good reason, the provisional republic proclaimed in 1918 called itself the “Republic of German-Austria”, thereby expressing its intent to ally itself to Germany sooner or later.

The imperial authority had left a political vacuum (Burgess 2006: 93) with a prevailing mood of disorientation and a striking lack of prospects. At the very beginning, federalism was not on the agenda; on the contrary, the Provisional National Assembly (Provisorische Nationalversammlung) which convened in October 1918 aimed at founding a unitary state bound to become part of the German Reich. Soon, however, the debate revolved around the conflict between centralism and federalism, with the latter targeted by the Christian Social Party, which dominated in the provinces, while the Social Democrats with their stronghold in Vienna favoured the centralist option (Stelzer 2011: 9). The founding process became extremely tense and was to take around two years, being finalised as late as November 1920 when the new—in the end, federal—constitution came into effect.

As a matter of fact, on both sides there had been some misunderstanding about who had the real power to determine the country’s fate. Eventually, the 1919 Treaty of St. Germain with Article 27 (stating that “The frontiers of Austria shall be fixed as follows […]”) in conjunction with Article 88 (forbidding Austria “any act which might directly or indirectly […] compromise her independence”) put an end to any ambition of pan-German unity. It was simply the victorious powers redrawing the boundaries, thereby leaving a small Austria in the role of a henceforth minor, if not negligible, player in European politics.

As for the envisaged internal structure of Austria—should it now become a unitary or a federal state—the Entente did not care; it simply expected the country to accept the predetermined boundaries. Therefore, any regional attempt to change the defined geography was brought to a halt.
Bohemia and Sudeten were cut off, while Burgenland, which had previously belonged to Hungary, was affiliated to Austria.

The debate on why and how Austria was eventually structured on a federal basis has been controversial up to the present time. One school of thought claims that Austria was established in a first step towards it becoming a centralist unitary state which, in a second step, devolved competences to the Länder or states. In fact, the process was more challenging, as outlined in a recent historical study emphasising that the first provisional constitution, adopted in October 1918, merely reconfirmed the imperial Landesordnungen (territorial law codes) of 1861, which assigned only rudimentary autonomy to the provinces (Wiederin 2011). However, within a short time the provinces, while accepting the constitution as kind of an indispensable “joint umbrella”, started a debate on the question of whether the republic should be a federalist or a unitary one. Federalist claims rested upon the so-called Kronländer (crown Lands), a quasi-federal Habsburg heritage comprising Vorarlberg, Tyrol, Salzburg, Carinthia, Styria, Upper Austria and Lower Austria, with some of them dating back as far as the late Middle Ages (Palme 2000). In November 1918, “most Länder declared their ‘accession’ to the newly created republic in order to demonstrate their original statehood and claim of autonomy” (Marko 2015). Thus, all the Länder defined themselves as autonomous, albeit without arrogating sovereignty to themselves, in the sense of them being independent states, but by expressing their intent of linking themselves to one another in a common state (Brauneder 1998: 202).

What must be added, though, is that what appeared to be states coming together in a kind of federation was actually orchestrated by Chancellor Karl Renner, who provided pre-formulated, textually identical declarations of accession to the state parliaments (Wiederin 2011: 361). Notwithstanding this, the states’ commitment to the new republic remained fragile for a while, as revealed by several attempts at secession: In 1919, Tyrol, in a hopeless effort to reunite with its southern part, which had been annexed by Italy, declared itself a free state. In Vorarlberg, a referendum on acceding to Switzerland, held in 1921, was affirmed by ninety-nine percent of the voters. In the same year, referenda in Tyrol and Salzburg on joining Germany were supported by strong majorities of voters. None of these initiatives had a reasonable chance of success (Fiedler 2007: 7f.).

In 1945, the situation was quite the same as after WWI. The Allies definitely had no interest in considering regional interests in their strategic plans. The provisional government in Vienna was the only accepted au-
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Thoritative interlocutor, although at its outset it was suspected of being a tool of the Soviets by the Western forces. The fact that immediately after the defeat of the Nazi regime the country was divided into four “zones” (distributed among the US, the UK, France and the Soviet Union) makes explaining the rebuilding of federalism in post-war Austria a bit difficult. For the allied authorities in the provinces, the Land governors (who to begin with were provisional only, since they had not been elected) were welcome with regard to administrative matters. Thus, in the initial post-war time, with the central government not even in a position to communicate its decisions nationwide, the Länder managed to establish informal political and administrative structures they could build on when the first Länderkonferenz (state conference) was held in Vienna in September 1945.

To sum up, Austrian federalism does not fit into any of the categories of federal state-building provided by comparative research. Since, after the Habsburg Empire had fallen apart, virtually all actors, both the Länder and the political parties, had assumed the rump state would sooner or later join the German Reich, the outcome was not a coming-together federation; by the same token, it wasn’t a holding-together federation either. And although state-building in both 1918 and 1945 took place under the control of external actors, a factor which underlies Bermeo’s definition of forced together federalism (2002: 110), not even this latter category is appropriate in describing Austria. It does not apply because the victorious powers, unlike in Germany after WWII (cf. Burgess 2006: 95–97; Swenden 2004: 59), did not care whether or not Austria became a federation. As a matter of fact, Austrian federalism emerged in a more or less chaotic process of cobbling together what had already existed, albeit now considerably smaller. There was no other option but to assemble what had been left from Austria’s vast former empire (Wiederin 2011: 371).

3 Cf. the much-noticed typology introduced by Stepan (1999).
III. Distribution of competences between restriction and compensation

A. Flexible constitution

The constitution introduced in 1920 was formally the result of negotiations between central government and the Länder, but in reality it was between the political parties. Ideologically charged with intransigent positions, the negotiations finally resulted in a compromise in that the issue of civil rights, for example, was simply not dealt with, and instead the Basic Law (Staatsgrundgesetz) of 1867 was kept in effect. In the same way, no agreement on a solemn preamble could be reached. An urgently needed amendment on regulations concerning the competences of the federation and the Länder—in the main to the disadvantage of the latter—was passed as late as 1925.

Eventually, the far-reaching constitutional revision of 1929 was already overshadowed by political unrest and looming civil war. Although a parliamentary motion of the Christian Social Party pursuing the objective of transforming the republic into a corporative state failed because it fell short of the required two-thirds majority; the revised allocation of powers favouring the state at the cost of the Länder henceforth allowed the conservative government to make use of it in its attacks against the much hated, socialist-governed Red Vienna. In the end, the amended constitution offered no protection against the gradual undermining of democracy, a process eventually culminating in the Austro-fascist coup d’état of 1933/34 (Brauneder 1998: 231f.) Paradoxically, it was to be exactly the same constitution that from 1945 on provided the legal framework for Austria’s much-noticed model of consociational democracy, which unfolded in the Second Republic.

While the First Republic had been unstable and fragile from beginning to end, in the Second Republic compromise and consensus have been emphasised since its inception, thereby making evident that the written constitution is paralleled by a real one, the latter in terms of political culture with a broad continuum comprising extreme attitudes (cf., e.g., Pelinka 1999: 261). Within the frame of one and the same constitutional architecture, the various actors involved can display quite different behaviour, par-

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4 Even symbols of the state, such as flags and emblems, were incorporated into the constitutional text as late as 1981 (Öhlinger and Eberhard 2014: 454f.).
ticularly in order to make up for institutional restrictions and vagueness, as outlined in the next chapter.

From a legal perspective, the Austrian federation is laid out in a markedly unitary way, with a striking lack of constitution-based balance in power-sharing. Articles 10–14 enumerate lengthily and in detail the central state’s fields of competence, while Article 15 leaves the Länder with unspecified residual powers. Moreover, due to the fact that since 1945 numerous powers have been transferred from the Länder to the centre (Gampfer 2000: 251), observers tend to regard Austria as a special case of over-centralisation, with the national subunits being “subject to encroaching behaviour by the central government” (Braun 2011: 35ff.).

As a matter of fact, from a comparative perspective Austria has the most extensive, most complex and, at the same time, most flexible constitution. It owes this special status to the fact that simple laws can be elevated to constitutional status but need not be incorporated into the constitution as such. Despite a radical cutback made in 2008, there are still about 50 elevated laws and, what is more, 500 laws with constitution-related clauses aside from the constitutional charter (Öhlinger 2012: 81; Stelzer 2011: 21ff.). The long-time prevailing coalition between the SPÖ (Social Democratic Party) and ÖVP (People’s Party) has extensively made use of this possibility, thereby producing an ever-growing need for reform of the federal constitution over time (Schroeder and Weber 2006: 6).

B. A party-oriented form of federalism

In a multilayered system political parties are kind of integrative agents and, along with interest groups, important vehicles of centralisation (v. Beyme 2010: 373). In Austria, due to their all-encompassing presence at all levels, political parties have represented a pivotal element in cohesion and unification. Being a country with “strong parties in a weak federal polity” (Obinger 2005) makes it a special example of a party federal state (Parteienbundesstaat—cf. Decker 2011).

For a long time, the structural architecture of the party federal state left little room for regional parties on a permanent basis. Until very recently, the congruence of the party systems at national and provincial level provided a welcome basis for policy coordination, with the two dominant parties, the SPÖ and ÖVP, functioning as intermediary agencies between the centre and periphery (v. Beyme 2010: 376).
In the last two or three decades, the Austrian party system has been changing in line with the international trend, which has manifested itself, among other things, in a decrease in the parties’ capacity to reconcile conflicting interests (cf. Niedermayer et al. 2006). Until the 1980s, with the two dominant parties of the SPÖ and ÖVP continuously achieving more than ninety percent of the votes, and the third largest party FPÖ (Freedom Party) ranging between five and seven percent, Austria had a typical two-and-a-half-party system. Thereafter, the hitherto frozen party system entered into a stage of rapid change, with the newly emerging Greens on the one side and the FPÖ transforming itself into a radical right populist party on the other, and both capturing considerable shares of the Lager parties’ electorates. At Länder level, however, the party systems have until recently proved considerably resistant, with the SPÖ and ÖVP managing to maintain their supremacy. All things considered, the strength of the parties at state level appears to be the most remarkable feature of real federalism in Austria (Pelinka 2007: 141).

C. Executive federalism

In Austria, like in Germany and Switzerland, “jurisdiction of legislation and administration has in many areas been assigned to different orders of government”; as a result, it is “more centralized in legislative terms and more decentralized in administrative terms” (Watts 2015: 15f.; see also Watts 2001: 29).

As regards the division of competences between the federation and the Länder, the Austrian constitution provides four different alternatives (Art 10–15 B-VG): (1) legislation drawn up and implemented exclusively by the federation; (2) legislation drawn up by the federation but implemented by the Länder; (3) framework legislation drawn up by the federation, with the implementation of legislation and its execution assigned to the Länder; (4) legislation drawn up and implemented exclusively by the Länder (cf. Gamper 2000: 253).

The term Lager (English “camp”) refers to the fact that, due to historical reasons, Austria’s dominant political parties SPÖ (social democratic) and ÖVP (Catholic-conservative) are based on relatively closed socio-cultural milieus with a dense network of party-affiliated organisations covering various spheres of life.
More precisely the powers are specified in Art 102 B-VG with the distinction between direct and indirect federal administration (direkte und mittelbare Bundesverwaltung—cf. Weber 1987). While direct administration provides for the federal authorities to execute laws at all levels, indirect administration means that a “significant proportion of federal administration is carried out by the Länder on behalf of the federation”, a provision through which the constitution “compensates the Länder for their relative lack of power” (Gamper 2006: 82). What at first sight appears to be hardly more than a regulation reducing the states to mere agents of the central government is in practice the “organisational core” (Öhlinger 2010: 21) of Austrian cooperative federalism.

For a couple of reasons, indirect federal administration is not, as one would expect, a hierarchical but rather a complex, in parts even stratarchical negotiating system with the states controlling the execution of federal law: “[E]ven competences that are allocated entirely to the federation are principally performed by the Länder, although they retain their federal character” (Gamper 2006: 83). Any attempt to change the rules would almost inevitably be foredoomed to fail since it is difficult to imagine that the Länder would give their consent, as is required by constitutional law.

The system of indirect administration mirrors a special kind of executive federalism with the governors pulling the strings. It is worth noting that, in terms of personnel, the subnational administration, including district authorities, is extremely strong (Biela et al. 2011: 13). In addition, with respect to indirect administration affairs, lower-level authorities are subordinate only to the governor and a state’s government office (Amt der Landesregierung), which he heads. Formally, the central government has the right to issue instructions directly to a governor—which, however, has only been done once since 1945, and in this unique case was simply ignored by the addressee (Karlhofer 2011: 322).

With regard to the control of indirect administration, the federal constitution is remarkably non-binding. As a result, “a substantial part of a state’s government activities remains without formal state supervision” (Fallend 2003: 23). Given the states are virtually free to carry out indirect federal administrative matters, it is no wonder that proposals aiming at a reform of the division of powers mostly fail to address the issue, since this would imply formally transferring the whole range of tasks from federal to Länder level. Once administration authority is transferred from the federal to the state level, controlling government activities would be a matter for each respective Landtag from then on (Pelinka 2007: 21f.).
To sum up, two factors contribute decisively to mitigating the constitutional power asymmetry between the Austrian federation and its Länder: for one thing, the practice of indirect federal administration, and for another thing, the role of the institution Landeshauptmann (Land governor) and the Conference of Land Governors (Landeshauptleutekonferenz – LHK) as the informal coordination body of the governors. As outlined above, political parties play an important role in the federal compound (see section IV.B).

IV. Substate autonomy as opposed to federal state power

In every two-tiered political system, the relations between the actors involved are inherently interest-related and thus inevitably more or less filled with tension. In order to secure and regulate the coexistence of and cooperation between the different levels, any federation has a constitution that regulates overlapping control of a single population by a superior state and a group of subordinate states. More specifically, along with the “super-constitution” of the federation, any subnational entity also has a constitution of its own, which in research is referred to under the term “subconstitutionalism” (Ginsburg and Posner 2010: 1). With regard to Austria, it makes sense to extend the concept with the factor of informality, thereby drawing upon Marshfield, who defines sub-national constitutionalism “as a series of rules (both formal and informal) that protect and define the authority of sub-national units within a federal system to exercise some degree of independence in structuring and/or limiting the political power reserved to them by the federation” (Marshfield 2011: 1153). Leaving informality out of consideration would inevitably lead to conclusions that cover only part of the story.

In this section, an outline of the subnational scope for action is given, followed by a look at the role of Land governors (Landeshauptleute) as formal and informal key players in the system.6

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6 For a more detailed description, see Karlhofer 2015a.
A. Subnational scope for action

With regard to the historical development of subnational constitutionalism since the founding of the First Republic, Koja (1988: 11f.) identifies three phases:

1. adjustment of state constitutions to the national constitution (a temporally uneven process, starting with Styria in 1918 and completed as late as 1930 when latecomer Upper Austria finally adopted its own constitution);

2. refoundation of the republic in 1945, followed by a long period of stagnation in which the Länder were essentially confined to replicating federal constitutional law with striking passiveness, which did not change until the mid-1960s;

3. significantly increased self-confidence of the Länder after the release of a constitutionalist’s legal opinion attributing considerably more autonomy to the substates than initially thought.

As for phase three, it started in 1964 with a joint initiative by the Länder in which they demanded their competences be increased in return for their granting aid to the federation in a financially precarious situation (Funk 1988: 71). The legal doctrine elaborated in this context drew on the insight that state constitutions are not simply subordinated to the federal constitution, which is basically confined to implementing federal law. Rather, notwithstanding the rule that state constitutions may in principle not affect the federal constitution, there has always been some “relative” constitutional autonomy largely neglected so far (Koja 1988: 19ff.). The opinion paved the way for a paradigm shift in constitutional politics, encouraging the Länder to address the federal government with further demands. The negotiations of the two decades that followed did not really result in substantial changes, but did not preclude important groundwork for times to come. Remarkably, by the way, the negotiations were conducted between the federal government and state governors. The parliaments of both levels, though directly concerned when changing the constitutional rules is on the agenda, were excluded from the talks—once again, a prime example of constitutional reality superseding formal federalism (Fallend 2003: 28).

The change in the relations caused by the new doctrine of relative autonomy has persisted to the present day, naturally circling around the question of how to define the scope and limits of relative autonomy. Given that most federal systems just provide an “incomplete” framework leaving
more or less “space” for the federal architecture to be filled by sub-national provisions and arrangements (Tarr 2011: 1133), identifying and analysing scope, activities and substance is both exciting and difficult.

When bearing in mind that filling the space is, to a considerable extent, not just a matter of options but also a matter of political culture, in some of the Länder regional identity is strong and underpinned by historical heritage, traditionalism and patriotic sentiments, while in others citizens have a more rational view of the Land they live in. Comparative studies show that there is a difference between the western and the eastern Länder: in Vorarlberg, Tyrol and Salzburg, emotional attachment to the Land is significantly higher than the national average (Plasser and Ulram 2003: 433). Obviously, there is a close correlation between regional identity and the attitude towards federalism: the citizens of Vorarlberg and Tyrol rank highest (seventy-five per cent and seventy-four per cent respectively compared to fifty-nine per cent nationwide) in terms of requesting a stronger role for the Länder in federal politics (Bußjäger et al. 2010: 38).

B. Intergovernmental coordination: Land governors as veto players in the federal system

In comparative research, it is realised that cooperation between the different levels of a federation follows formal and informal rules, whereby “the use of formal intergovernmental agreements is probably less significant than the informal relations that occur between departments of the central and regional executives” (Opeskin 2001: 131).

Basically, cooperative federalism is about self-rule taking a backseat to shared-rule, which is to say that only a minor share of political tasks are carried out by one level alone; rather, with good reason state and substates work together to fulfil their tasks (Leunig 2010: 172). In this respect, Austria represents an extreme variant of compound federalism “with cooperation and coordination constituting the essence of Austrian federalism” (Öhlinger 2010: 20).

Intergovernmental coordination in Austria rests upon fixed rules, the most noteworthy being the option of concluding agreements based on Article 15a B-VG (Storr 2012: 694), and at the same time on informal mechanisms of self-coordination. Of particular importance with regard to the latter are the various Land conferences of, among others, the presidents of
parliaments, the heads of state administration and, most pre-eminently, of the Land governors (Rosner and Gmeiner 2010: 49ff.)

The office of a Landeshauptmann enjoys a special status in the country’s federal set-up. First of all, as outlined above, in the broad field of indirect federal administration, it is the governor who has the final say. He/she alone is the central government’s counterpart, and is thus neither responsible to the Landtag nor to his cabinet. With the administrative apparatus directly subordinated to the governor and parliamentary decision-making to a high extent predetermined by the executive branch, the scope of influence of the Landtage is narrow, especially as even its formal right of creating and controlling the government is considerably restricted in practice. Not only is the governor the head of the government, the head of the bureaucracy, in charge of indirect federal administration and, last but not least, “head of state” in all external relations. What is more, any candidate for governor is usually leader of his or her respective party and therefore enjoys strong intra-party authority. As a result, Landtag elections are primarily governor elections (Weber 2004: 78–80). Altogether, as an institution and in practice, Land governors are quite powerful gatekeepers in the federal architecture.

In several federal countries, the chief executives of the member states have established more or less formalised bodies for the coordination of common interests. In the same way, Austria has a Landeshauptleutekonferenz (LHK), which had already convened at the outset of the First Republic and of the Second Republic as well. In both cases, 1918 and 1945, they played an important, if not decisive role in the founding of the state (Rosner and Gmeiner 2010; Rosner 2011). After the 1945 meeting, the governors came together sporadically for some time and then, from 1970 onwards, at six-month intervals (Bußjäger 2003: 82–84). In the course of time, the LHK has consolidated itself as lasting compensation for the second chamber’s and the state parliaments’ weakness, and, in general, for the lack of an effective institutionalised body for the states’ participation in federal policymaking processes (Bußjäger 2003: 91–92). The effect, however, is that this form of compensation in practice has strengthened the state executive (represented alone by the governor), while the parliamentary level—Bundesrat and Landtage—has been marginalised still further. Representing the combined force of all the nine governors, the LHK is a powerful veto player in the federal system, and an indispensable negotiating partner when it comes to reallocating resources or authority (Karlhofer 2011; Karlhofer and Pallaver 2013).
Federalism, as is well known, is a constitutional legal system that allocates a clearly defined degree of autonomy to each level. Beyond that, in order to work, federalism in practice is a bargaining system (Engelmann and Schwartz 1981: 81). Politics, both in its intra- and intergovernmental dimensions, is not determined by formal institutions and rules of procedure alone but by how actors cooperate and how they apply the rules. Even if different levels stand in a relation of superordination and subordination, interdependencies are frequently handled by negotiations or mutual adjustment (Benz 2010). Thus, treating federalism merely as a system that covers more or less autonomously governed territorial units with clear demarcation lines would fall short unless the pressure of coordination through negotiation was taken into consideration, too. Achieving consensus about issues loaded with programmatic differences is particularly difficult, as pointed out in brief below.

A. Selected policy fields

1. Public education

Public schooling, regulated in Article 14 B-VG, is one of the special cases exempt from the general rules for the division of competences (Schroeder and Weber 2006: 13). Ideologically charged in the negotiations of the constitutional convention of 1920, the structural-conservative core of the issue was reinforced in 1962 through the passage of an education act entrenched into the constitution: since then, legislation is the responsibility of the federation, while implementation, including crucial administrative powers, such as personnel affairs and appointments, has been transferred to the states. Remarkably, and unique in international terms, in Austria it is the governor who presides over the education authority (Landesschulrat) of his respective province (Storr 2012: 687). Recent parliamentary motions aiming at the introduction of educational councils (Bildungsdirektionen) won’t change the system since the council’s executive board is also intended to be appointed by the governor.

Positions in the field of education have been and will presumably remain gridlocked. The constitutional provisions leave little scope for sub-
substantial change and, in the end, will turn out to be even completely resistant to innovation (Bußjäger 2015: 212).

2. **Healthcare policy**

Health service is an encompassing policy area jointly covered by federation and provinces plus public social insurance carriers, all of whom have veto rights in the case of dissent. As a consequence, any attempt to reorganise the healthcare system is inextricably linked with time-consuming negotiations back and forth, which frequently lack a realistic chance of those involved in them coming to an agreement.

To give an example: In 2011, a first stage of reforming, among other things, the issue of “Organisation and Finance of the Healthcare System” was reached with two agreements based on Article 15a B-VG. In 2013, the national parliament passed a healthcare reform act which aimed at goal-setting based on partnership. At the same time, a couple of accompanying legislative measures focusing on a “health promotion strategy” were passed. In a report issued in 2015, it was stated that the implementation of the overall strategy was “on the right track”. As of mid-2017, though, none of the nine Länder has managed to make up its mind to settle the case.

3. **Finance relations**

Other than comparable federations, such as Germany or Switzerland, Austria has no horizontal fiscal equalisation scheme. Rather, the redistribution of income is organised vertically from federation to Länder and from Länder to municipalities. For a good reason, the federation has special power of supervision in financial affairs in that it can attach conditions to the granting of subsidies of various kinds (Öhlinger and Eberhard 2010: 152). On the other hand, mutual control of expenditure is ensured through the consultation procedure (Konsultationsmechanismus) introduced in 1999, and the stability pact (Stabilitätspakt), which has been in force since 2008.

The rules for revenue-sharing are considered the core of any federal order inasmuch as they regulate the financing of tasks and, at the same time, the balancing of unevenness between the different levels (Schuppert 2011:...
With regard to Austria’s fiscal federalism, economic diagnoses underline the fact that it has a high degree of centralisation in legislation and financial steering, with costly areas such as, in particular, education, healthcare and economic development, at the same time suffering from parallel administrative competences (Bröthaler et al. 2012: 911). Reform suggestions by economic experts therefore focus on connectivity in terms of task and expense responsibility. Given that improving the allocation of resources in conjunction with providing effective incentive structures is an indispensable premise for fiscal federal reform (ibid.), it is precisely because of this that changing the rules is a project with little prospect of success.

B. Land governors: Interests and logic of action

The cases given above—by no means chosen as extreme, but rather as illustrative examples—indicate the key role of governors and their informal body for coordination in federal policymaking. With regard to the governors as individual actors, and their joint action as LHK, several patterns of constellation of interest and of collective action can be identified:

• The states have “natural” common interests vis-a-vis the federation with regard to the allocation of resources (Thöni 2008).
• The states have “natural” common interests vis-a-vis the federation with regard to the allocation of costs (ibid.).
• The LHK less frequently takes the initiative in pursuing a goal rather than in resisting unwelcome government action (Bußjäger 2007: 210).
• LHK resolutions require a unanimous vote, thus finding maximum acceptance with the federal government. On the downside, though, joint resolutions tend to be nothing more than the lowest common denominator since just one single vote against can quash a proposal (Luther 1997: 824; Weber 1992: 417).
• The common base of interests of regional actors vis-a-vis national authorities occasionally (particularly in the run-up to elections) tends to interfere with party loyalties (Pelinka 2007: 16–18; more generally, see Lorenz 2011: 409).

Clearly, the LHK is first and foremost an informal body for coordinating the interests of Länder in order to make up for an unbalanced distribution of competences in the federal structure. On the downside, though, it is a
club of veto players, who all too often obstruct change if particularistic influence is at stake. In doing so, however, the actors follow an understandable pattern: Since in practice the system of indirect federal administration provides a wide field of autonomy (selection of personnel, allocation of resources, etc.), the states have no need for more formal rights. Secondly, governors and the LHK prefer to act in an extra-constitutional sphere, while formal responsibility is passed to federal constitutional bodies (Lienbacher 2011, 161); they are simply “not willing to pay the price for more decentralization of competencies” (Braun 2008, 22). In other words, formal weakness results in informal strength (Karlhofer and Pallaver 2013). Therefore, the underlying driving force of Austria’s federal dynamic is “muddling through”. As a result, formal rules and institutions may remain unaltered, while perceptions, interpretations and practice may change.

C. The federal system in need of reform

As set out at the beginning of this chapter, along with the fraught formation of the democratic republic from 1918 to 1920, a federal architecture developed whose shortcomings have persisted to the present day. As far as the distribution of competences between the different levels in the federal state is concerned, virtually all political actors involved are well aware that a reallocation of rights and duties is urgently needed. Nevertheless, since 1945, Austrian federalism has not developed consistently in a certain direction, neither clearly towards (over-)centralisation nor towards decentralisation. Broadly speaking, four different periods can be identified (Bußjäger 2012: 67):

- 1945–1974: creeping centralisation
- as from 1988: uneven development
- since 1995: despite many attempts little progress with federal state reform

The Baustelle Bundesstaat (translated as the “building site federal state”), as a book on the topic is entitled (Steger 2007), appears to have no completion date. Despite innumerable reform attempts the system is still suffering from a marked degree of fragmented competence, which inherently causes demarcation disputes. Given the interweaving of competences in...
policymaking and policy implementation, exacerbated by claims of actors exploiting uncertainties combined with what Scharpf (2009) has identified as a joint decision trap with regard to Germany, efforts aiming at thorough reform appear to have no prospect of success.

The history of attempts at federal reform is well-documented (cf. the overview by Weiss 2011), and in the following is therefore sketched out with reference to exceptional stages only. In 1964, the LHK addressed the federal government with a catalogue of demands, including even taxation authority being granted to the Länder in several areas. After a short phase of constructive negotiations, the reform drive faded away. In the aftermath, some progress in restructuring federal and state competences was achieved, most notably in 1974 with the introduction of an Article 15a into the federal constitution henceforth allowing for autonomous agreements between the states as well as between the states and federal government (Gamper 2006). On the scale of things, though, the results were modest.

A particularly noteworthy event was the Perchtoldsdorf framework agreement\(^7\) concluded in 1992, which was generally expected to become the big reform project—ranging from minor adjustments through to substantial changes in state-federation relations, including even indirect federal administration, one of the most crucial obstacles to recalibrating the distribution of powers. Rather soon, however, the actors of all levels involved, while rhetorically showing commitment and good will, began to ignore and even thwart any initiative which aimed at a change of the status quo. The final failure of federal state reform in 1993/94 was not necessarily the result of a lack of unity among states or of a lack of readiness to accept federal responsibility, but simply that the momentum for change had already begun to wane. Under these circumstances, inhibiting forces in state and ministerial bureaucracies successfully opposed the reform (Bußjäger 2005b: 313). It was a rare case which made clear that it was not the executive, not to speak of the legislative, but the administrative apparatus that was obstructing a reform process.

Reform resistance finally peaked in the disappointing outcome of the so-called Österreich-Konvent (Austrian Convention) of 2003/04. The convention, established in 2003 and comprising, among others, delegates of interest associations, civil society and (most prominently) state govern-

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\(^7\) “Abkommen von Perchtoldsdorf”, named after the meeting place, a small market town in Lower Austria.

28
ments, was entrusted with the task of elaborating a new federal constitution which allowed for “future-oriented, cost-efficient, transparent and citizen-oriented public policy”, explicitly including a restructuring of the federal layout.⁸

The convention started working under adverse conditions. Since the then ruling government consisted of a coalition made up of the conservative ÖVP and the right-wing populist FPÖ, the country’s political climate was conflictual and polarised. SPÖ and Greens, both in opposition, suspected the government’s motives to be dishonest and opportunistic. That the convention was doomed to fail from the outset was to be seen from “the paradox of the convention’s politicisation combined with the notorious absenteeism of political elites”.⁹

Again, just as in the 1990s, the nine state governors, despite being members (actually key players) of the convention, did not even occasionally attend the meetings (Lienbacher 2008: 7). Notwithstanding this, the LHK reacted promptly with a proposal of its own to the draft constitution presented by the president of the convention after its work was finished. (Eventually, not even the LHK itself persisted with its own counterproposal—it was simply a demonstration of disregard of the convention’s work.) Since that time, apart from minor adjustments in 2007, the rejected convention report has been subject to a parliamentary subcommittee with no end in sight (Watts 2008: 35).

Another initiative was undertaken in the first half of 2007 by the (social democratic) governor of Salzburg as half-year rotation chair of the LHK. Pointing out in a speech to the Bundesrat that right at that time the national government was being formed by a grand coalition of SPÖ and ÖVP, which coincided with roughly balanced majorities of the two parties in state governments, she emphasised the “historically unique opportunity” to overcome shortcomings in the federal architecture.

The governor made her diagnosis under the impression of coalition negotiations taking place at that time. In the very same year, however, the window of opportunity—such as in 1994—began to close again.¹⁰ It's not

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⁹ Bußjäger 2005a: 406; see also Grotz and Poier 2010.
¹⁰ A general reflection about windows of opportunity closing rapidly unless the chance for constitutional reform is taken at the precise moment is provided by Scharpf (2005: 6–8).
just that the SPÖ suffered heavy losses in several state elections; what is
more, in 2008, a severe government crisis led to a snap election in which
the SPÖ und ÖVP (which formed a coalition again) lost their former two-
thirds majority (which is a sine qua non for any constitutional change).

Notwithstanding the insight that a grand coalition’s chances to success-
fully resolve a problem are considerably higher than those of a smaller one
(Behnke 2010: 52), the initiative failed. With regard to the 2008 election
and aside from the fact that constitutional reforms can hardly be accom-
plished under time pressure, even a swift procedure would have had little
chance of success. Worse still, the Salzburg governor’s effort met with no
response even from her own fellow leaders (in particular, those belonging
to the ÖVP).

VI. The prospects of Austria’s real federalism

As practice has shown, Austria’s federal system, though in need of reform,
is anything but open to adaptation and change. Even under favourable
conditions readiness for change is limited since, whenever a reform pro-
cess is started, one or the other actor will veto the initiative with certainty
due to worries about a potential loss of influence. Given the deeply rooted
resistance to momentous steps, tackling the recalibration of the spheres of
competence has a reasonable chance of success only inasmuch as, in ac-
cordance with accustomed rules of compromise bargaining, formal as well
as informal vested interests are incorporated into the decision-making pro-
cess. At all events, however, the basic idea underlying the various impuls-
es towards state reform has not yet reached the minds of the people. In-
stead, public opinion is wavering between diffuse regional patriotism, on
the one hand, and scepticism about federalism perceived as a wasteful
patchwork, on the other. Public discourse between political actors all too
often takes place under a pretext of purportedly conflicting state-substate
interests rather than in a constructive, solution-oriented spirit.

Clearly, the aim of arriving at a precise understanding of competence
demarcation can only be achieved by slow degrees (Gamper 2000: 265). It
is in particular the Land governors or the LHK who represent an almost
insurmountable hurdle against any change of the status quo. Despite their
formally subaltern position in the context of indirect federal administra-
tion, the governors have a wide scope in practice and they know to make
use of it (Karlhofer and Pallaver 2013: 55). It is not without reason that
constitutionalists consider the doubtful prospects for administrative reform—in particular of the school system—to be evidence that federal reform itself has little chance of success. Given the ever-present risk of political stalemate, it is only in the Bundesrat where the restructuring of competences and electoral procedures appears to be realistic.

Somewhat surprisingly, constitutional experts tend not to take the written but rather the real constitution as the basis of their assessments. The latter, however—with a focus on the party system—is undergoing rapid change, as indicated by at least three trends:

**Decline of two-party systems:** At the governmental level the political system of the Second Republic has almost continuously been shaped by a duopoly of SPÖ and ÖVP since 1945. The predominance of the two Lager parties, both based on a dense network of affiliated organisations, have played an all-encompassing integrative role in political, economic and social affairs—and also in the country’s federal layer. Negotiations between the state and substates have, at the same time, always been bipartisan negotiations based on the—more or less explicit—premise of a wide-ranging, generalised political exchange relationship. To a large extent, the federalism was embedded in a strictly coordinated party constellation, controlled by two parties acting as an intermediary between the centre and periphery. The congruence of the party systems at federal and Länder levels therefore served as a decisive factor in policy coordination. With some delay, two party dominance at provincial level is now eroding, too. As of mid-2017, SPÖ and ÖVP hold no more than a total of 59% of Landtag seats, compared to 67% in 2014 (cf. above, chapter III.B).

**Coalitions beyond party-oriented government:** While the party system at federal level has been subject to increasing fragmentation since the 1980s, the party systems at substate level remained comparatively stable for a while longer. Due to the so-called Proporz rule applying to the composition of regional governments, in practice almost none of the parties were in opposition. As political newcomers, the Greens also successively gained the strength that allowed them to be represented in nearly all regional executives in the 1990s. As a result, while government formation at federal level still took place with a focus on grand coalitions between SPÖ and ÖVP, several regions began to break the mould. Notwithstanding that since the 1990s most of the Länder have abandoned inclusiveness in

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favour of a “classic” model of government (cf. Swenden 2006: 167f.), in seven out of nine executives SPÖ or ÖVP have formed a coalition with a “third” party, i.e. with the FPÖ or the Greens. As a consequence, the formerly dominant intermediary role of the two Lager parties has been weakened significantly.

The end of constitutional majority. The custom of passing constitution-related laws without incorporating them into the constitution as such was practicable as long as the two Lager parties held a comfortable two-thirds majority in parliament. In the national election of 2008, though, they lost the majority and have not regained it since.

All things considered, it can be concluded that SPÖ and ÖVP have played a determining role in the federal state for decades, and they certainly will not completely forfeit their influence in the near future. Without question, however, the duopolist hegemony is facing its end. For a long time, generally accepted functional characteristics have become superfluous, if not dysfunctional. As far as the reform of the federal system is concerned, the erosion of the Lager parties’ formative power is connected with uncertainty. Above all things, the fact that the party systems are congruent at state and substate level has not really been conducive to the envisaged restructuring of the federation. However, although increasing incongruence of the party systems may open new paths, with regard to the system of power-sharing, it may, at the same time, come along with increased demands for power by substate actors, through which actual constitutional vagueness might become even more confusing.

References


Federalism and Decentralisation in Switzerland

Sean Mueller and Adrian Vatter

I. Introduction

Federalism is a cornerstone of the Swiss political system (Vatter 2005; Vatter 2014a; Mueller 2015). As an institutional strategy for dividing powers, functions, responsibilities and resources vertically, that is between Confederation and cantons, its realisation in Switzerland exhibits both static and dynamic features. Thus, while essentially defined in modern Switzerland’s founding document, the Federal Constitution of 1848, and thus having been in place for 170 years, the policy-specific distribution of powers and the meaning of self-rule and shared rule have, nevertheless, changed greatly over that period. The first purpose of this chapter is to map this change (section II).

More particularly, the Swiss federation has become more and more centralised, by which is meant that major policy decisions are increasingly taken at the national level (Dardanelli and Mueller, forthcoming), that policies are harmonised across the entire territory and that political competition, too, occurs more at the federal than the cantonal levels of government. And yet the cantons remain important political actors and communities, with their own preferences and party systems, their own resources and priorities, and their own socio-economic and cultural structures, which vary from one place to another. This regional resilience can also be seen in the cooperation among cantons that serves both to avoid central regulation and profit from economies of scale (Bochsler 2009; Bolleyer 2009). And even if the federal government increasingly legislates, it is the cantons (and often also the municipalities) that largely implement public policies. This is especially the case in major and welfare state areas, such as health and social policy (Bonoli 2014; Vatter and Rüefli 2014). In other words:

1 Parts of the research for this chapter have been funded by the Swiss National Science Foundation (project 10001A_159343 on the political consequences of the Federal Reform of 2008).
the cantons are both autonomous and original founders of the Confederation as well as its executing agents and being subject to its legal hierarchy.

It is only natural that these twin features—legislative centralisation, on the one hand, and cantonal political resilience, on the other—have occasionally led to reform attempts. Section III describes one such attempt, the Federal Reform of 2008, and its two precursors. We will show that over the past few decades, since the onset of the Swiss welfare state after World War II, the “vertical division of powers” debate has usually been solved by a typically Swiss compromise. Faced with the options of either nationalising a policy—which would have left the cantons disempowered—or leaving the cantons in charge—resulting in a cross-cantonal patchwork of public services and persisting inequality—a third option was chosen: nationalising legislation but leaving cantons in charge of its implementation, with resource allocation shared accordingly. This solution, however, created problems of its own: where responsibilities are shared, neither of the involved parties feels fully bound, and where resources are transferred, incentives to overspend abound. The main goals of the Federal Reform of 2008, therefore, were to unbundle the shared powers, i.e. nationalise some and cantonalise others, and optimise cooperation where it remained indispensable.

Section III of this chapter also looks in greater detail at two of the policy areas reformed in 2008: highways and special schools. It will be shown that while responsibility for the former was handed over to the Confederation, the cantons have remained involved, and that although cantons were put in charge of taking care of the education of kids needing special education, national standards were defined for fear of unequal policy delivery. The Federal Reform thus broke its own promises. More generally, this shows that vertical cooperation inevitably ensues given the current political pressures existing in Switzerland: because centralisation necessitates constitutional change sanctioned by a popular and cantonal majority, it is easier to define national priorities only roughly, but leave the cantons in charge of further details. At the same time, it is the federal parliament itself—whose MPs are all elected in the cantons, which are regarded as single, undivided constituencies—which often calls for greater federal involvement. This, however, did not keep it from passing a motion in spring 2015, tasking the federal government to examine the current vertical dis-
tribution of powers and proposing measures for their further devolution. As the report is due by 2018, the topic is likely to stay on the political agenda.

II. Vertical power-sharing in Switzerland

The basic principles setting out the division of powers between the Confederation and cantons have remained unchanged since 1848. The same applies to the idea of the minimal state. Together, this amounts to a strong presumption against federal state activity unless explicitly allowed for in the Federal Constitution (enumeration principle). This is reinforced by the absence of a Federal Court with the powers to review the constitutionality of federal laws, thus blocking the road towards centralisation by mere reinterpretation of existing provisions. Nevertheless, beneath the institutional surface some significant changes have taken place—almost all of them leading to greater centralisation (Freiburghaus and Buchli 2003; Dardanelli and Mueller, forthcoming), as the following two sections show.

A. Away from the minimal state (1848–1918) ...

In 1848, both the horizontal and the vertical division of powers were fixed and have remained in place ever since: a bicameral parliament, composed of a popular and a cantonal chamber, and a collegial government and Federal Tribunal elected by it. At the same time, the necessity of obtaining both a popular and cantonal majority was defined as the only way to amend the Federal Constitution (Vatter 2014a). Both ways of dividing powers, and in particular the double combination of personal and territorial principles (in the parliamentary and the directly democratic arena), were regarded as key to accommodating the losing side in the civil war of 1847, without, however, obstructing the winning side’s push towards greater integration either.

Two different pathways have subsequently been taken in the Swiss centralisation process: either cantonal powers were delegated to the federal

level or the federal level has assumed new powers hitherto not within the public domain. Both mechanisms had their staunchest adversary in the ideal of non-centralisation of political powers (Elazar 1987), or subsidiarity (Mueller 2015), according to which power is best exercised by everyone over themselves, in a private corporation (Genossenschaft), by local governments, by regional governments and only at the very end by the federal level. From this cultural conviction stems the German term for the Swiss Confederation, Eidgenossenschaft, which literally translates as “(private) corporation bound together by oath”.

The ideal of the only minimal federal state pretty much found its match in the reality of the early Swiss federation—Freiburghaus and Buchli (2003: 30) use the term Nachtwächterstaat (“night-watchman’s state”), whose sole task would be to ensure citizens’ physical safety and that they live together in an orderly fashion, in addition to managing foreign policy. Even the financial means granted to the Swiss federation in the first few decades were minimal: next to custom duties, only the monopolies over postal services and gun powder were nationalised (ibid.). Moreover, the Confederation had to compensate the cantons for their income losses from customs and powder—to an extent that the postal services even ran a deficit in the first few years (Steiger 1923: 27f. and 35f.).

Of course, the creation of a modern state with all its symbols greatly facilitated a sense of Swiss nationhood coming into being, too. Unlike in two of its neighbouring countries of the 19th century, however, the Swiss nation was never founded on a single language or a single religion, but rejected monoculturalism in favour of embracing and even celebrating both linguistic and religious diversity (Linder 2012; Papadopoulos 1997: 37). The confluence of two factors enabled and cemented this cultural diversity: first, the lucky circumstance that religious and linguistic divisions were cross-cutting, that is, one could be German-speaking and Catholic or German-speaking and Protestant at the same time, for example. Second, the absence of primordial ties was compensated for by heightened political activity: for the first time in the entire history of Switzerland, the nationwide popular vote offered direct political participation above the cantonal level. Because this participation was binding and recurring, it carried with it the grains of political integration instead of cultural dominance by one group over the others.

The result of cross-cutting cultural groups and direct democratic participation was an increasing sense of the people being Swiss citizens rather than belonging to Geneva or Basel. At the same time, cantons retained
many functions that were vital for their continued existence as more than just folklore: for example, the infantry contained cantonal troops until 1999 (Freiburghaus and Buchli 2003: 30; Jaun 2014); only with the Federal Reform of 2008 (see below, section III.B) did the army become fully centralised (BR 2005, EFV 2013: 7).

The first total revision of the constitution, in 1874, handed over further powers to the federal level. These concerned most notably the army, judicial affairs, social services and transport. This push towards centralisation was mainly driven by the French–German war of 1870/71 and the economic crisis of 1873 (Freiburghaus and Buchli 2003: 33). At the same time, the introduction of the facultative referendum against parliamentary acts (1874) and, shortly afterwards, the popular initiative on partial constitutional revision (1891) significantly extended the opportunities for citizens to decide directly and, in this process, feel like and act as Swiss citizens. The granting of several individual rights (such as freedom of religion and conscience) rounded off the image of 1874 as a real push towards greater centralisation (Dardanelli and Mueller, forthcoming).

In parallel, Swiss society turned from a land of emigration into one of immigration (D’Amato 2008)—a sign that economic development was taking place and quite possibly a consequence of the Swiss single market. Industrialisation, although de-concentrated along the rivers as main powers sources, also led to class conscience gradually supplanting territorial belonging. The founding of the Swiss Socialist Party in 1888 meant that the left–right conflict had begun to replace the older centre–periphery cleavage (Linder et al. 2008) for good. The same can be deduced from the formation of the big business unions, which gained in importance at the end of the 19th century (Vatter 2016: 170). Other major developments in that period were the creation of two Swiss entities that further helped economic development and which, in turn, were dependent on proto-capitalism: the Swiss Federal Railways (1902) and the National Bank (1906). If the former has spurred researchers to look at Switzerland as a whole through topographical rather than various political components, the latter took on the task of harmonising currency and monetary affairs in an economically still fragmented territory.
Between the 1920s and 1960s, the vertical division of power hardly constituted the main political topic—if it was discussed at all, then only as part of policy-specific questions (Freiburghaus and Buchli 2003: 37). Nevertheless, or probably thanks to that, some significant upward shifts took place. Thus, in 1925 the constitutional groundwork for old-age and survivors’ insurance (OASI) was laid, and in 1938 criminal law, which was hitherto cantonal, became nationalised (Freiburghaus and Buchli 2003: 41–43; Fagagnini 1991: 46; BR 2005: 6090ff.). Also, new tasks were assumed by the Confederation, brought about by the demands of an ever increasingly industrialised and modern society. Furthermore, the two World Wars revealed the necessity of the national level having its own direct taxation income. Introduced first as a “war tax”, however, even after 1950 this income source was granted to the Confederation only for the duration of four years. And although once transformed into the Federal Direct Tax it has de facto become a permanent source of income (Freiburghaus and Buchli 2003: 47); legally speaking its renewal must be approved by the people and cantons every ten years—making Switzerland probably the only liberal–democratic state in the world with only provisional direct taxation at national level (Ladner 2013: 24ff.).

The approval of the so-called “economic articles” in 1947 constituted another major turning point in the development of the Swiss welfare state, granting the Confederation wide powers over the regulation of the economy, although cantons remained in charge of implementing the new regulations (Fagagnini 1991: 48). In parallel, the federation also became active in social policy, especially through its various insurance schemes. From today’s perspective, the most important innovations were the following (Bonoli 2014: 811):

1. **Healthcare insurance**: constitutional article of 1890, implementing a law which has been in force since 1914; general obligation to get insured in 1996;
2. **Accident insurance**: constitutional article of 1890, implementing a law from 1918;

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3 The last renewal of the power of direct taxation dates from 2014 and is valid until the end of 2020 (see Art. 128 and Art. 196.13 of the Federal Constitution of 1999).
3. **Old-age and survivors’ insurance (1st pillar):** constitutional article of 1925, implementing a law from 1948;
4. **Disability insurance (DI):** constitutional article of 1925, implementing a law from 1960;
5. **Family allowances:** constitutional article of 1945, implementing a law (only in agriculture) from 1953; nationwide harmonisation (all other sectors) in 2009;
6. **Maternity insurance:** constitutional article of 1956, implementing a law from 2005;
7. **Occupational pension (2nd pillar):** constitutional article from 1972, implementing a law of 1985; and
8. **Unemployment insurance:** constitutional article of 1976, implementing a law from 1984.

The long time that often passed between the enabling constitutional provision and implementing the law is striking and can be explained once more by direct democracy, in general, and the facultative referendum, more particularly (Linder et al. 2010). However, with the sole exception of the Swiss National Accident Insurance Fund founded in 1914, all other implementing organs are either cantonal or private, so the federal state has remained minimal in that sense.

In infrastructure, the most important developments were the transferal of powers over energy (nuclear energy in 1958, more generally in 1990), highways (1958), the promotion of scientific research (1973) and the construction of two major tunnels crossing the Alps (1992) to the Confederation. A main characteristic of post-WWII developments is that instead of transferring entire policy areas, more and more specific functions were allocated to either the national or the regional domains. The resulting cooperation, however, did not lead to “common tasks” in the German image (Fagagnini 1991: 49; also Braun 2003). In other words, it is only since the 1950s that the Confederation has increasingly provided public services, or at least participated in their provision at subnational level (e.g. in the promotion of social housing), and only since the 1970s has it interfered in spatial and environmental planning.

The type of federalism that developed in this way is known as “executive” or “administrative”, since the cantons execute decisions of the higher level (Fagagnini 1991: 55). However, one of the main problems with this type is that the financial means do not always match the administrative workload. A second problem relates to diluted responsibilities and the op-
tion of cantonal and federal authorities engaging in vertical blame-shif-
ing. Both types of problems were to be tackled by the Federal reform of 2008 (see section III.B).

In sum, the federation of 1848 is noteworthy firstly for the creation of a multicultur
al state (four languages, two Christian denominations), which stood in stark contrast to the monocultural projects pursued by neighbouring Germany and Italy at that time. Secondly, the wide autonomy retained by the cantons as well as their degree of continued participation in federal matters also set Switzerland apart from European unitary states, such as France or the UK. The third aspect that set Switzerland apart from other states as early as the 19th century is direct democracy, which unlike the other two has even been further developed over the decades since then (Vatter 2016). Nevertheless, none of these three guiding principles—multiculturalism, federalism and direct democracy—was able to halt the development of a more centralised state. One could even speculate that especially the latter has contributed to a socially more united and politically inte-
grated nation, for it enables a wide range of actors to call for and even impose national solutions to regional problems (ch Stiftung 2014: 2, 38 and 64; Bochsler et al. 2016). On the other hand, direct democracy in combination with a political culture sceptical of the idea of a state and the institutional safeguards of federalism were able to at least slow down this development. These safeguards are discussed next.

C. Current division of power and institutional safeguards

Although the centralisation process has been steady, Switzerland still fig-
ures among the most decentralised federations worldwide (Dardanelli and Mueller, forthcoming). Table 1, for example, shows average figures for the Confederation, cantons and local governments over the ten-year period be-
tween 2005 and 2014. In total, the national level (excluding forms of so-
cial insurance) is responsible for only a third of public finances, the can-
tons for two fifths and the local level for a quarter. Moreover, only in fi-
nances is the Confederation both the major revenue raiser and spender, whereas the cantons particularly dominate education and security, with lo-
cal governments dealing with the environment and planning as well as cul-
ture, sport and the church.
Table 1: Income and expenditure by area and level of government, 2005–14 (average)

<table>
<thead>
<tr>
<th>Policy Area</th>
<th>Income</th>
<th>Expenditure</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>CH</td>
<td>Cantons</td>
</tr>
<tr>
<td>Finances</td>
<td>43%</td>
<td>36%</td>
</tr>
<tr>
<td>Social security</td>
<td>3%</td>
<td>66%</td>
</tr>
<tr>
<td>Economy</td>
<td>18%</td>
<td>64%</td>
</tr>
<tr>
<td>Transport and telecomm.</td>
<td>27%</td>
<td>59%</td>
</tr>
<tr>
<td>Admin</td>
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<td>43%</td>
</tr>
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<td>Security</td>
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</tr>
<tr>
<td>Environment and planning</td>
<td>2%</td>
<td>20%</td>
</tr>
<tr>
<td>Culture, sport and the church</td>
<td>4%</td>
<td>26%</td>
</tr>
<tr>
<td>total</td>
<td>34%</td>
<td>42%</td>
</tr>
</tbody>
</table>

Source: own calculations based on data from EFV (2017).

If we now ask what the three levels of government spend their money on, the picture as displayed in Figure 1 emerges. In fact, both local governments and cantons spend a quarter of their money on education, while the Confederation spends almost a third on social security. The latter is also the second most costly item at the subnational level (cf. also Bochsler et al. 2004: 127). All in all, we can conclude that judging from the financial division of labour between the three levels of government, the ideal of the minimal state continues to live on especially at the federal level, while the sub-national entities, through their involvement in health, education, environment protection, spatial planning and social housing (cf. also Knoepfel and Nahrath 2014: 756), clearly reveal the transformation towards a welfare state.
Figure 1: Policy expenses at federal, cantonal and local levels, 2005–14 (average)

![Policy expenses graph]

Source: own calculations based on data from EFV (2017).

Depending on one’s ideological position, this state structure is either regarded as unfinished nationalisation or successful defence of cantonal autonomy. Supporters of the former view often cite the lack of educational harmonisation and unequal access to health services across the territory as problems that could be solved with further centralisation. Those with the opposite opinion, in turn, regard inter-cantonal tax competition as beneficial for keeping state expenditure low and highlight the advantages of autonomous decision-making. Regardless of these debates, led mainly by the left on the one hand and the right on the other, both main institutional safeguards of Swiss federalism have remained intact, although their function has changed over time:

1. The *cantonal majority* is the chief instrument by which constitutional change that is unfavourable for the subnational level can be blocked. Although it continues to protect cantonal interests, it does so only for the majority of rural, German-speaking cantons. This can be explained by the fact that the French-speaking minority has shifted from a decentralist to a centralist orientation on federal decision-making, especially in social policy. Together with the cities, French-speakers are therefore regularly outvoted on territorial grounds (Linder et al. 2008; Vatter 2014b; Mueller 2015).

2. The *Council of States* is the main institution at the federal level that gives cantons a direct voice in deciding national laws. Each full canton is given two, while each of the six half-cantons has one seat in the Up-
per Chamber, which has the exact same powers as the National Council. However, although each canton can decide freely on the designation mode of its representatives, all have introduced their popular election. Because the party system, too, has become increasingly nationalised (Knapp 1986; Bochsler et al. 2016), partisan interests and dynamics have largely overtaken territorial allegiances, although the cantons remain the undivided constituencies for elections to both houses of parliament (Vatter 2016).

Both these institutions have repeatedly been the subject of reform proposals (see Vatter 2006 for an overview), but in vain. In turn, long-forgotten instruments have been revived and new ones created. Thus, the cantonal referendum was used for the very first time in 2003/4 to combat a federal law that would have led to significant cantonal losses (Fischer 2006), and since 1993 the cantons have organised themselves into the Conference of Cantonal Governments to exert political influence (cf. Abderhalden 1999; Brunner 2000; Blatter 2010).

Finally, the cantons also cooperate horizontally (Bochsler et al. 2004), i.e. at the exclusion of the federal government, on tasks that fall within their exclusive domain or whose implementation they oversee (see also below, section 3.2). The primary instruments here are inter-cantonal treaties (called “concordats”). One way to gauge the importance of inter-cantonal cooperation is by assessing transfers between the cantons. Figure 2 shows the massive increase in such transfers from 400 million CHF in 1990 to almost 5 billion in 2014. Almost two thirds of these concern education, and within that area especially tertiary education (2.3 billion CHF in 2014). A third of all transfers, i.e. 1.6 billion CHF in 2014, is unconditional and comes in the form of fiscal equalisation from the richer to the poorer cantons.
In sum, public powers in Switzerland can be grouped according to the type of competence and the level of government in charge, as shown in Table 2. The next section discusses the Federal Reform of 2008 as the most encompassing attempt so far to bring order to two centuries of centralisation and increasing vertical and horizontal cooperation.

Table 2: Division and fusion of powers between Confederation and Cantons

<table>
<thead>
<tr>
<th>Level</th>
<th>Competence</th>
</tr>
</thead>
<tbody>
<tr>
<td>Confederation</td>
<td>Exclusive</td>
</tr>
<tr>
<td></td>
<td>A: Centralisation, e.g. highways</td>
</tr>
<tr>
<td></td>
<td>C: Shared domains with or without programme agreements, e.g. agglomeration or environmental policy</td>
</tr>
<tr>
<td>Cantons</td>
<td>B: Autonomy, e.g. special schools</td>
</tr>
<tr>
<td></td>
<td>D: Concordats with or without cost equalisation, e.g. prisons</td>
</tr>
</tbody>
</table>

Source: own calculations based on data from EFV (2017).
III. The federal reform of 2008

A. Precursors

The Federal Reform, approved by popular and cantonal majorities in November 2004 and in force since 1st January 2008, can look back on quite a history. In fact, the first reflections on reforming Swiss federalism date back to the 1960s (BR 1981: 743ff.; Klöti and Nüssli 1986). Even then, the Swiss government demanded that they “check whether the federal level ought to be involved when transferring powers over to it, or if not, the cantons themselves could provide for even better solutions by cooperating sectorially, regionally or in nationwide organisations” (BR 1968: 1218; all translations our own).

The goal of the first two reform proposals elaborated by the federal government in the 1980s was to “strengthen and develop Swiss federalism —with a strong Confederation, strong cantons and strong communes” (BR 1981: 755). Next to reforming fiscal equalisation, 12 policy areas were selected for devolution: the implementation of criminal law (prisons), civil protection, primary schools, classes in domestic science, stipends, sports and recreation, healthcare, supplementary benefits to the OASI and DI, healthcare insurance, retirement homes, refugee policy and housing promotion (BR 1981: 748–755).

However, Parliament rejected the withdrawal of federal support from housing, for it would have cost the cantons some 20 million CHF annually (BR 1981: 818; BR 1988: 1336). In the federal referendum of March 1985, the withdrawal of federal support from stipends (ca. 80 million CHF per year) was also rejected (Linder et al. 2010: 427f.). That day only the much less important cancellation of federal subsidies for primary schools and food control (together around 3 million CHF per year) was accepted (Linder et al. 2010: 425ff.). Three months later, cantonal shares in the proceeds from stamp (ca. 140 million CH per year) and alcohol taxes (ca. 150 million CH per year) were abolished (Linder et al. 2010: 431f.) in exchange for almost doubling the cantonal share in the Federal Direct Tax that was destined for fiscal equalisation, from 7.5% to 13% (BR 1981: 833). But in 1987, the revision of healthcare insurance failed, which meant that of the original 12 attempts at reform only nine were eventually passed (BR 1988: 1337). All in all, this first attempt at reforming the federal division of powers relieved the Confederation of expenditure worth 468 million CHF (BR 1988: 1349f.), which in 1990 amounted to just 1.5% of all...
federal expenses (EFV 2017). But at least the government, parliament, people and cantons had shown themselves willing to engage in reform.

A second reform package dealt with another seven policy areas: tertiary education promotion, school wall maps, disability insurance, waterworks, fishing, road transport and defence (BR 1988: 1363–1402), but only tasks in a total range of 8 million CHF per year were to be handed over to the cantons (ibid.: 1403). This corresponded to just 0.02% of total cantonal expenditure in 1990, which is also why no income sharing adjustments were made. After minor changes, both houses of parliament embraced the reform between 1988 and 1991 (APS 1988–1991) and no referendum was called. This already marked the end of the first two reform waves—or rather: wavelets.

B. The federal reform of 2008

The Federal Reform of 2008 describes a process that had begun as early as in 1996 (BR 2001: 2317). However, instead of merely devolving a few minor policy areas and adjusting federal subsidies and revenue sharing, the approach pursued this time was to reform a substantial number of policy areas in a single go and design a whole new fiscal equalisation scheme. As before, the whole exercise was to be cost-neutral (BR 2001: 2296), meaning that if one layer of government ended up with more duties to fulfil, it should also be given a corresponding increase in income, without however increasing the overall burden on taxpayers. This then took shape in the form of alleviating the Confederation of tasks worth 670 million CHF per year and increasing the burden on cantons by 662 million (see also Table 3). Cantons also lost their part in federal direct taxation, which was destined for fiscal equalisation (13% of proceeds, i.e. 1.3 billion CHF), but continued to receive 17%. In exchange, a whole new fiscal equalisation scheme worth almost 2 billion CHF per year was designed. However, the cost neutrality rule was broken by the government introducing a solidarity fund to cover excessive losses on the cantonal side in the transition from the old to the new system (BR 2001: 2412–2414).
Table 3: Planned extent of the federal reform of 2008 [million CHF]

<table>
<thead>
<tr>
<th>Policy Area</th>
<th>Confederation</th>
<th>Cantons</th>
<th>Third parties</th>
</tr>
</thead>
<tbody>
<tr>
<td>Defence</td>
<td>-11</td>
<td>11</td>
<td>0</td>
</tr>
<tr>
<td>Education, research, culture</td>
<td>-37</td>
<td>653</td>
<td>-616*</td>
</tr>
<tr>
<td>Environment &amp; planning</td>
<td>-48</td>
<td>48</td>
<td>0</td>
</tr>
<tr>
<td>Public works</td>
<td>-272</td>
<td>268</td>
<td>3**</td>
</tr>
<tr>
<td>Economy</td>
<td>-6</td>
<td>1</td>
<td>0</td>
</tr>
<tr>
<td>Housing, labour, social welfare and health</td>
<td>-295</td>
<td>-321</td>
<td>616***</td>
</tr>
<tr>
<td>Civil &amp; criminal law, land surveying</td>
<td>0</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Total function devolution*</td>
<td>-670</td>
<td>662</td>
<td>8</td>
</tr>
<tr>
<td>Fiscal Equalisation</td>
<td>1,981</td>
<td>-1,981</td>
<td>-</td>
</tr>
<tr>
<td>Compensation Federal Direct Tax</td>
<td>-1,319</td>
<td>1,319</td>
<td>-</td>
</tr>
<tr>
<td>Correction (third parties)</td>
<td>8</td>
<td>0</td>
<td>-8</td>
</tr>
<tr>
<td>Total effect Federal Reform 2008 (excl. solidarity fund)</td>
<td>0</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Solidarity fund</td>
<td>285</td>
<td>-285</td>
<td>-</td>
</tr>
<tr>
<td>Total effect (incl. solidarity fund)</td>
<td>285</td>
<td>-285</td>
<td>2</td>
</tr>
</tbody>
</table>

Source: Own tabulation based on BR (2001: 2496 and 2498). Note: *OASI, **Airport owners, ***OASI and DIV, +incl. dairy farming (4.6 million CHF).

At the same time, the common tasks of the Confederation and the cantons were either centralised (A), cantonalised (B) or reorganised as vertical cooperation (C); while a final group of tasks ended up in the category of horizontal cooperation with cost equalisation (D). Table 4 shows the result of this reorganising exercise.

Assessing the Federal Reform of 2008 results in an ambivalent judgement (cf. also Wettstein 2012; Braun 2008; Braun 2009; Dafflon 2005). On the one hand, it is certainly a great success that a reform covering as many as 43 policy areas was possible in the first place. A total of 17 policy areas were distributed to either the federal or cantonal level, and centralisation alone concerned tasks worth 2.3 billion CHF, mainly in health and social welfare (BR 2005: 6272). Finally, the reorganisation of 17 vertical cooperation areas included important policies such as agglomeration transport or individual subsidies for health insurance. Providing a constitutional basis for inter-cantonal cooperation in a further 9 nine areas marked an important step, too.
### Table 4: Functional devolution through the Federal Reform of 2008

<table>
<thead>
<tr>
<th><strong>A: Centralisation</strong></th>
<th><strong>B: Cantonalisation</strong></th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Defence</td>
<td>1. Support for housing, working and day-care facilities for invalids</td>
</tr>
<tr>
<td>2. Highways</td>
<td>2. Special schools</td>
</tr>
<tr>
<td>3. Personal services OASI</td>
<td>3. Support for regional and local activities of organisations for the less abled</td>
</tr>
<tr>
<td>4. Personal services DI</td>
<td>4. Educational grants up until secondary schools</td>
</tr>
<tr>
<td>5. Support for Organisations for the disabled with nationwide activity</td>
<td>5. Traffic control outside agglomerations</td>
</tr>
<tr>
<td>6. Agricultural consultancy agencies;</td>
<td>6. Support for educational facilities for social workers</td>
</tr>
<tr>
<td>7. Animal breeding</td>
<td>7. Recreation and sport</td>
</tr>
<tr>
<td></td>
<td>8. Airfields</td>
</tr>
<tr>
<td></td>
<td>9. Improvement of housing conditions in mountain areas</td>
</tr>
<tr>
<td></td>
<td>10. Cantonal agricultural advice</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th><strong>C: Vertical cooperation</strong></th>
<th><strong>D: Horizontal cooperation</strong></th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Additional social benefits</td>
<td>1. Execution of criminal penalties and measures</td>
</tr>
<tr>
<td>3. Traffic within agglomerations</td>
<td>3. Cantonal institutions of higher education</td>
</tr>
<tr>
<td>4. Main roads</td>
<td>4. Cultural institutions of supra-regional importance</td>
</tr>
<tr>
<td>5. Penitentiary system</td>
<td>5. Waste management</td>
</tr>
<tr>
<td>7. Individual subsidies for the healthcare insurance</td>
<td>7. Urban transport</td>
</tr>
<tr>
<td>8. Regional traffic</td>
<td>8. Advanced medical science and specialist clinics</td>
</tr>
<tr>
<td>9. Improvement of agricultural structures</td>
<td>9. Institutions for the rehabilitation and care of invalids</td>
</tr>
<tr>
<td>10. Noise protection along local and cantonal roads</td>
<td></td>
</tr>
<tr>
<td>11. Protection of culturally/historically important buildings/monuments</td>
<td></td>
</tr>
<tr>
<td>12. Nature and wildlife protection</td>
<td></td>
</tr>
<tr>
<td>13. Flood protection</td>
<td></td>
</tr>
<tr>
<td>14. Water protection</td>
<td></td>
</tr>
<tr>
<td>15. Forest maintenance</td>
<td></td>
</tr>
<tr>
<td>16. Hunting oversight</td>
<td></td>
</tr>
<tr>
<td>17. Fishing oversight</td>
<td></td>
</tr>
</tbody>
</table>

Source: Own tabulation based on BR (2001 and 2005).

On the other hand, judging by the originally targeted 29 out of a total of 50 shared areas identified for task devolution (APS 1996), the result of 17 areas falls rather short. Inter-cantonal cooperation equally results in some disadvantages compared to full cantonalisation or centralisation, such as a lack of parliamentary and popular involvement in treaty-making and a lack of transparency (cf. Rhinow 2003). What is more, the federal parliament has since engaged in creating new shared tasks that would warrant a further reform (BR 2014; ch Stiftung 2014). Finally, as the next section
shows, even the areas that were so devolved could not escape the deeply cooperative nature of Swiss politics in both its vertical and horizontal direction.

IV. Selected policy areas

A. Highways: newly centralised—or not?

One of the areas that the Federal Reform of 2008 fully centralised was the power over planning and building as well as the duty of maintaining highways, i.e. the main freeways connecting the different parts of Switzerland, which before had been a vertically shared task. Nevertheless, the cantons remained in charge of completing the already planned network; the Confederation’s exclusiveness only applied to new roads (EFV 2013: 45).

In its efficiency analysis of 2011, the Federal Roads Office (ATSRA 2011: 55) estimates that the reform saved between 24 to 39 million CHF annually. This is mainly due to the economies of scale that result from the central planning and ordering of construction materials: it is more efficient to run one Federal Office with five territorial units than 24 cantonal roads offices. However, although the regional offices are responsible for the “implementation of current and project-free maintenance” (Art. 47 of the National Highways Decree of November 2007, as of 1st January 2016), in actual practice they conclude treaties with cantonal roads offices, e.g. with Canton Zurich to cover some 320 km of highways lying within its own territory as well neighbouring Schwyz and Schaffhausen. In other words, cantons have remained included in the execution of a now formally fully centralised task.

Of course, before 2008 the cantons were also the owners, builders and managers of all highways. However, even then federal subsidies of as much as 97% of the construction costs could be granted if certain criteria relating to liability, interest and financial capacity were met (Art. 56 of the National Highways Act of 1960, version of 2007). But precisely because of this incongruence between financing and planning, coupled with the small scale of the Swiss territory more generally, many inefficiencies oc-

4 The two Appenzells are the only cantons untouched by a highway.
curred during the construction of the national highways network, which spanned some 1,893 km in total (Sager 2014: 731; BR 2001: 2424).

The first solution proposed by the project leaders of the Federal Reform of 2008 aimed to separate maintenance and operation, but this was rejected in the consultation phase as too unclear in practice (BR 2005: 6066). Also, the creation of a Federal Office for Highways was “given up in the face of massive resistance from a majority of cantons and political parties”, since the existing ASTRA was argued to suffice (ibid.: 6072). Instead, the ASTRA was given five regional offices to cover Central and North-Western (headquarters: Zofingen/AG), Western (Estavayer-le-Lac/FR), North-Eastern (Winterthur/ZH) and Southern Switzerland (Bellinzona/TI) as well as Berne and Valais (Thun/BE), each with a staff of between 30 and 50 people and responsible for some 300 to 450 km of highways (ASTRA 2011: 12). So even when it came to centralising the (few) administrative responsibilities at the federal level, de-concentration towards regional field offices—selected on technocratic rather than political grounds—was chosen to reduce communication and information distances on the ground. Together with the executive cooperation just mentioned, this significantly relativizes the story of full centralisation told by the Federal Reform of 2008. It almost seems as if one could not really dispose of the cantons.

However, because the Confederation is now formally in full charge of the highways, citizens have lost an important veto power over specific projects in their region. A noteworthy example of this is the plan to bypass the municipality of Glarus North, a project repeatedly rejected by the cantonal electorate but “handed over” to the federal authorities by upgrading it from a cantonal to a federal road (Krummenacher 2013). The road was included in the federal plan to extend the national highways network; in turn, it was rejected in a first national referendum in 2013 but approved in February 2017 (BFS 2017). Another example relates to Canton Schwyz, where a similar upgrade was fought with a popular initiative at cantonal level (Marty 2015). However, a large cantonal majority of 63% approved of the plan in June 2016 (SZ 2016). In both instances, the argument could be heard that since the federal government was paying for the road, this was an opportunity not to be missed—another violation of one of the core principles of the Federal Reform of 2008, namely fiscal equivalence.
B. Special schools: newly cantonalised—or not?

The second policy area we investigated more closely to probe the actual effects of the Federal Reform of 2008 relates to special schools. This concerns school kids with special needs due to physical or mental disabilities and resulting learning difficulties. For the welfare state, that means providing pedagogical care, therapeutic measures and logistical support, such as offering food, shelter or transport services (BR 2001: 2417).

Before the Federal Reform of 2008, costs were shared by the Disability Insurance (DI) and the cantons on equal terms, but this concerned only special schools in the narrow sense of the term—if kids with special needs were taught as part of a regular class, the DI did not participate (ibid.). The same was true for delinquent kids (ibid.: 2418). By contrast, the DI could participate in the financing of special school buildings (both construction and maintenance). All in all, in 1999 the DI paid the cantons around 626 million CHF. However, this constituted another instance of federal encroachment into cantonal school autonomy, for with the money federal rules and regulations also had to be adhered to (ibid.).

Therefore, the Federal Reform of 2008 transferred the entire regulatory and financial power over special schools to the cantons. But because during the consultation phase of the reform left-wing parties especially voiced concerns that this decentralisation would result in an inter-cantonal race to the bottom and significant welfare cuts, three national safeguards were introduced—again in breach of the very idea of federal reform. First, an individual, justiciable right to care was enshrined in the Federal Constitution (Art. 62.3): “The Cantons shall ensure that adequate special needs education is provided to all children and young people with disabilities up to the age of 20.” (cf. also BR 2001: 2419). Second, a transitory provision was fixed, again at federal constitutional level (Art. 197.2):

“From the date on which [the Federal Reform of 2008] comes into force, the Cantons shall, until they have their own approved special-needs school strategies, but for a minimum of three years, assume responsibility for the current payments made by the Invalidity Insurance for special needs education […]”

This meant that the services of the DI were to be kept until at least 2010 and that each canton had to elaborate its own “strategy”, or concept, on special schools. Third and finally, intercantonal cooperation was at least partially placed under Damocles’ sword by listing “institutions for the rehabilitation and care of invalids” under the new Article 48a, with which, “[a]t the request of interested Cantons, the Confederation may declare in-
ter-cantonal agreements to be generally binding or require Cantons to participate in inter-cantonal agreements [...]. The ensuing inter-cantonal treaty on specialised pedagogics (EDK 2010 and 2013: 5) entered into force in 2010 and currently has 16 members. A further eight cantons have at least a concept, but are not members of the treaty, while Berne and Appenzell Inner-Rhodes have neither.

The purpose of the treaty is to regulate the right to services (Art. 3), standardise what is basically offered (Art. 4), harmonise the terminology and stipulate the required quality so that service providers get recognition (Art. 7a and 1a 6.3). The cantonal concepts, in turn, specify the content, financing and actual provision of services. The only federal principle that cantons need to observe here relates to “integration before separation” (EDK 2013 and Art. 20.2 of the Federal Law on the Equality of Handicapped Persons of 2002, as of January 2017).

Moreover, although cantons have gained in autonomy, which the DI had prescribed them in regulations in exchange for federal transfers, payments for people in a care facility in another canton are regulated by yet another treaty on social institutions (IVSE), to which all 26 cantons plus Liechtenstein have signed up. The corresponding national database of recognised institutions is managed by the Conference of Cantonal Directors of Social Affairs, founded in 1984 and located in the “House of Cantons” in Berne (Art. 32.1 IVSE).

In other words, although fully decentralised in theory, the cantons not only had to comply with federal regulations in a transition phase and beyond, but have also had to elaborate individual concepts, can be forced to cooperate and have themselves decided to centralise some services in the federal capital. Hence, to mirror the conclusion from section IV.A, it almost seems as if one could not really dispose of a certain degree of centralisation either.

V. Conclusion

By the early 21st century, Switzerland was undoubtedly still one of the most federal and decentralised states. Despite 170 years of slow but steady...
centralisation, cantons continue to be in charge of most implementation and only one third of public finances is managed at the national level. Territorially entrenched multiculturalism, extensive provisions and use of direct democracy and a culture of subsidiarity are key factors that have helped preserve many of the original structures of 1848. The Federal Reform of 2008 was meant to reinvigorate the federal character of Switzerland and bring it towards a more efficient provision of services by either vertically separating public tasks or streamlining vertical and horizontal cooperation, next to completely redesigning fiscal equalisation. Thanks to two prior reform attempts, there was a helpful precedent for this rather ambitious endeavour.

The net result of the Reform has been to put the cantons back in the driver’s seat in many areas that had become centralised “by stealth”, that is, through federal legislation, vertical transfers and corresponding obligations. However, both examples discussed here raise doubts as to the suitability of thinking of tasks as either national or cantonal. On the one hand, even the full centralisation of a task—such as the power over national highways—just cannot do without the cantons when it comes to its actual implementation, for the federal government neither has the manpower nor the finances to build, run and maintain things on its own.

On the other hand, even when a task is fully cantonalised—such as caring and educating kids with special needs—professional and ideological opposition against cuts and declining professionalism threatened to veto the changes, so minimum national standards and transitory provisions were decided upon. Moreover, cantons also cooperate in the implementation of what are supposed to be their own, individual duties—and they even do so by delegating to “their” Conference of Cantonal Directors of Social Affairs seated in Berne, i.e. in the federal capital (cf. also Vatter 2016: 442). In sum, the more appropriate way then to describe Swiss federalism is not in terms of division of power but rather cooperation and power-sharing.

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The *Länder* Lose Out. Competence Sharing in German Federalism

*Roland Sturm*

I. How Competences are allocated in Germany

A. Cooperative federalism and the dominant role of consensus in German politics

From its very beginnings, German federalism was devised as cooperative federalism based on the interest intermediation of the federal states (Sturm 2011; Lehmbruch 2015). The German constitution of 1949 allocates the lion’s share of legislative powers to the federal government (often as shared powers with the *Länder*). The *Länder* have most of the powers when it comes to the administration of law (including federal law). Joint competence for the administration of law at federal and *Land* levels (*Mischverwaltung*) is a very rare exception. The constitution allows it only with regard to services for the long-term unemployed. Here, local government (which is governed by the *Länder*) and the federal employment agency work together in joint working groups (*Arbeitsgemeinschaften—ARGEN*). The constitutional change which made this possible resulted from a 2007 ruling by the Federal Constitutional Court. This ruling stressed that joint competence for the administration of law is illegal. A special provision in the constitution was therefore necessary. A new article, 91e (1) of 2010, allows the cooperation between the federal and *Land* levels in joint institutions in order to secure the basic needs of jobseekers.

Via the *Bundesrat* (a quasi-second chamber of parliament) the *Länder* have a role in passing federal law. When it comes to the election of the Federal President or the judges of the Federal Constitutional Court, the *Länder* and the federal institutions are on an equal footing. Germany’s membership of the EU was the source of further empowerment of the *Länder* in federal decision-making. The sharing of competence in German federalism is paradigmatic for Germany’s democratic culture, which is based on consensus and compromise. This culture of federalism is reinforced by the experience of close cooperation in political life. It would be
wrong to assume that the need to cooperate automatically creates harmony. It means more coordination, which strengthens the political executives on the federal and Land levels and weakens parliaments. Decisions are made by finding the smallest common denominator. This gives second-best solutions a chance to succeed. Politics is slowed down, and fresh starts in politics are rare (Schmidt 2011) but not impossible (Rüb 2014). Most of the time, the result of federal-Land bargaining processes is one of give and take. The Länder get federal financial support; and the federal level gets greater access to Länder responsibilities.

Over the years, cooperation between the Länder and the federal level has become ever closer. One reason for this was the growth of policy areas for which the state took responsibility. The welfare state grew step by step and with the inclusion of new policies, for example environmental policies. In most cases, this meant that the federal level took the lead. It could always argue that the Federal Constitution, in Article 20 (1), defines the German Federal Republic as a federal state based on social principles, i.e. as a welfare state.

In the post-war years, the cooperation between the federal level and the Länder concentrated on problems which needed to be solved, such as the future of agriculture or economic support for the territories bordering the Iron Curtain that were disadvantaged by the partition of Germany (Zonenrandgebiete). Cooperation followed the principles of efficiency and financial viability. In the next few decades, the federal level developed an appetite for a more systematic plan to bring Germany forward and together. This implied an improved capacity to steer central government in more and more policy areas. The additional impetus of German unification 1989/90 and the connected process of institution-building led to even more strategic centralisation. It was also the rationale behind financial transfers and the transfer of administrative and political personnel from West to East under the auspices of the federal government.

The German constitution is built on the logic of the principle of subsidiarity. In Article 30 it starts from the assumption that the Länder are responsible for public policies and public administration, with the exceptions enumerated in the constitution. In practical politics, the Länder no longer dominate German statehood. Now the federal level alone or in cooperation with the Länder sits in the driver’s seat. This is partly the case because the federal level has taken almost full control of the fields of concurrent legislation, and partly because the federal level has an almost exclusive right to make tax laws. Germany has a system of joint taxation,
which excludes the Länder from separate sources of income of their own. And when it comes to expenditure policies, the principle of subsidiarity is less important than pan-German solidarity and equality (Sturm 2010: 29).

B. The powers of the federal level and the Länder

In Article 73, the German constitution lists the federal powers. It defines the tasks for which only the federal institutions have responsibility. Another category of lawmaking is concurrent legislation. Concurrent legislation means that the Länder are responsible for matters which fall into this category, but only if the federal level does not prefer to take over. Elements of concurrent legislation are the law (civil and penal), lawmaking concerning civil associations (e.g. the federal home office may decide to ban right-wing extremist associations), decisions on the rights of foreigners to enter the country or to stay, laws at the workplace, food law, reproduction medicine or waste management (for example, systems for the recycling of waste).

Over time the federal level took responsibility for concurrent legislation. The justifications for this strategy are found in Article 72 (2) of the constitution. This article gives the federal level priority in the fields of concurrent legislation whenever national legal unity is needed to govern properly. Another justification is the need to protect a pan-German economic zone with no barriers. And, finally, the article offers the reasoning that the federal level may intervene and take responsibility for concurrent legislation to guarantee living conditions of equal value for everyone whichever part of Germany he or she lives in.

The same justifications applied to framework legislation until 2006, for example in the field of higher education. In 2006, framework legislation was discontinued in the process of federalism reform. Framework legislation allowed the federal Parliament to decide on the principles of lawmaking in a certain policy area. Land parliaments could then define their priorities in Land laws which fitted into the federal framework. Framework legislation became untenable when the Federal Parliament began to pass framework laws which no longer gave the Land parliaments a real choice. Framework legislation is a good example of the perils of cooperation in German federalism. Political decision makers often argue that the logic of policymaking in a certain policy area makes very close cooperation be-
tween the Länder and the federal level unavoidable. The price is a loss of Länder autonomy. This is a constant source of political conflict.

Above all for economic reasons, federal–Länder cooperation increased until the 1960s. In 1966, for the first time in the post-war period, Germany suffered from an (seen in perspective, minor) economic crisis. At the time, an interruption of the post-war “economic miracle” felt like an economic shock. Politics reacted with expenditure programmes to support the economy. To make these programmes work, it was necessary to closely bring together decision-making at the local, Land and federal levels. The aim was to coordinate fiscal and economic policies. Two new institutions for financial planning (Finanzplanungsrat) and for intervention in the business cycle (Konjunkturrat der öffentlichen Hand) institutionalised federal–Länder cooperation.

1. Tax policies as a precondition for and consequence of centralised competence

In addition to economic interventionism, the federal level also developed an appetite for social engineering. The aim was top-down modernisation of the country. The major tool was the expansion of the welfare state. Federalism had to be reformed to fit into this new approach.

The constitution was changed. Framework legislation now covered more policy areas. This gave the federal level more influence in policy-making. The principle that the federal level and the Land level had their own tax sources was given up. In 1949 all income from VAT was reserved for the federal level. The Länder had exclusive access to the revenues from income and corporate tax. Local government took the income from local business taxes. In 1966 a joint tax system had come into existence, in which local government, the Länder and the federal level participated. The reformed constitution institutionalised the sharing of tax income. Ever since, the federal level and the Länder have received fifty per cent of the corporate tax yield. After the share for local government has been deducted, the same rule applies for income tax. For its share of income tax, local government had to give up its exclusive access to local business taxes. A small amount of local business taxes now goes to the Länder and the federal level, too. Today, the most important source of tax income is VAT. The constitution does not define shares of tax income for VAT. What the Länder get and what remains for the federal level depends on political bar-
gaining. It turned out that this source of public finance had the potential to finance interest intermediation between the federal and Land levels in German federalism. Whenever conflicts arise, because the Länder have budgetary difficulties, there is an inclination to increase the Länder share of VAT income to solve these conflicts.

The joint tax system was meant to coordinate tax policies at all levels of German federalism. The logic of federalism reform implied long-term deepened cooperation between the federal and the Land levels and joint decision-making. This changed the quality of German federalism. Cooperation became more than an occasional partnership. Cooperation was now hardened into an institutional network of joint decision-making. Cooperative federalism developed into “interlocking federalism”, into Politikverflechtung as the German political scientist Fritz W. Scharpf called the new phenomenon (Scharpf et al. 1976; Kropp 2010). For the general question of what is the right balance between diversity and unity in German federalism, new answers had to be found, because now it meant evaluating Länder autonomy in the light of interlocking federalism. The Länder were not opposed to the federalism reforms of the 1960s. For them, interlocking federalism implied budgetary stability. Their governments even gained political power via the Bundesrat, where the Länder executives used to support the reforms of the constitution with the necessary two-thirds majority. The increase in the number of federal bills which affect Land interests—a consequence of the federalism reforms—increases the veto power of the Länder and their role in federal policymaking.

Interlocking federalism did not only relate to tax policies. It also influenced expenditure policies. The aim of the federalism reforms was to engage both the federal state and the Länder in the financing of major policy areas. The constitution was therefore amended by an article on the joint tasks of the Länder and the federal level. The financing of these tasks relied on equal financial contributions (fifty per cent) from both levels of federalism. Policies which fell under this new rule were the construction of universities and university hospitals, financial support for economically less successful regions, the modernisation of German agriculture and the protection of German coasts. The 2006 federalism reform gave the task of constructing universities and university hospitals back to the Länder. Decisions on joint tasks are made in planning committees, where the federal level and the Länder are represented by equal numbers. Three-quarter majorities are needed. In other words, consensus is the rule. Interlocking fed-
eralism increases the need for unanimity in German federalism. It has created new opaque and inflexible institutions.

2. Financial support as a steering mechanism

What was more important for the critics of interlocking federalism, however, was another implication of federalism reform. They worried about the incentives of so-called non-genuine joint tasks. Non-genuine joint tasks concern those policy areas outside the article on joint tasks in the constitution for which the federal level can provide financial support, although they are genuine Länder responsibilities. Federal co-financing here seems to contradict article 104a of the constitution, which states that both the federal and the Land levels have to finance their expenditure from their own budgets. Article 104b, however, justifies federal aid. This is an offer most of the Länder now and in the past were happy to accept. The price they had to pay was accepting that the federal level could now play a role in decision-making on Länder responsibilities and a loss of autonomy. The federal level now had a new tool with which to steer Land politics.

The literature on German federalism (e.g., Sturm 2015) calls this steering mechanism a “golden rein” for the federal level to control the Länder with. Article 104b is generous with regard to federal intervention. It allows federal financial aid for the Länder in times of economic crises, in fighting territorial economic imbalance in Germany, for the support of economic growth, for natural disasters and for emergencies which cannot be controlled by governments and have a major budgetary impact. The federalism reform of 2006 dealt with the problem of the “golden rein” and the resulting federal–Land interdependencies. The reform changed the existing constitutional provision. Conditions for federal financial aid were attached. Article 104b (2) now limits the time period in which the federal level can give financial support. It asks for efficiency controls at regular intervals, and over time the annual grant has to decrease.

A further restriction on federal aid was the so-called Kooperationsverbot, the ban on federal financial aid for genuine Land responsibilities. In other words, the federal level was only allowed to support the Länder in policy areas that were in its jurisdiction. For example, in education policies, a responsibility of the Länder, the federal level cannot provide financial support for the Länder. In practice, the Länders’ need for budgetary support undermined the principles of the ban on federal financial aid. In
this respect, the 2006 federalism reform already made an exception and changed Article 91b of the constitution accordingly. Federal aid was allowed for science and research at universities that had more than a regional impact, and for the construction of university buildings dedicated to research. The federal level and the Länder were also allowed to cooperate in international performance tests of the German educational system (e.g. PISA). There is a consensus in German politics that education is the key to a successful Germany in the future. And it is obvious that the Länder alone are not able to invest what is necessary in education (Münch 2012). This has led to an ongoing discussion about the desirability of the Kooperationsverbot. In 2014, the constitution was changed again. Article 91b now also allows federal financial support for university teaching. A further change to the constitution which would allow federal financial support for schools is under discussion. In 2017 the constitution was changed to make federal investments in local education infrastructure possible (article 104c).

C. The responsibilities of the German Länder

1. Radio and TV

That the Länder are responsible for the media (radio and TV) is the logical consequence of historical events. After the Second World War most of the Länder came into existence before the West and East German states were formed. The Allied Forces started broadcasting in the German occupied zones and their regions. The Länder then took over. On June 9th, 1950, the six existing Länder broadcasting agencies established the ARD (Arbeitsgemeinschaft der Rundfunkanstalten Deutschlands), i.e. an institutionalised form of cooperation between all West German broadcasting services. The ARD brought together the Bayerischer Rundfunk (Bavaria), Hessischer Rundfunk (Hesse), Radio Bremen, Süddeutscher Rundfunk (parts of what is now Baden-Württemberg), Südwestfunk (Rhineland-Palatinate) and Nordwestdeutscher Rundfunk (Hamburg, Lower Saxony, North Rhine-Westphalia and Schleswig-Holstein). The broadcasting service in the American sector of Berlin (RIAS) had an advisory status in this organisa-

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1 Cf. Leber 2014.
tion. Up to the present, this organisation of joint regional broadcasting services has guaranteed its members full autonomy. Later on, new regional broadcasting services joined the ARD: in Berlin the broadcaster Sender Freies Berlin, and the Saarländische Rundfunk, when the Saarland became a German Land in 1957. The Nordwestdeutsche Rundfunk was divided into the Westdeutscher Rundfunk (North Rhine-Westphalia) and the Norddeutscher Rundfunk. After German unification, RIAS became part of Deutschlandradio, which serves an all-German audience, and is a joint enterprise between ARD and German TV’s second channel, ZDF. Unification brought the Mitteldeutscher Rundfunk (Thuringia, Saxony, Saxony-Anhalt) and the Ostdeutscher Rundfunk Brandenburg to the former GDR states. In 1998, the Süddeutsche and the Südwestfunk merged into the Südwestrundfunk. In 2003, the merger of the Ostdeutsche Rundfunk Brandenburg and Sender Freies Berlin followed (Eberle and Krone 2014).

The Länder’s competence over the media was confirmed by a ruling of the German Federal Constitutional Court of 1961. The court blocked legislation by the conservative Konrad Adenauer government which would have created a national broadcasting service controlled by the federal level. Hesse and Hamburg, governed by social democrats had gone to the court. The court ruled that the German constitution does not empower the federal level in matters of radio and TV, except for technical issues which relate to transmission systems. The federal institutions have to respect the responsibilities of the Länder. As a logical consequence of this court ruling, the second TV channel in Germany was established in 1963 by a treaty signed by the Länder.

2. Economic policies of the Länder

The Länder try to support their regional industries with tailor-made industrial policies (Sturm 1991) in order to protect jobs in regional industries as long as possible, even if these industries have lost their competitiveness. North Rhine-Westphalia and the Saarland fought for their coal and steel industries, which were in crisis after the late 1960s. In 2012, the last mine in the Saarland was shut down. Shipbuilding was as pivotal for the economy of the coastal Länder as coal and steel was for North Rhine-Westphalia and the Saarland. Consequently, these Länder have invested in infrastructure to attract investors and tourists, to make them attractive places for investment, and to contribute to a positive picture of a Land in Ger-
many and abroad. Hamburg bought up shares in companies in difficulty to help them survive (Beiersdorf, cosmetics, or Hapag-Lloyd, shipping). The aim was to keep the companies in the city and to keep out companies with no connection to Hamburg which might have bought up the ailing firms. There is a special law which guarantees Lower Saxony a veto in strategic decisions by Volkswagen. Not all industrial initiatives by the Länder are successful. Some examples of failed projects because of cost overrides or insolvencies demonstrate the financial risk the Länder take: modernising the Nürburgring Formula 1 circuit in Rhineland-Palatinate, the Space Park in Bremen or the Elbphilharmonie concert hall in Hamburg.

3. **Technology transfer**

The Länder agree that education is the key to future economic success. Science policies are therefore essential for the advancement of research and technology. In the 1980s, Baden-Württemberg and North Rhine-Westphalia took the first steps to improve the transfer of technology from their universities to promising start-ups. This triggered the spread of technology centres in all of the Länder (Jürgens and Krumbein 1991). Technology centres profit from their proximity to universities. They get financial support from their Land for their infrastructure. The idea behind these centres is to enable start-ups and innovative entrepreneurs to bring their products onto the market faster. The Ulm science city connected university research directly to the research department of a global player, Daimler. But economic policies of the Länder mostly focus on small and medium-sized companies. These companies are most likely to keep their headquarters in their respective Land and feel connected with that Land. Above all, small and medium-sized enterprises create jobs and—relative to their size—provide most apprenticeships.

4. **The lottery monopoly**

Another responsibility of the Länder is the regulation of lotteries. Regulation is based on Länder cooperation. In Berlin in December 2011, fifteen of the sixteen Länder signed a new treaty on lotteries. Schleswig-Holstein abstained. The treaty stressed the Länder’s monopoly on the lottery. The Federal Constitutional Court has ruled that the monopoly is justified, but
only if the Länder engage in strict and credible policies to prevent addiction. The lottery monopoly has come under pressure, because the EU Commission sees it as an unjustified distortion of the Single Market. The job of chairperson of a Land lottery agency is popular and well paid. The sizeable incomes of the lotteries are used by the Länder to support cultural and sporting activities. There are twenty lottery licenses for private firms. Internet lotteries are not allowed. This does, however, not affect foreign companies, which control 95 per cent of the German market. After a change of government in Schleswig-Holstein in 2012, the Land ended the liberalisation of its lottery market and decided to sign the existing Länder treaty on lotteries.

5. Support for small and medium-sized enterprises (Mittelstand)

Small and medium-sized enterprises are offered cheap credit mostly by local savings banks owned by local governments, but also by Land funds. The Land prime ministers see themselves as scouts for Land companies. They, together with Land industry bosses, market Land companies at international trade fairs and during official Land visits abroad. Before the 2008 financial crisis, the Länder owned efficient banks (Gubitz 2013), which were owned in part by the local savings banks. In the early 1990s, all West German Länder were shareholders of Land banks. In 2011, after the crisis, only 12 of the 16 German Land banks had survived. The problem for the Länder was that, too a great degree, their banks had emancipated themselves from their traditional business model, i.e. to act as clearing banks for the local savings banks and as a source of cheap credit for the regional small and medium-sized companies. During the financial crisis, they suffered from great losses in investment banking and other high risk investments. Today, the Land banks have lost their former importance as an instrument for the Länders’ economic policies, not least because of the amount of debt they burdened the Länder with (Trampusch et al. 2014). Some of the Land banks resorted to mergers, others went bankrupt and disappeared. Now there are six Land banks left, which have to look for new (less risky) business models.
6. Police and home security

Home security is an important area of competence of the Länder. The Länder have to guarantee the security of the general public. Land police forces control soccer games and guarantee peaceful demonstrations. The tasks of Land police forces are similar, but their internal organisation is different from Land to Land. Whether each is structured according to the tasks of a police force or based on territorial principles is for each Land to decide. The same goes for the names given to police stations (e.g. North Rhine-Westphalia: Polizeihauptwache; Lower Saxony: Kommissariat). Differences between the Länder’s security policies also exist with respect to shooting in self-defence (finaler Rettungsschuss), to closed-circuit television surveillance or to police checks when no crime was committed (Schleierfahndung). Home security includes the activities of the Land secret agencies entrusted with the protection of the constitutional order. They concentrate on political extremism and Islamic terrorism.

Six Länder in Northern Germany cooperate when it comes to the imprisonment of criminals who are still too dangerous for society after they have served their time in jail. The German Federal Constitutional Court has ruled that it is legal to imprison criminals after they have served their time in jail, but only when they are housed in special facilities, which look different to prisons and have another quality of life than prisons usually have. With the 2006 federalism reform, competence over the prison system was placed in the hands of the Länder (Jünemann 2012). The Länder cooperate to save money. In Lower Saxony, Hamburg and Brandenburg, new institutions for this special category of criminals were built. The Länder Mecklenburg-West Pomerania, Schleswig-Holstein and Bremen can take their prisoners to these three new institutions. Hesse, Rhineland Palatinate and Saarland are also interested in cooperating closely on this issue, but they will not build new special prisons.

Home security is a policy area in which the cooperation of Land administrations and their cooperation with the federal level are essential if mistakes and inefficient action are to be avoided. Critics, for example the former Federal Minister of the Interior, Otto Schily, or the current Minister of the Interior, Thomas de Maizière, would prefer federal agencies to play a stronger role. Schily wanted agencies responsible for the protection of the constitutional order to be centralised and more competence for the Federal Office responsible for fighting criminal offences (Bundeskriminalamt). In his view, the role of the Länder in home security was a danger to public
security (Maron 2004; Bach and Schneider 2014). Ever since, the debate on the role of the Länder has continued. It was fuelled by unsuccessful efforts to detain right-wing and Islamic terrorists before they committed crimes.

7. Education policies

We can find a similar debate on the advantages of centralisation in the field of education policies (Renzsch 2012). In 2012, the then Berlin senator for finance (the minister) provoked the public by saying: I could do without federalism in the education system without any problems (Der Spiegel 2012). Günter Oettinger, when he was prime minister of Baden-Württemberg, supported the centralising of secondary school final exams (Abitur) on the national level, and some influential members of his Conservative party shared his view (Frankfurter Allgemeine Zeitung 2007). In 2012, a Land final exam for secondary schools existed in all of the Länder with the exception of Rhineland-Palatinate, where this exam was still organised by the schools. Greater differences between the Länder existed with regard to the number of obligatory subjects pupils had to take in their exams: one in North Rhine-Westphalia and Berlin, two in Thuringia, Lower Saxony, Bremen, Hamburg, Schleswig-Holstein and Brandenburg, and three in the other Länder.

The then Federal Education Minister, Annette Schavan, even proposed federal universities (Frankfurter Allgemeine Zeitung 2011). Critics of the decentralised structure of the German education system often overlook the facts that the Länder already work together closely in the field of education policies, and that the pressure international performance tests exert (PISA, for example) has forced all of the Länder to make efforts to improve their school and university systems. Starting in 2017, all topics for the final exams at secondary schools come from a common pool of topics of similar difficulty. The Länder choose from this pool. The effect is that the Länder keep their competence, but at the same time the quality of exams is on an equal level in the whole of Germany.

Educational policies are the essence of Länder autonomy. The Länder are responsible for the protection of the opportunities for future generations. The school system has gone through a number of reforms to make it more efficient. The traditional three-tier school system (Hauptschule/Realschule/Gymnasium) still exists only in Bavaria. Universities have also
become more diverse. BA and MA courses differ not only between the Länder, but also between universities. The disappearance of university fees was universal, however, but not because the underfunding of universities had ended, but for political reasons (promises in election campaigns). The Länder are fighting hard to defend their competence in educational policies, notwithstanding the critical voices of parents, who fear disadvantages for their children when they move house from one Land to another. Federal diversity in the education system is due to different approaches to schooling and different interpretations of the role of schools and universities in society. The Länder here give regional creativity priority over a unitary system organised by the federal level of politics.

8. Cultural policies

Culture is another prerogative of the Länder (Haug 2011). More than eighty per cent of national expenditure on culture comes from Land and local budgets. Local government shoulders about half of this expenditure (Statistische Ämter des Bundes und der Länder 2012: 26). Many of the most important museums, monuments or archives, such as the German National Library in Frankfurt/Main and Leipzig, are not in the capital Berlin. In the whole country, one finds festivals and other cultural events. Local and Land orchestras play for regional audiences.

Because of its financial power the federal level could have increased its role in cultural policies in cooperation with the Länder, especially after German unification. Since 1998, a junior minister in the Federal Chancellery (Beauftragter der Bundesregierung für Angelegenheiten der Kultur und der Medien) has been responsible for matters of culture and the media. This minister supports foundations, public associations, festivals (the annual Richard Wagner opera festival in Bayreuth), monuments, art collections of national importance (for example, Stiftung Preußischer Kulturbesitz in Berlin) and the film industry. In 2002, the federal foundation for culture began its work in the Frankeschen Stiftungen in Halle/Saale. This foundation supports art and culture wherever the federal government has competence. The Länder need the federal level to finance some of their most important cultural activities, but they remain sceptical whenever the federal government intervenes with cultural activities of its own.
II. Reforms of the way responsibilities are shared between the federal level and the Länder

A. The devolution of powers

Since the 1980s, political decision-makers and political scientists have begun to see many problems caused by the transformation of Germany’s cooperative federalism into a system of interlocking federalism (Sturm 1999). The alternative to interlocking federalism was, in their eyes, more autonomy for the Länder to improve the transparency of political decision-making. After devolution of some areas of federal competence to the Länder, it was expected that more room for decision-making by Land parliaments was possible. Land parliaments would be able to become more important, and the same would apply to elections to Land parliaments. The Länder were also expected to compete amongst themselves to find the best possible solution to political problems. Devolution was supposed to strengthen the democratic potential of German federalism, such as the proximity of decision-making to the needs of citizens and power of innovation. Only a few of these high hopes materialised, because devolution reform was extremely cautious.

B. The 2006 federalism reforms

The 2006 federalism reforms gained some visibility because they allowed the Länder to decide on non-smoking rules (Wiesel 2014), the closing time of shops, rules for noise caused by soccer games or festivities, the income of Land civil servants or the running of prisons. The 2006 reforms also invented a new type of legislation in which the Länder are given the chance to deviate from federal legislation to write their preferences into law. This right of the Länder is limited to some policy areas concerning the protection of the environment and admission to universities and university degrees, which fall under concurrent legislation. The Länder may also deviate from federal rules when it comes to the administration of federal law, which is a Länder responsibility most of the time. Where the Länder have the right to deviate from federal legislation, the Bundesrat is

no longer involved in law-making. One consequence of these new provisions is that the number of bills which the Bundesrat can veto is reduced, and bills can be passed faster. Before federalism reform the Bundesrat had a veto on about 60 per cent of legislation. What the exact effects of the 2006 federalism reforms were is under discussion, though there is a consensus that the Bundesrat veto lost some importance with regard to numbers. Still the Bundesrat remains of great influence because of its vetoing power over many highly contested political bills. Article 104a, (4), of the constitution guarantees a Bundesrat veto on bills which imply financial support for or other transfers and services by the federal government to the Länder (Sturm 2001).

When the Länder deviate from federal legislation, this happens according to the following procedure: The parliament (Bundestag) makes a law. The law does not take effect until six months after it has been signed by the Federal President. This waiting period gives the Länder sufficient time to think about their preferences. If, for example, Bavaria and Saxony decide to deviate from federal law, what is legal will be different in Saxony than in Bavaria, and both Länder will have other rules than the fourteen Länder which accept the federal law as it is. If the Bundestag legislates on the same matter again, federal law is also binding for Saxony and Bavaria, but only if they do not decide to deviate again. In other words, the last piece of legislation is binding, no matter whether it was passed by the federal or the Land parliament. This is an interesting innovation in Germany’s constitutional history, because the German constitution in Article 31 says that federal law always supersedes Land laws. However, this is not the case any more with regard to the right of the Länder to deviate. So far the Länder have only exercised their new right rarely, for example with respect to Land interests in hunting (Obermeier 2012) or the specifics of social transfer payments.

C. The 2009 federalism reforms

The 2009 federalism reforms aggravated the financial problems the Länder are in and thereby further reduced their autonomy. Their financial room for manoeuvre was limited by a balanced budget requirement and

3 Cf. Sturm 2009; Ryczewski 2011.
the European fiscal compact. Some of the Länder are near bankruptcy. It is remarkable that the Länder parliaments, which have the power of the purse, did not have a voice when Länder executives and the federal government decided on a reform that massively restricts the ability of Länder parliaments to budget. Only after that fact did the Länder parliaments begin to reflect on the new rules (Sturm 2011). In some of the Länder, balanced budget requirements were given constitutional status. In two of the Länder, which can amend their constitutions only by referenda, these referenda were held in connection with local elections (Hesse 2011) or with Land elections (Bavaria 2013).

The balanced budget requirements force the Länder to have balanced budgets no later than 2020. Public debt is no longer an alternative source of income. Those Länder which have the greatest problems applying the new rules get financial support from the federal and Länder budgets. To consolidate its budget, Bremen gets 300 million euros per annum, the Saarland gets 260 million, Berlin, Saxony-Anhalt and Schleswig-Holstein get 80 million each, a total of 800 million euros. Half of the money for this financial support comes from the federal level and half of it from the Länder. Both use VAT income. Support comes with strings attached. The budgets of the Länder which receive financial support are supervised by a Stability Council (Stabilitätsrat) (Thye 2014). This institution is also the watchdog for the balanced budget requirements, which took effect for the federal government in 2016 and will take effect for the Länder in 2020. Members of the Stability Council are the Federal Finance Minister, the Federal Economics and Technology Minister and the finance ministers of the Länder. Critics have remarked that this is a group of politicians which have an interest in bending the rules on expenditure policies. At least those Länder who ignore the balanced budget requirement are exempted by law from participation in a vote by the Stability Council.

The Länder that receive financial support from the other Länder and the federal budget have more rules to obey and are monitored more closely. They have to adhere to annual upper limits for the reduction of their deficits. In 2011, the implementation of the balanced budget requirement began. Because the Länder have ten years to reduce their annual deficits to zero, each year the annual deficit has to be ten per cent lower than the year before. Financial support for the Länder is paid by the Federal Ministry of Finance. Länder in need get two thirds of the sum they are entitled to by July 1st. The Stability Council decides. One third of the sum is paid by July 1st of the following year. If a Land does not play by the rules, it does not
get the second payment and has to repay the first one, too. Those Länder which do not meet the financial goals lose their entitlement to support for this year, and get a warning from the Stability Council. If the Land complies the following year, payments are restarted. Financial support in years of non-compliance is, however, lost forever. In 2012, Saxony-Anhalt, as the first Land with such an initiative, created its own Stability Council, in which the Land, local government offices and a number of Land offices cooperate. The task of this Stability Council is to coordinate budgetary policies in order to facilitate deficit reduction and compliance with the balanced budget requirements.

In 2020, the Länder have to have balanced budgets (structural balance). Imbalances caused by the business cycle still can be used as justification for public deficits. This kind of deficit is supposed to help restart the economy through public investments. If the Länder choose to raise money to fight an economic crisis by creating new public debt, they are obliged to register their expenditure on a special account and to pay back all their debts as soon as possible. The Länder are allowed to ignore the balanced budget requirements in cases of emergency or because of other events which governments cannot control and which have considerable financial consequences. In the past, German unification would have been such an ‘event’; at present, the financial crisis of 2008 perhaps falls into this category. If parliament decides that such a special event demands extra expenditure, it also has to make a plan for the settlement of new debt. The repayment of debt has to happen in an appropriate time period.

III. Summary and prospects

The sharing of responsibilities between the Länder and the federation in German federalism is characterised by a high level of institutionalised cooperation. It is obvious that the federal level is the dominant one. The role of the Länder is to administer decisions made by the federal level most of the time. This includes the problem that federal legislation guarantees certain entitlements for the citizens, which then have to be paid for by local government or the Länder (unfunded mandates). The most disadvantaged in this context are local governments. Whereas the Länder have a say in federal legislation in the Bundesrat, local government has no voice.

The federalism reform of 2006 tried to solve this problem. Article 85 (1), now makes it illegal for the federal parliament to transfer tasks to lo-
cal government or local government associations. Only the Länder can burden the local government with tasks. The Länder have agreed to avoid unfunded mandates (Konnexitätsprinzip) for local government. With regard to the relationship of the federal level and the Länder, no such arrangement is in place. As bills which have financial consequences for the Länder cannot become law without the consent of the Bundesrat (where the Land governments sit), a rule on unfunded mandates is not essential here. Financial problems of this kind are solved in federal–Land negotiations.

Federal–Land cooperation is embedded in the logic of interlocking federalism. This is a form of institutionalised cooperation, which forces all actors to look for consensus. If there are no conflicts, this kind of Procrustean decision-making may be efficient. Interlocking federalism, however, has the side effects of weakening the innovative powers of federalism, encouraging political standstill and increasing political costs. It is easy for politicians and bureaucrats who are specialists in certain policy areas to come to a nationwide consensus at the expense of the taxpayer. Though Germany has an anti-bureaucracy council (Normenkontrollrat) on the national level, true political efforts to critically reflect on the powers at the Land and federal levels are rare. The German public is not interested in these questions. There is no demand for more transparency of competence in German federalism or for devolution of powers—on the contrary. Empirical studies have all come to the same result. Germany is a federation without federalists—her citizens want the federal government to control all policy areas (Sturm et al. 2010; Funk 2013).

Federalism reforms have so far only marginally readjusted the federal–Land balance of competence. Where German federalism is heading is open to question. We find both timid steps towards the devolution of powers, but also a strong consensus on more interlocking federalism and the centralisation of competence. The undermining of Land autonomy in budgeting has convinced most of the Länder that they need federal support to solve their problems. This makes them inclined to accept the federal government and parliament as playing a stronger role in policymaking. The result will not only be the permanent transferal of decision-making power to the federal level, but also the overburdening of the central government in the long run. The Länder have a tendency not to use their remaining autonomy independently, but to join forces with all the other Länder. They cooperate to come to agreements (the so-called third level of German federalism). Voluntary cooperation among the Länder adds to the uniformity
in German federalism. It strengthens unitary federalism, a form of federalism which the central government prefers anyhow.

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Belgium: A Role Model for Dual Federalism?

Manfred Kohler and Bettina Petersohn

I. Introduction

Twenty years after Belgium became a federal state, the governing and opposition parties once again passed a comprehensive reform of the federal set-up. Based on the coalition agreement of November 2011, signed by the six governing parties (symmetrical coalition of Socialists PS/Sp.a., Liberal MR/Open VLD, Conservatives CdH/CD&V) and the environmentally friendly parties (Ecolo/Groen!), the 2012 reform included solutions to the long-standing Flemish–Walloon conflict and the partition of the electoral district of BHV (Petersohn 2013: 303; Chardon 2012: 383). The latter had been subject to repeated disputes due to its bilingual character but was finally split along linguistic lines with the 2012 reform. The only item then left was the reform of federal institutions and changes to the distribution of competences.

The most important components of the 2013/14 reform included the reorganisation of the senate into a territorial chamber to improve the representation of the territorial entities, granting constitutional autonomy to the Brussels-Capital Region and the German-speaking Community, changes to the special law concerning the Belgian fiscal regime as well as the further decentralisation of competences. Overall, the reform demonstrated another successfully achieved compromise in a divided Belgium but also reaffirmed the centrifugal tendencies of Belgian federalism.

In consequence of the recent reforms, the regions (Flanders, Wallonia and Brussels-Capital Region) are emerging as the relevant entities of the federal design with the German-speaking Community as a fourth unit. The idea of creating a federal state based on the three regions is not new, but the previous reforms were dominated by the Flemish–Walloon conflict.

which left Brussels and the German-speaking communities as less empowered entities (Deschouwer 2012: 50; Swenden et al. 2006: 863). The first and second sections of this paper will focus on the historical, legal and political elements of the comprehensive reform of 1993, when Belgium became a federal state for the first time. It will shed light on the distribution of competences between all layers of government in Belgium, while at the same time highlighting the distinctive nature of Belgian federalism. The third section will ultimately focus on the latest reform of the Belgian state and draw some preliminary conclusions on the latter. There is a clear trend from “dual or exclusive federalism” with some responsibilities for the central level of government to real confederalism, turning Belgium into a state with almost no central authority.

II. The prelude to Belgian federalisation in 1993

Prior to the 1993 federalism reform, the interests of the Flemish and Walloons clashed over a Walloon weapons deal in the Middle East against the background of the Gulf War in 1991 and the transformation of Czechoslovakia into two separate nation states (Fitzmaurice 1996: 141f.). The conflict brought the challenges of the consociational design of the Belgian government to light, which obliged the governing parties to find a consensus despite their contrasting positions.

When the Walloon Socialist Philippe Moreaux, deputy prime minister at the time, threatened that the Walloon Region would depart from the constitutional framework by granting weapons export licenses to two Walloon weapons producers (Hecking 2003: 99) even though the central government was holding exclusive jurisdiction over defence and foreign policy, the Flemish people were radicalised even more. In the 1991 elections to parliament on 24th November, the traditional parties, mainly the Christians and Socialists of both linguistic groups, suffered remarkable losses (around 2% of the national vote share) and the Flemish Nationalists, Volksunie (VU), also dropped from 13.0 to 9.5% of the Flemish vote. The right-wing, anti-Belgian Vlaams Blok2 came out as the winner of the election with 11.5% of all Flemish votes, surpassing the VU in Flanders for

2 The party changed its name to Vlaams Belang after a trial in 2004 had declared its position on immigration as discriminatory and racist. The party has since then attempted to soften its radical positions and to appear more moderate.

The conflict between the communities was further exacerbated by the negotiated dissolution of Czechoslovakia in the summer of 1992 and the gradually developing awareness of the Flemish public that the federal social security scheme meant a transfer of billions of Belgian francs from Flanders to Wallonia. Against that background, the Flemish Nationalist, Vandenberghe, even called for the separation of both parts of the country (Dewachter 1996: 121).

An agreement on the fourth state reform was eventually reached in September 1992. The St. Michael’s Agreement was supported by the coalition parties as well as the two Green parties and the Volksunie to reach the two-thirds majority threshold in both houses required for constitutional amendments. In return for their approval of the state reform, the Greens demanded the establishment of an eco-tax. Changes in the funding schemes of communities and regions as well as an increase in federal transfers was introduced to appease demands by the VU to address the unequal financial contributions made by Flanders to Wallonia (Clement et.al. 1994: 28f.; Berge and Grasse 2003: 112).

With the reform, Belgium also officially became a federal state in 1993, composed of communities and regions. The next sub-chapter introduces the main characteristics of the new Belgian polity, with particular emphasis on how the relations between the two large linguistic communities—the Dutch and French-speaking populations—and the Regions of Flanders, Wallonia and Brussels are organised within these institutions.

III. The new federal structure of Belgium from 1993 to 2001: components, features and particularities

The 1993 constitutional reform marks the provisional end of the federalisation process in Belgium, recognising the communities and regions as the main components of the federal state and creating a framework for the co-existence of Flemings and Walloons (Alen 1995). The kingdom continues to be a bicameral parliamentary monarchy with a new vertical distribution of power between the federal state on the one hand, and its federated entities—the three autonomous regions and the three autonomous communities—on the other hand. At the lowest level, Belgium continues to be or-
organised in provinces and municipalities. See table 1 for the complex institutional and political structure of Belgium after the 1993 constitutional revision:

Table 1: Politico-linguistic and institutional structure of Belgium

<table>
<thead>
<tr>
<th>Level</th>
<th>Institutions</th>
</tr>
</thead>
<tbody>
<tr>
<td>Federal</td>
<td>Federal Government (Chamber and Senate)</td>
</tr>
<tr>
<td>Communities</td>
<td>German-speaking Community</td>
</tr>
<tr>
<td></td>
<td>French Community</td>
</tr>
<tr>
<td></td>
<td>Flemish Community and Region</td>
</tr>
<tr>
<td>Regions</td>
<td>Walloon Region</td>
</tr>
<tr>
<td></td>
<td>Brussels Region</td>
</tr>
<tr>
<td>Linguistic regions</td>
<td>German unilingual</td>
</tr>
<tr>
<td>Provinces</td>
<td>Liege</td>
</tr>
<tr>
<td></td>
<td>Namur Hainaut Luxembourg Walloon Brabant</td>
</tr>
<tr>
<td></td>
<td>Not a Province</td>
</tr>
<tr>
<td></td>
<td>Antwerp Flemish Brabant Limburg East and West Flanders</td>
</tr>
<tr>
<td>Municipalities</td>
<td>German unilingual</td>
</tr>
<tr>
<td>Municipalities</td>
<td>German unilingual</td>
</tr>
</tbody>
</table>


One particularity of Belgian federalism is that the regional level does not equal subordinated entities, but communities and regions—endowed with their own legislative and executive branches—more or less exist parallel to the federal state. Thus the federal model of Belgium belongs to that of dual federalism, where regions and communities enjoy significant autonomy and independent decision-making authority, which highlights the con-

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3 The table is to be read from bottom to top. Example: a resident of a Brussels municipality does not belong to any province (since Brussels does not have a provincial status), but to the bilingual linguistic region of Brussels, to either the French or to the Flemish Community depending on the linguistic group he or she adheres to, and is governed by the federal government at the Belgian level (see Hecking 2001: 110).
tractual nature of this specific kind of federation. Another special feature of Belgian-style federalism is its asymmetrical design: Because of its bilingual status, the Brussels-Capital Region forms part of both the Flemish and French communities, and the territory of the German-speaking Community is part of the Walloon Region, making communities and regions incongruent (Reuchamps 2013; Förster and Lambertz 2007; Hooghe 2004; Deschouwer 2002).

### A. The Communities and Regions: Institutions and Responsibilities

In this context, the concept of ‘community’ refers to all Belgians of a specific linguistic group, whereas the concept of ‘region’ relates to a specific territory. That means that the three regions of Flanders, Wallonia and Brussels have clear-cut borders, while communities\(^4\) equal non-territorial, autonomous units or relate to a group that speaks a distinct language. The Flemish Community includes Dutch speakers living in Flanders and Brussels and their respective institutions and infrastructures. The Flemish Region, however, refers to the territory of Flanders only, not Brussels. The French Community covers Wallonia and those French-speaking persons living in Brussels. The Walloon Region, in turn, refers to Wallonia exclusively. The German-speaking Community encompasses nine municipalities of the East Cantons belonging to the Walloon Region (Fitzmaurice 1996; Swenden et.al. 2006).

The six communities and regions have five councils or parliaments\(^5\). This asymmetry derives from the fact that the Flemish chose to merge the institutions of their region with their community, thus governing both entities via just one parliament and government. The following institutions exist at the sub-state level: a parliament and government of the Walloon Region, a parliament and government of the French Community, a parliament and government of the Brussels-Capital Region, a parliament and government of the German-speaking Community, as well as a parliament

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\(^4\) The Belgian Court of Arbitrage, however, which is responsible for deciding over federal disputes (Article 142 of the Belgian Constitution), basically considers communities territorial entities (see Alen 1995: 11f.).

\(^5\) The 2005 revision of the Belgian constitution, carried out on 25\(^{th}\) February, renamed all legislative bodies in Belgium from councils to parliaments.

As regards the responsibilities of the regions and communities, two different principles were applied, with the regions receiving powers over territorial matters, such as transport or regional economic development, and communities being granted those over personal matters, such as healthcare or education. The distinction between the personality and the territoriality principle has evolved over time and coexists alongside the principle of autonomous decision-making at the federal level and the federated entities (McRae 1986). Article 141 § 1 of the Belgian constitution furthermore stipulates the principle of federal loyalty, but it constitutes a political norm rather than a constitutional principle that is enforced in practice (Mörsdorf 1996: 277).

The parliaments and governments of the communities and regions exercise comprehensive legislative and executive functions. The basic principles of distributing competences between the federal level and regions and communities are as follows (Mabille 2000: 412f.; Berge and Grasse 2003: 117f.).

- The legislative competences of the communities and regions enjoy equal status. The communities as well as the Flemish and Walloon Regions alike enjoy the power to enact so-called decrees. The legislative acts passed by the parliament of the Brussels-Capital Region are called ordinances.
- The mutual exclusivity of competence exercised by the federal state, communities and regions was considered a fundamental feature of the distribution of competences after the 1993 reform. Competence in the fields of taxation, environmental protection and scientific research, however, are of concurrent nature, meaning that they are shared by the federal state and subnational entities. This equally applies to economic policy: Respecting the national framework, the regions are responsible for the Economic and Monetary Union (EMU).
- The communities and regions enjoy designated competences only. That means that they can only exercise functions granted by and through the Belgian constitution. Residuary competence, however, remains in the federal domain, a reflection of Belgium’s federalist evolution from a unitary state.
- The communities exercise competences in the fields of education, cultural affairs and language use in public administration, education and
employer–employee relations. Additionally, they are responsible for
inter-community and international cooperation in the fields designated
to them, as well as for healthcare and social services. The functions of
the regions mainly concern socio-economic activities. Their responsi-
bilities are: town and country planning, the environment, rural devel-
opment, housing (albeit with limited jurisdiction), water policy (with
exceptions), economic policy, regional energy policy (no jurisdiction
over nuclear power), organisation and supervision of subordinated au-
thorities, employment and labour (including the implementation of na-
tional measures), public services, transport, fiscal matters, foreign
trade, agriculture, scientific research and international relations with
regard to the competences mentioned above.

The federalisation process has led to an increase in power of the federated
entities, communities and regions. The federal state is responsible for all
superordinate affairs of the state, which are, among other things, national
defence, finances, monetary policy, justice, foreign relations (without in-
terfering with the competences of the regions and communities), important
areas of the public healthcare system and social security, internal affairs as
well as state-owned companies, such as the Belgian railways. It should be
noted that the central state authorities do not have any political or legal
control mechanisms in terms of the decree, administrative and budgetary
responsibilities of the federated or decentralised entities. However, the
federal state can reverse the abuse of powers committed by the regions
and communities through decisions by the constitutional court. The exclu-
sivity of the respective competences and the non-existence of a hierarchy
of norms are central characteristics of the Belgian federal state. That
means that federal law does not supersede subnational legislation
(Delpérée 1993; Delgrange 1993).

Another expression of Belgian-style federalism and its asymmetric de-
velopments is the fact that the regions and communities are able to act and
be represented at the international or even European levels in those areas
that fall under their jurisdiction (see 2.2 below). According to Articles 127
and 167 of the Belgian constitution, the regions and communities are al-
lowed to sign international treaties and cooperation agreements when it
comes to their areas of responsibility. One example is the membership of
the German-speaking Community in the Euregio Maas-Rhine, a cross-bor-
der economic, cultural and education agreement (Berge and Grasse 2003:
118). International relations or cooperation and scientific research have
been considered shared competences between the federal state and its federated entities since 1993.

Since the last big state reform in 2001, the communities and regions have enjoyed a so-called constitutional autonomy, with the exception of the German-speaking Community and the Brussels-Capital Region. According to Alen (1995: 35), this provides the opportunity for communities and regions to draft their own constitutions and define their institutions autonomously. This constitutive autonomy could accelerate the constitutional change in Belgium’s federal system thus further by pronouncing the double-layered structure and asymmetry already in place (Conceição-Heldt 1998:46).

With the fifth state reform of 2001, based on the Lambermont Agreement, the regions gained further competences in agriculture, the organisation and supervision of municipalities and provinces, and foreign trade. Development policy was to become a responsibility of the regions in the fields of water, country planning, waste management, economic policy and research as of 2004. In consequence, the regions have become increasingly active in the international arena.

**Figure 1: Parliaments of Regions and Communities**

Source: Authors’ own depiction and update, based on Blaise 2006: 26.
As mentioned above, the Belgian state reforms produced a rather complicated federal structure, with no more than five regional parliaments that enjoy differing competences which exist alongside each other in a way. The territorial asymmetry between the communities and regions is further intensified by the asymmetry of their respective political institutions.

The communities and regions each received their own legislative and executive bodies. According to the Special Majority Law of 8 August 1980, the sub-state councils, now called parliaments, are composed as follows:

- Flemish Parliament—which executes the responsibilities of both the Flemish Region and the Flemish Community—is composed of 118 directly elected members in multi-member constituencies of the provinces in Flanders plus six members elected to the parliament of the Brussels-Capital Region. While the former have voting rights on matters of the region and the community, the latter only take part in decisions that fall under the jurisdiction of the Flemish Community.

- The parliament of the Walloon Region, situated in Namur, comprises 75 members directly elected in multi-member constituencies which exercise the responsibilities of the Walloon Region.

- The parliament of the Brussels-Capital Region is composed of 89 directly elected members. Since 2004, 72 of the members have been elected from French-language lists and 17 from Dutch-language lists by the respective Belgian adults who are registered in one of the communes of the Brussels-Capital Region.

- The French Community Parliament situated in Brussels consists of all 75 members of the Walloon regional parliament, plus 19 members that are appointed from the French-speaking members of the Brussels-Capital Region Parliament. It is responsible for the needs of the French Community.

- The parliament of the German-speaking Community, situated in Eupen, comprises 25 directly elected members exercising community competence for the German-speaking population (Deschouwer 2012: 66–68).

As illustrated in figure 1, 25 members of the Brussels-Capital Region Parliament exercise a dual mandate for the respective community parliaments, a unique feature since dual functions had been abolished for the other remaining Parliaments before (Berge and Grasse 2003: 123).
Another unique feature of Belgian federalism are the institutions of the bilingual Brussels-Capital Region. Since the jurisdiction of the Dutch-speaking and French-speaking Communities overlap in Brussels without a clear-cut border, and citizens of Brussels do not need to declare their membership to one of the two communities, there is a need to coordinate the provision of services within Brussels. Both communities are institutionally represented in the form of Community Commissions on each side, and are able to thus pursue the interests of their respective linguistic groups. After the 2001 constitutional reform, the institutional structure of the Brussels-Capital Region was further improved in order to cater to the needs and interests of the Dutch-speaking and French-speaking residents of Brussels. One can explain the institutional structure by referring to the fact that there are unilingual electoral lists and voters can only vote for the Dutch or the French list. Voters directly elect representatives to the parliament of the Brussels-Capital Region. For matters falling under the jurisdiction of the communities, the 72 members elected to the French language list form the French Community Commission, and the 17 members elected to the Dutch language list form the Flemish Community Commission. If matters affect both communities in the Brussels-Capital region, the two groups join to form the Common Community Commission composed of all 89 members of the Brussels regional parliament (Van Wynsberghe 2013: 65f.).

The Common Community Commission is a body of inter-community cooperation, and it also constitutes an administrative entity for institutions belonging to both communities. The French Community Commission and the Common Community Commission (COCOF and COMCOM) are fully fledged legislative bodies. The former exercises cultural and social competences in francophone Brussels. The Flemish Community Commission, on the other hand, does not represent a legislative body as a result of the fact that decisions made by the Flemish Community are executed by the regular Flemish institutions, a further asymmetric feature of the Belgian polity.

B. The Regions and Communities at European Union level and the Council of Ministers especially

Due to the transfer of exclusive competences to the regions and communities, and as a result of the latter having been able to enter into external re-
lations in their policy areas after 1993, the governments of subnational entities negotiated successfully to represent their entities at the European level alongside or on behalf of the federal government. The regions and communities execute powers and cooperate in the regional policy area of the European Union (structural funds), constitute members of the Committee of Regions, and are protagonists at the Council of Ministers. Since the structural funds are increasingly redistributing resources to Central and Eastern European member states, and since the Committee of Regions is relatively powerless in terms of decision-making authority, the regions’ and communities’ representation in these spheres is of rather symbolic nature (Berge and Grasse 2003: 119 and 123). However, regions and communities are significant actors in the Council of Ministers, which legislates together with the European Parliament and takes decisions either by unanimity or qualified majority vote.

Delmartino speaks of cooperative federalism when describing the way Belgium (the federal state and the subnational entities) participates in the decision-making process in the Council of Ministers. He even claims that, at times, cooperation between the subnational entities and the federal state works better at the European Union level than in intra-state affairs, where confederal tendencies have been increasingly observed recently. Despite the fact that the European Union does not explicitly recognise subnational units as state actors in the treaties, constitutional arrangements within Belgium have opened up the opportunity for subnational representation in EU decision-making processes. The legal basis for the inclusion of subnational units therefore rests on Belgian constitutional settlements as well as EU treaties (Delmartino 2003: 423ff.)

A first step towards integrating the communities and regions was made in the Treaty of Maastricht upon demands made by Belgium and Germany in 1991/92 (Article 146 back then or Article 203 in the version of Amsterdam). According to Article 203 of the Treaty establishing the European Community (TEC), ministers that are not members of the federal government, but approved by law to represent the entire state of Belgium are allowed to participate in the sessions of the Council of Ministers. A second step had to be made by Belgium in the form of a well-balanced agreement between regions, communities and the federal state to make sure regional and federal ministers could speak for the entire country (Berge and Grasse 2003: 120). A cooperation agreement was agreed upon on 8th March 1994, regulating the representation of Belgium in the Council of Ministers. The agreement installed a Directorate-General for European Affairs (called
P-11 meetings) within the Federal Ministry of Foreign Affairs. The Directorate-General for European affairs today makes sure that all levels of government are informed about and included in the decision-making processes of the Council of Ministers. This makes it easier to shape a common Belgian position. The following actors are delegated *ex officio* to these so-called P-11 sessions (see Delmartino 2003: 427):

- the federal prime minister,
- the deputy prime ministers, which are the federal cabinet and minister for foreign affairs,
- the minister for European affairs,
- the minister-presidents of the regions and communities,
- the ministers of communities and regions responsible for international relations,
- the permanent representative (ambassador) of Belgium in the European Union.

According to the respective agenda of the Council of Ministers, the P-11 sessions host representatives of the federal, community and region ministers in charge of or affected by a certain policy area on the said agenda. In consequence, these sessions are not dominated by the federal and regional ministers, but by their deputies. The ministers of the various levels of government only participate in disagreements among their delegates. Since the Council of Ministers sessions deal with a mixed agenda, it is often the case that both regional and federal items and competences are concerned. The cooperation agreement of 8th March 1994 thus also defines the organisation of how and when a respective level of government is delegated to the sessions of the Council of Ministers, coming to terms with the distribution of competences within the Belgian state but also with the organisation of the Council of Ministers in policy areas. There are four different ways in which Belgium is to be represented in this European Union institution:

- Exclusive federal representation when it comes to exclusive federal competences, which are the economy and finances, telecommunications, fishery, justice and internal affairs, disaster management, consumer protection, budgetary issues, development and general affairs.
- Mixed competences with the federal government having superior jurisdiction over the regions and communities, which are present but do not
have a right to vote and speak: agriculture, the environment, transport, employment and social affairs, energy, the common market and health.

- Mixed competences with the regions having superior jurisdiction over the federal level, which is present but does not have a right to speak and vote: industry and research.

- Exclusive representation of the federated entities when it comes to their exclusive competences: tourism, culture, education and matters concerning adolescents.

In line with the said cooperation agreement, there is also a system of rotation between the regions and communities that defines which subnational entity is to represent the Belgian state at what time and in which area of competence. In order to guarantee coherence and continuity, the term in which a region or community is represented in the Council of Ministers coincides with the respective presidency of the Council (Berge and Grasse 2003: 121f.; Delmartino 2003: 428).

With more national competences delegated to the European level of government, the cooperation agreement of 8th March 1994 makes sure that the regions and communities are enabled to exercise their constitutionally guaranteed competences at the European level, too. Kerremans therefore points out that the Belgian federated entities fulfil a hybrid function in the framework of the concept of the three-tier system of multilevel government (Kerremans 2000: 483). They are both attributable to the second and third levels of government, with Belgium’s capacity to act at the European level being strongly impeded when there is intra-state disagreement.

Delmartino highlights the fact that this system of coordinating the interests of regions, communities and the federal state constitutes a successful story. However, agreement among the various levels of government is particularly low when it comes to the system of financial redistribution in Belgium (Delmartino 2003: 427).

C. The asymmetry between exclusive political competence and the financial autonomy of Regions and Communities

In contrast to the high degree of legislative autonomy that the regions and communities enjoy, their fiscal autonomy is considerably lower. The communities in particular are dependent on transfers from the centre, while the regions have been granted some leeway over tax raising powers (Berge
and Grasse 2003: 126ff). When we compare the distribution of public expenditure across levels of government in several federal or quasi-federal West-European states, Belgium does not appear to be that decentralised any more. Table 2 clearly shows this:

Table 2: Public expenditure distribution at central, regional and local levels

<table>
<thead>
<tr>
<th></th>
<th>BE</th>
<th>ES</th>
<th>DE</th>
<th>AT</th>
<th>CH</th>
<th>UK</th>
</tr>
</thead>
<tbody>
<tr>
<td>Central</td>
<td>59.2</td>
<td>51.0</td>
<td>35.0</td>
<td>63.9</td>
<td>32.0</td>
<td>75.0</td>
</tr>
<tr>
<td>Regional</td>
<td>40.8</td>
<td>32.5</td>
<td>38.0</td>
<td>24.5</td>
<td>39.0</td>
<td>5.0</td>
</tr>
<tr>
<td>Local</td>
<td>16.5</td>
<td>27.0</td>
<td>11.6</td>
<td>29.0</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Total</td>
<td>100.0</td>
<td>100.0</td>
<td>100.0</td>
<td>100.0</td>
<td>100.0</td>
<td>100.0</td>
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</tbody>
</table>


Swenden, however, concedes that, on the surface, Spanish regional public expenditure appears to be higher than that of Belgium. However, about one third of total federal expenditure in Belgium is spent on repaying interest as a result of excessive state debts (Swenden 2006a: 310). He also points out that it is true that Germany’s Bundesländer and Switzerland’s Kantone record a bigger share of total public expenditure, but, in the case of Germany at least, the subnational entities spend a lot of money as a result of laws passed by the federal level, a typical feature of executive federalism.

It is also important to note that regional tax autonomy in Belgium is rather weak compared to that of other states. Additionally, communities do not have a right to collect their own taxes because they lack a territorial basis as a result of the representation of both the Flemish and French Communities in Brussels, where citizens do not have to register their community affiliation. They are thus highly dependent on federal income and value-added tax inflows (Swenden 2006a: 311). The regions, however, have had the power to raise their own taxes when it comes to gambling, inheritance, administrative charges and fines since 1993. The latter taxation areas do not generate much revenue for the regions compared to total

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public revenue, though. Apart from the UK, Belgian federalism seems to be most decentralised with respect to tax autonomy.

Table 3: Public revenue distribution at central, regional and local levels

<table>
<thead>
<tr>
<th></th>
<th>BE</th>
<th>ES</th>
<th>DE</th>
<th>AT</th>
<th>CH</th>
<th>UK</th>
</tr>
</thead>
<tbody>
<tr>
<td>Central</td>
<td>92.7</td>
<td>87.6</td>
<td>51.5</td>
<td>79.8</td>
<td>29.2</td>
<td>95.9</td>
</tr>
<tr>
<td>Regional and local</td>
<td>7.3</td>
<td>12.4</td>
<td>48.5</td>
<td>21.2</td>
<td>70.8</td>
<td>4.1</td>
</tr>
<tr>
<td>Total</td>
<td>100.0</td>
<td>100.0</td>
<td>100.0</td>
<td>100.0</td>
<td>100.0</td>
<td>100.0</td>
</tr>
</tbody>
</table>

Source: Swenden 2006b: 112.

With the state reform of 2001, however, Belgian regions received the right to collect all regional taxes within their competences and change the tax rate for federal individual income taxes. This gives them significant leeway in making their locations attractive to investments, but it may also lead to fiscal migration. The regions have therefore not made use of that option, also because their tax policies are still supervised by the federal state. An overwhelming share of public tax revenue is therefore in the hands of the federal level, which mainly distributes revenue through social security to the communities (see also Deschouwer 2012: 70).

Speaking of Belgian social security, one of the most contentious causes of arguments between Flemings and Walloons up until today has been the so-called solidarity intervention, which equals a system of vertical financial redistribution from the federal level to the regions and communities. This vertical redistribution benefits the Walloon and Brussels-Capital Regions most because their average level of income is below that of the federal average, a major reason for discontent among Flemish parties (Berge and Grasse 2003: 129). Although social security payments are based on individual needs, they constitute the redistribution of taxes generated in Flanders to Wallonia and Brussels. This makes today’s efforts for further Flemish autonomy rights so difficult. Walloons and Brussels’ francophone residents do not want to dispense with that mechanism (Swenden 2005: 311).

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A study carried out in 1999 by Dandoy and Baudewyns (2005: 155f.) tells the story differently, however. They argue that welfare payments to Wallonia, Brussels and Flanders basically correspond to their population figures. Brussels thus receives 10% of these payments with a 9.2% share of Belgium’s total population. Wallonia gets 33% with a 32.7% share of Belgium’s population, and Flanders obtains 57% of all funds with a population share of 58.1%. It should be borne in mind, however, that Flanders contributes 63% of welfare payments, whereas the contributions of Wallonia and Brussels come to 29% and 8% respectively.

Another survey produced by a Flemish think tank called *In de Warande* in November of 2005 brings to light the fact that the redistribution from Flanders to Wallonia and Brussels is even higher. Along with the aforementioned social security or welfare payments, it speaks of further transfer payments to Wallonia as a result of the system of financing the regions and communities, the regional allocation of federal administrative duties, and the share of Flanders in repaying national debts. Adding up these items, the survey claims that Flemish per capita financial transfers to Wallonia and Brussels equal 1734 euros annually. No wonder that this report has caused so much reform fervour on the Flemish side (Swenden 2005: 314). Another state reform seems to be difficult to achieve, with the special majority requirements in place in the federal parliament. There can be no reform without the consent of all linguistic groups.

D. Remnants of the unitary state: Provinces and Municipalities

The provinces and municipalities created in 1830 are basically still in place today. After the split of Brabant along linguistic lines, we can distinguish between ten provinces: West Flanders, East Flanders, Antwerp, Limburg, Flemish Brabant, Walloon Brabant, Hainaut, Namur, Liège and Luxembourg, while Brussels is a region but not a province.

Based on the principle of subsidiarity, the ten provinces are subordinated to the respective region they are situated in. According to the said principle, these third-level entities can take over the competences of the regions and communities when it comes to matters of direct provincial interest. These areas of responsibility can be culture, youth policies, sports, the environment, health, education, agriculture, tourism and economic affairs. However, provinces constitute entities under the constant control of the regions they are situated in, which thus limits their autonomy (Berge and
Grasse 2003: 130ff.). The latter are provided with supervisory bodies which have the authority to abolish decisions made by the corresponding municipal and provincial legislative and executive bodies. There are 589 municipalities in Belgium today, after their numbers had been enormously reduced through the integration of small municipalities. Just like provinces, municipalities possess their own legislative and executive bodies, the directly elected Municipal Councils and executive colleges, called Colleges of Mayor and Aldermen. The latter include the regionally elected mayor and the aldermen designated by the municipal councils. The municipalities also fulfil a variety of functions, most importantly services of general interest. Along with the provinces, they are subordinated to the regions. The latter check whether or not the municipalities comply with regional and federal laws and whether they serve the common interest. The regions also supervise the municipalities’ and provinces’ budgets and are able to approve or disapprove their budget plans. However, the regions do not just supervise, but also advise the municipalities and provinces. It should also be mentioned that the nine German-speaking municipalities are subordinated to and supervised by the German-speaking Community (Deschouver 2012: 175f.).

E. Horizontal distribution of power at the federal level

After the reform of 2001, the federal state has fulfilled a variety of residuary responsibilities because of the comprehensive, exclusive competences enjoyed by the subnational entities. These are national defence including the federal police, the judiciary, national foreign policy, the supervision of state-owned companies, national communications, parts of the competences delegated to the regional levels, tax authority excluding regional taxes, and most importantly, social security including pensions, unemployment benefits, health insurance, child allowance and the regulation of the subsistence minimum (Swenden et al. 2006: 867f.; Deschouver 2012: 62f.).

The federal state enjoys residuary competences which are not enumerated in the constitution\(^8\), while the responsibilities of the communities are

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\(^8\) Article 35 of the Belgian Constitution, which was added in 1993, ensures the possibility of enumerating the federal competences and thus the further delegation of the latter to the subnational entities.
in turn explicitly enumerated in the Belgian constitution (Alen 1995: 35f.). As has been said before, the competences allocated to the federal and sub-national entities are clearly separated in Belgium according to a model of dual federalism. The area of scientific research and international relations constitutes one of the few exceptions where responsibilities are shared. The Court of Arbitrage or Constitutional Court reviews cases in which one government oversteps the boundaries of its responsibilities and has the capacity to reverse the excessive use of powers by any state level (Berge and Grasse 2003: 135).

IV. The legislative Branch: House of Representatives and Senate

Belgium has operated with a bicameral parliament at its centre—the House of Representatives and the Senate—since the foundation of the state in 1830. With the transformation of Belgium into a federal state, the relations between the two chambers have, however, altered significantly. Once almost equal in powers, the House of Representatives has emerged as the more powerful chamber, while the Senate’s role has been developed into a chamber of reflection over the evolution of the Belgian state and constitutional reform. The House of Representatives has the right to vote on the budget and the federal government is responsible to the House only, while the Senate is no longer involved in a vote of confidence or budget approval.

The Chamber of Representatives consists of 150 directly elected members (MPs) for four years using a proportional representation electoral system and the d’Hondt formula. The Members of Parliament enjoy a free mandate, indemnity and immunity. According to article 42 of the Belgian constitution, members of the Chamber serve the nation as a whole. Since parties are split along linguistic lines, community interests are represented by their respective parties in the Chamber. The Chamber is divided into two linguistic groups (Article 43 of the Belgian Constitution), with 91 Flemish and 59 francophone members reflecting the relative size of the language groups among Belgium’s population.

The Senate’s composition has been repeatedly changed in the course of the transformation of the Belgian state in order to reflect the newly created federal structure better. With the 1993 reform, the number of senators was reduced to 71 with 40 directly elected senators (25 from Flanders and 15 from Wallonia). The Flemish Parliament and the parliament of the French
Community each elect ten senators from their members to the Senate, with one senator being appointed by the German Community Council, and the remaining ten senators are co-opted by the already elected senators, with six coming from the Dutch-speaking Community and four from the French-speaking Community. Furthermore, the children of the royal family have the right to become senators and vote at the age of 21. However, in practice, the three princes never vote and participate only in ceremonial meetings of the Senate (Deschouwer 2012: 181ff.). The composition of the Senate after the 1993 reform clearly reflected a strong connection to the communities, but without taking the second type of federated entity—the regions—into account.

One of the most important functions of the Chamber is to elect the federal government consisting of 15 ministers, the cabinet, with the MPs of the governing parties voting in line with a coalition agreement negotiated by the party leaders beforehand. The latter agreement determines the goals and composition of the future government (Hecking 2003: 100ff.).

Each member of the House of Representatives or the Senate has the right to introduce private member bills either alone or with other members, thereby initiating the legislative process. The vast majority of bills that are finally accepted by parliament, however, have been initiated by the government in line with the thesis of executive dominance over legislature in parliamentary systems more generally. The particular role that political parties play in the Belgian political system, however, further emphasises the connection between the executive and legislature.

Decisions in the House of Representatives and the Senate are normally taken by simple majorities, with the former being able to overrule the Senate’s vote in cases of disagreement. There are, however, several areas where special majorities apply, which were mainly introduced to protect the francophone minority (but also the Dutch-speaking minority in the Brussels regional parliament) from being overruled by a majority vote. Constitutional revisions, for example, require a declaration of changes to constitutional articles, the dissolution of the House and new elections within 40 days. The newly elected parliament has the mandate to amend the listed constitutional articles with a two-thirds majority of its members, given that at least two thirds of all the parliamentarians are present.

Furthermore, special majority laws require a larger consensus than a simple majority. These laws are closely connected to the federalisation of Belgium. They are used to spell out the details of the distribution of powers between the regions, communities and the federal level, and the rules
for fiscal powers and financial redistribution. Special majority laws require a two-thirds majority in the House of Representatives and the Senate as well as a simple majority in each linguistic group in both houses. They form one of the protection mechanisms for the French-speaking minority.

Another protection mechanism for each linguistic group was introduced with the constitutional reform of 1970—the so-called alarm bell procedure. Three quarters of the linguistic group in parliament can trigger the procedure to stop the legislative process for 30 days if they consider a bill to be harmful to the interests of their linguistic group. During that period, the government steps in to find a compromise. The existence of the procedure already serves to prevent a linguistic group from tabling legislative proposals that might trigger a conflict (Deschouwer 2012: 190).

The powers of each chamber of parliament give clear priority to the directly elected House of Representatives. The House can exert a number of functions without the Senate’s approval when it comes to naturalisation, laws concerning the ministers’ liability according to criminal and civil law, federal budget plans, establishing the army contingents, and votes of no-confidence against members of the government. Nevertheless, the Senate retained a strong position in particular on constitutional changes and the distribution of power between the different entities. In case of disagreement between both chambers, a concertation committee is formed to resolve disputes. This committee is composed of an equal number of MPs from the Chamber and Senate. Eventually, both houses agree on the same text and the bill is passed. In cases where the consent of the Senate is not required, it can still issue an opinion on a bill, but the House of Representatives has the final vote on it (Hecking 2003: 102f.).

One of the Senate’s obvious weaknesses derives from its composition or election procedure. Swenden points out that the former prime minister, Guy Verhofstadt, proposed transforming the Senate’s composition in such a way that the link between the parliaments of the communities and the Senate would be significantly increased. The necessity of such reform is debatable, however, because the partition of the parties along linguistic lines already guarantees the promotion of community interests in both the Chamber and Senate. He therefore legitimately raised the question of the necessity of establishing a new Senate called the Federal Council, for all federal MPs are affiliated with parties that have a purely regional base, structure and organisation (Swenden 2004: 204f.).
The process of establishing the federal government or cabinet is rather complicated in Belgium. As part of the parliamentary system of government, the executive emerges from and remains connected to parliamentary majorities. The consociational element of the Belgian government, however, also requires parity of linguistic groups in the cabinet. Article 99 stipulates that the new government has to be composed of a maximum of 15 ministers, usually resulting in seven French-speaking and seven Dutch-speaking ministers. The prime minister is excluded from this provision. In consequence, two types of cleavages have to be resolved in Belgium during the process of government formation: ideological differences between parties and differences between parties from the Dutch-speaking North and the French-speaking South.

Article 96 of the Belgian constitution stipulates that it is the king who formally appoints the federal ministers and government respectively, but in fact the government is dependent on Chamber approval. The federal government thus offers the king its resignation upon a vote of no-confidence by an absolute majority in the Chamber or upon rejection of a vote of confidence. Simultaneously, the Chamber proposes a successor to the prime minister in the cases mentioned above. The new prime minister will then be appointed by the king and starts his term when the new government takes the oath.

However, reality is very different. First of all, the political parties, who are not explicitly mentioned in the Belgian constitution, are very important actors during the formation of government after new elections. At the beginning of this process, the king appoints a so-called *informateur*. The latter, usually an experienced politician, works out the possibilities for the formation of the government with the various political parties. After that step, the king appoints a *formateur*, usually the chairman of the strongest political party and the future prime minister, responsible for forming a new government with a parliamentary majority after having elaborated a programme for the new government with the future coalition parties. The *formateur* or future prime minister has to take account of the aforementioned linguistic parity in his cabinet. This requires him to work out the composition of the future government with his coalition partners beforehand. Only after that can he present his new government programme and cabinet in the Chamber, which then approves the cabinet by vote of confidence, which requires an absolute majority (Hecking 2003: 106f.).
Due to the high degree of party fragmentation in Belgium and the split of the party system along linguistic lines, government formation has become a lengthy and difficult process. The formation has been additionally prolonged by the frequent constitutional changes initiated in the past few decades, which require special majorities in parliament and therefore a broader consent. Although the constitutional articles that are subject to change have to be listed prior to the election, the details of the constitutional reform are discussed as part of the negotiations of the coalition agreement (Deschouwer 2012: 168f., 48f.).

The significance of parties in the Belgian government is furthermore enhanced by a strong link between cabinet members and parties. Federal ministers take part in the weekly sessions of their respective party, where the former have to justify their policies vis-à-vis the latter, and there are weekly meetings between federal ministers and their respective party leaders for the purpose of discussing government proposals. Another way for parties to be involved in government politics is through their representation in the cabinets of the various ministers. The various parties always belong to one of the two main linguistic groups (Dutch or French) in Belgium and can exert influence on the positioning of a number of state secretaries, who are subordinated to the respective federal minister in the various federal ministries. The post of secretary of state is sometimes used to compensate one linguistic group for the loss of a significant ministry to the other language group (Deschouwer 2012: 149ff.).

The king forms part of the executive branch in Belgium. He, Albert II, cannot be held responsible for actions by the federal government. He is mainly there to represent the Belgian nation abroad, and ministers are required to countersign royal decrees. The king also signs international treaties and agreements, and he is commander-in-chief of the Belgian military forces. The king promulgates laws by the government and parliament in the Belgian official journal, and nominates or dismisses the prime minister as well as the remaining federal ministers. With the establishment of a constructive vote of no-confidence, the king cannot make use of a power vacuum anymore, as he did in the decades before the 1970s (Hecking 2003: 109f.).
VI. The Judicial Branch

The judicial branch in Belgium has long been of minor importance. Only with the big constitutional reforms, which transformed Belgium into a federal state, has it become more significant, since there is more conflict potential as a result of the parallel existence of federal and subnational institutions, which affects the relationship between the Flemish and Walloons especially (Hecking 2003: 112).

The Court of Arbitrage, which is nowadays called the Constitutional Court, plays a crucial role in conflicts over jurisdiction and in judging whether or not competences between the various entities collide with each other. The Constitutional Court makes final judgements in cases where competences have been allegedly violated. It is thus considered an umpire between the various entities. One of its important judgements was to consider communities territorial entities, discarding the person-related nature of the concept of communities supported by the Walloons or francophones. It is also quite important to mention that the Constitutional Court is divided into French-speaking and Dutch-speaking divisions in order to satisfy demands by francophones and Dutch-speakers for equal representation (Berge and Grasse 2003: 112f. and 145).

VII. The state reforms of 2013/14: furthering the trend towards regional autonomy

Belgian federalism is very much a continuous process, in which parties try to accommodate the linguistic groups but also the different ideological positions of parties which have gained electoral support in Flanders and those that have won the election in Wallonia (Petersohn 2011). The state reform of 2013/14 was no exception to that and illustrates the importance of parties in constitutional negotiations once more. It also continues the trend of decreasing the powers of the Senate and of increasing the powers of the regions. The central elements of the 2013/14 state reform are a) the reform of the Senate and the bicameral system; b) synchronising parliamentary election dates at the various levels; c) granting constitutive autonomy to the Brussels-Capital Region and the German-speaking Community; d) conferring more powers to the component subnational entities and fiscal autonomy for the regions; and e) improving cooperation among subnational units by common decrees. The negotiations mainly took place in
the second half of 2013. Since the basic elements of reform had already been agreed upon in 2011, there were no major conflicts during parliamentary debates.

Of the two visions of a Belgian federal state based on two larger linguistic communities plus two smaller units in the form of the Brussels-Capital Region and the German-speaking Community versus three equal regions, it was the regional variant that was given priority. Since the territorial boundaries of the regions are clearly defined, it is easier to transfer tax-raising powers to the regions. The list of the various reform areas also shows that, along with the further decentralisation of competences, the connection between the various layers of government in terms of *shared rule* played an equally crucial role in the latest reform effort. Granting constitutive autonomy to the Brussels-Capital Region opened the door to new forms of cooperation between the Brussels-Capital Region and Wallonia as well as the French-speaking Community.

A. Senate reform

Based on the agreement in the 2011 negotiations to form a coalition, the reform of the bicameral system contained a thorough transformation of the Senate into a chamber representing the territorial entities. The 2014 reforms reduced the number of Senators to 60, 50 of whom are appointed by and from the parliaments of the regions and communities. The distribution of seats among the senators is based on their respective election results in these parliaments. In consequence, senators will no longer be directly elected and the composition of the Senate may change in accordance with regional electoral results. The Flemish legislature delegates 29 senators, its French counterpart ten, the Region of Wallonia eight, the French-speaking group of the Brussels legislature two and the German-speaking Community just one senator. In addition, ten senators are co-opted (six from the Dutch-speaking group, four from the French-speaking group), the party composition of whom is then based on the elections to the Chamber of Representatives. Parliamentary seats in the regions or communities are incompatible with a seat in the Senate, as are ministerial offices.

This composition of the Senate based on delegation by the subnational parliaments strengthens the federal character of the institution, while at the same time it ensures its stronger decoupling from the House of Representatives. At the same time, however, the powers of the Senate in influenc-
ing federal legislation were further reduced, continuing a trend of previous state reforms. After a reform enters into force, both chambers are equally responsible for the declaration of revising the constitution as well as for the revision of the constitution as such; for special laws which require special majorities according to Article 4 of the constitution; for laws governing the funding of the German-speaking Community; for laws governing the financing of parties and election spending controls; and finally for laws that govern the organisation of the Senate and the legal position of Senators. The deadline for the Senate to elaborate and communicate new stipulations on bicameral issues was reduced by half to 30 days. The right of enquiry is now reserved to the Chamber of Representatives alone. The only thing the Senate can do in this respect is to solicit a special report on the distribution of powers between the regions and communities, but in times when no further constitutional or federal reforms are discussed, the Senate will in practice have few substantial responsibilities (Goossens and Cannoot 2015: E 38f.).

B. Synchronising election dates

The 2001 reform included the separation of election dates at the federal and regional levels. As a consequence, elections resulted in incongruent governing coalitions at the federal level compared to the regional ones, which made it harder for parties to pursue coherent national policies. While this is nothing peculiar in federal systems, the consensus-based mechanisms inherent in the Belgian federal design and the necessity of the linguistic groups cooperating at the federal level offer greater potential for conflict both within and between Belgian parties (Deschouwer 2009). The parties thus agreed to synchronise the election dates during the reform negotiations. The legislative term of the Chamber of Representatives was in turn increased to five years. Starting from 2014, elections to the Chamber are held parallel to European elections. The elections to the parliaments of the regions and communities already coincided with the elections to the European Parliament. Simultaneous elections increase the potential for congruent governments at the federal and regional levels. During the negotiations on the state reform, critics pointed towards the contradictions between the various parts of the reform, e.g. the idea of transforming the Senate into a chamber of delegates of subnational entities or the risk of re-
gional elections being overshadowed by the issues and candidates of the federal elections.

The first litmus test for the new regulations were the elections to the European Parliament held simultaneously with Belgian federal and regional elections on 25th May 2014. The results of the regional elections confirmed the success of regionalist parties, in particular in Flanders and in Brussels, allowing them to enter into coalition governments (Baudewyns et.al. 2015). On the Flemish side, the N-VA emerged as the winner in the federal and regional elections, while the right-wing Vlaams Belang lost over 5% in the federal and almost 10% in the regional elections. In Wallonia, the Socialist Party kept its position as the largest party, but the main winner was the liberal Reformist Movement (MR). For the Brussels regional parliament, the Socialists and Liberals held onto their first and second positions, while the liberal FDF were successful in becoming the third largest party. The FDF had split from MR over the separation of the electoral district Brussels-Hale-Vilvoorde into uni-linguistic parts.

The rationale behind synchronising elections was to facilitate government formation across the different levels. At the federal level, a new coalition was formed between the CD&V (Christian Democrat and Flemish), OpenVLD (Flemish Liberals), MR (Francophone Liberals) and the N-VA (Flemish Nationalists), a Flanders focused centre-right, liberal coalition with the Flemish Nationalists, which excluded the Socialists from the governing coalition for the first time since 1988. The idea of establishing congruent coalitions across the levels informed the formation of the coalition in Flanders. While a coalition between Flemish Nationalists and Christian Democrats would have controlled a majority of votes, the OpenVLD joined to form an oversized coalition, arguing that they would either enter both coalitions at federal and regional level or none at all. In contrast, the coalition formed in the Walloon Parliament between the socialist PS and the Humanist Democratic Centre (cdH) has left the liberal MR in opposition in the region. Similarly, the Brussels executive mirrors the federal coalition to a larger extent, with the CD&V and OpenVLD joining on the Flemish side, but it remains more incongruent on the francophone side with the PS, cdH and FDF in government.

The aim of the reform—to form more congruent coalitions—is dependent on the voting behaviour and the political will of party leaders to enter into coalitions even if they are not necessary mathematically. The period of government formation at the federal level again took five months,
which indicates that it has not become easier despite the simultaneous date of the elections.

C. Constitutive Autonomy for Brussels and the German-speaking Community

Conferring constitutive autonomy to the German-speaking Community and the Brussels-Capital Region occurred in close connection with the reintroduction of simultaneous election dates for elections to the federal and European Parliaments. Since the subnational units were also given the right to coordinate election dates, the German-speaking Community and the Brussels-Capital Region needed the competences to do so. Being granted constitutive autonomy, the two entities can independently rearrange both their institutions and their electoral districts, set election dates as well as the composition and functions of parliament in the case of the German-speaking Community. This constitutes an alignment with the competence of the two large communities and regions respectively. As far as the Brussels-Capital Region is concerned, such rules remain under federal supervision, especially regarding the linguistic rights and the relationship between the two linguistic groups in the Brussels parliament and government (i.e. the distribution of seats between the linguistic groups or the parity between linguistic groups in the regional government).

D. Changes to the distribution of competences and financial relations

Similarly to preceding reforms, further competences were transferred to the communities and regions, while the fiscal autonomy of the Regions was also upgraded. The aim was to make the distribution of competences more coherent and efficient. The old principle was maintained that communities received person-related responsibilities and regions received competences with a territorial dimension.

The communities received competences over policies for the elderly, for major parts of medical care (for instance, the norms that govern the accreditation of hospitals, the homogenisation of long-term care and psychiatric care, plus basic medical care), film regulation in the area of telecommunications, as well as for child allowances and allowances for people with disabilities. For Brussels, the Commission Communautaire Commun
(COCOM) takes either full responsibility for a number of decentralised competences or consults with the French-speaking and Dutch-speaking Communities. In terms of child allowances and allowances for people with disabilities, COCOM has been given full responsibility. This is a novelty in the sense that COCOM has received independent spending authority albeit only over these specific allowances. The federal level continues to be responsible for managing the programmes and the financing of hospitals. Nevertheless, the reform offers the opportunity for COCOM to develop programmes within its responsibilities which are specifically tailored to Brussels residents (Nassaux 2013).

The regions received further competences in the field of labour market policies (for instance, the responsibility for local labour market agencies, for active and passive measures to reintegrate the unemployed, for the training of apprentices and rules governing access to jobs, as well as full budgetary authority in this area), agriculture in terms of agricultural land and livestock lease, along with more competences in traffic security. The federal government kept the responsibility for labour law and wage policies (Goossens and Cannoot 2015: E44ff.).

Further decentralisation was paralleled by changes to the law governing the financing of communities and regions. One of the goals here was to enhance the fiscal autonomy of the regions. Another aim was to strike a balance between the financial endowment of subnational units and their actual responsibilities as well as to increase their responsibilities in public spending overall and participating in the financing of an ageing population especially. The regions were granted the right to impose taxes on natural persons, while bearing in mind the progressive nature of tax rates. The most prominent reform in this respect is that the regions have to take responsibility for their economic performance as well as take financial credit for positive developments. The communities receive additional funding for financing the decentralised allowances for the elderly and families, with funding being based on the number of old and young people respectively. The French-speaking Community benefits from the former, while the Flemish benefit from the latter following the pattern of package deals well-known to territorial reforms in Belgium (Caluwaerts and Reuchamps 2015: 287). The subnational units are now also responsible for maintaining balanced budgets. Before this new responsibility enters into force, the federal and regional levels have to sign a cooperation agreement, however.
Successful reforms in the territorial distribution of power have been quite common in Belgium. Despite the number of veto players, the negotiating actors of both linguistic groups regularly manage to pass comprehensive reform packages. The federal part of the sixth reform, however, follows this trend of forming a compromise between the two linguistic groups and their representatives. Reform success remains relative when comparing new with older reforms. The reform of the Senate was only possible because other parts of the reform were successfully passed in 2012, such as the partition of the electoral district of BHV. When factoring in time, the Senate could only be transformed into a territorial chamber 20 years after Belgian federalisation and in exchange for decreasing powers. As a result, the Senate has been left with a role that is more and more confined to constitutional reforms (Goossens and Cannoot 2015).

Furthermore, individual components of the reform follow contradictory aims which may result in a reduction instead of an increase in the coherence and efficiency of the distribution of competences and finances. Starting with 2014, the selection of senators will be connected to the results of elections to the parliaments of the three regions. The idea of transforming the Senate into a chamber of territorial representation is potentially countered by the synchronisation of electoral dates, which may result in the loss of distinctively regional electoral campaigns. Secondly, granting constitutive autonomy to the Brussels-Capital Region and the German-speaking Community aligns their competences with the two other regions and communities. However, crucial elements of the institutional design of the regional parliament and government of Brussels remain under federal supervision. Thirdly, there are legal opportunities for the subnational units to veer off from the joint election dates. It will be hard for the Flemish Parliament to do this because the six parliamentarians from Brussels who form part of the Flemish Community would not stand for elections at the same time. Fourthly, opportunities were created for the subnational units to coordinate decrees and to adopt common decrees elaborated in interparliamentary commissions. If governments choose to do so, it will become harder for the electorate to hold governments to account. Presumably, Belgian federalism, however, will not become more efficient or coherent this way. Finally, the continued success of individual constitutional reforms in Belgium comes at the expense of the long-term success of terri-
torial stability since the number of competences that can be decentralised as part of the federal compromise will decrease over time.

References


In Search of Functionality and Acceptance: The Distribution of Competences in Bosnia and Herzegovina

Soeren Keil and Jens Woelk

I. Introduction

The political system in Bosnia and Herzegovina\(^1\) is one of the most complex systems in the world. When we analyse the Bosnian political system and the distribution of areas of competence in this complex system especially, it is important to not only focus on the extreme decentralisation of competence distribution, but also to take the ongoing state-building processes and the long-term effects of the violent conflict in the early 1990s in the country into account.

Bosnia and Herzegovina became an independent country in April 1992. It was the fourth country after Slovenia, Croatia and Macedonia to become independent from the dissolving Yugoslavian federation. In the wake of the declaration of independence, violence broke out as a result of fears amongst the Serbian population in Bosnia (about one third of the population) of ending up in a state in which they would become a minority and would be dominated by Bosniaks (around 40% of the population) and Croats (around 17%). Serb paramilitaries, with the help of the Yugoslav army and political support from Serbia, aimed at separating those territories from Bosnia which had Serbs living in them and combine them into a Republika Srpska (RS), which would later join Serbia. Bosnian Croats also attempted to establish a Croat territory in Bosnia and unite it with Croatia after 1993. However, both secessionist attempts failed; first, in 1994 the Croat project to partition Bosnia ended with the Washington Agreement, which brought Bosniaks and Croats together to unite against Serb aggression in Bosnia. The war in Bosnia ended in December 1995, once NATO had intervened and Croat and Bosniak forces were able to take control of

\(^1\) The terms Bosnia and Herzegovina and Bosnia will be used interchangeably, following the general use in research literature. If not otherwise specified, this always refers to the whole country.
substantial territory previously held by Bosnian Serbs. The war ended with the Dayton Peace Agreement, which was signed in Dayton, Ohio (USA) in December 1995 as an agreement between the presidents of Bosnia, rump Yugoslavia and Croatia. They represented the three countries involved in the conflict in Bosnia and the three main ethnic groups in the country.

As part of the peace agreement it was agreed that Bosnia would get a new constitution. This constitution can be found in Annex IV of the peace agreement. The constitution has never been approved in a referendum amongst the people of Bosnia, and until today it is the English version which has remained the official constitution for Bosnia, as the elites of the three main ethnic groups have been unable to agree on a translation into the local language(s). The constitution takes its legitimacy from its reference to international values and norms, in particular in terms of fundamental rights, and from the direct intervention of the international community. The international community remains of key importance and has been considered as the fourth constituent part of the constitution, in addition to the three constituent peoples (Bosniaks, Serbs and Croats) (Bose 2002). Until today, it is the international community which has ensured the implementation of the Dayton Peace Agreement and has safeguarded the constitution against direct attacks from within and from outside the country.

This imposed constitution is the foundation of a multinational state, which is home to three constituent peoples who live in two entities: the Republika Srpska (RS), which is mainly home to the Bosnian Serb community, and the Federation of Bosnia and Herzegovina (hereafter: Federation), which is further divided into 10 cantons and is mainly home to Bosniaks and Croats. A complex system based on consociational power-sharing was designed in order to motivate elites from the different constituent peoples to work together and reach compromises.

The aim of this paper is to investigate the complex system of the distribution of competences in Bosnia and Herzegovina. In order to do this, we will proceed as follows: First, we will focus on the “twin union state” (Graf Vitzhum 2000) that Dayton created, and provide an overview of the basics of the political system. Second, we will look at the current distribu-

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2 For a detailed discussion about the Dayton Agreement, see the analysis of the Venice Commission of the Council of Europe. This was published in 2005, but it still remains relevant today (see European Commission for Democracy through Law [Venice Commission] 2005).
tion of competences, their implementation and their actual application. By doing so, we will not only focus on the distribution of competences between different levels of government, but we will also focus on the concrete implementation of the distribution of competences in selected policy areas. Third, we will look at how the distribution of competences has been interpreted and how checks and balances function in the political system. In part four, we will analyse how the distribution of areas of competence has evolved over time in post-war Bosnia. The focus will be on the changing dynamics between the central state, entities, cantons and municipalities. We will assess how the distribution of powers can be changed and which mechanisms are used to ensure that far-reaching changes to the distribution of powers follow a clear legal process. Finally, we will conclude by looking at the most recent developments in Bosnia and Herzegovina, pointing out where reforms are required and focusing on an important judgement of the European Court for Human Rights in relation to Bosnia’s political system.

II. The “Twin Union State” of Dayton

A. The distribution of competences in Bosnia’s complex political system

The current state of Bosnia and Herzegovina is based on the Dayton Peace Agreement of 1995 and is the legal successor of the Republic of Bosnia and Herzegovina. Its constitution can be found in Annex IV of the Dayton Agreement and is therefore part of an international treaty.3

The constitution itself is organised into a relatively long preamble and twelve articles, Article I (Bosnia and Herzegovina), Article II (Human Rights and Fundamental Freedoms), Article III (Distribution of Powers and Responsibilities), Articles IV-VII (Institutions), Article VIII (Finances), Article IX (General Provisions), Article X (Amendment), Article XI (Transitional Arrangements) and Article XII (Entry into Force). The structure of the constitution follows the American model and highlights the influence of American negotiators on the drafting of the document. There are also two annexes to the constitution: The first one focuses on different human rights agreements which are directly applicable to Bosnia

3 For a full text of Bosnia’s constitution, see: http://www.ohr.int/?page_id=68220 [accessed: 19.04.2017].
and Herzegovina, and the second amendment discusses further transitional arrangements. The constitution concludes with a declaration of the Republic of Bosnia and Herzegovina and the two entities, the Republika Srpska and the Federation of Bosnia and Herzegovina.

When compared to previous Yugoslav constitutions, it isrecognisable that Bosnia’s constitution is relatively short. This is a result of the origins of the constitution, which developed out of the negotiations to end the violence in the country and several interim agreements before the Dayton negotiations in November 1995. The constitution itself was written and finalised by the US State Department and played a minor role in the peace negotiations in Dayton, because these focused on which group would control certain territories.4

The political system in Bosnia has two main characteristics: On the one hand, it is possible to consider Bosnia a perfect example of consociational power-sharing (Lijphart 1977), based on an elite grand coalition, proportional representation and veto rights. On the other hand, it can be argued that Bosnia is the most decentralised country in the world. Bosnia’s asymmetrical federal system distinguishes between the two entities and the District of Brčko in Northern Bosnia.5 Furthermore, it is important to point out that the two entities are organised and administered differently, which further increases the complexity of the system.

Grand coalition requirements can be found in the criteria for the formation of the Council of Ministers (Article V.4), the Presidency (Article V) and the composition of the two parliamentary chambers (Article IV). In all of these institutions, there is a focus on the representation of both the three constituent peoples and the two entities. Likewise, the constitution makes clear that ethnic and territorial representation is essential when distributing public offices across and beyond political institutions. In some institutions, such as the Council of Ministers, there is only a requirement for territorial representation (not more than two thirds of the ministers can come from

4 The constitutional framework was designed to allow each side in the conflict to save face. Hence, the RS was to control 49% of the territory, while the Federation would control 51%. Likewise, the power-sharing mechanisms between Bosniaks, Serbs and Croats were designed in such a way as to ensure that they would have to work together and that neither party could be overruled. For the origins of Bosnia’s constitution, see Holbrooke 1999 and Daalder 2000.

5 Brčko became an autonomous district as a result of an international arbitration ruling. The city saw fierce fighting during the war and is strategically important as it combines the Western and the Eastern half of the RS. See also Schreuer 1999.
the Federation and at least one third of the ministers must come from the RS). However, in institutions such as the Presidency and the House of Peoples, there is a combination of territorial and ethnic representation. The three-member Presidency consists of one Bosniak, one Croat—both elected in the Federation—and one Serb—elected in the RS. This is also the case for the House of Peoples, which consists of 15 members, five Bosniaks, five Croats—appointed in the Federation—and five Serbs, who are appointed by the RS Assembly. There is a large number of veto rights built into the political system, giving each political institution and each level an opportunity to veto decisions. This substantial number of veto players has had a negative effect on policy outputs and has made blockades and delays very easy (Bahtić-Kunrath 2011).

The composition of Bosnia’s Constitutional Court as the guarantor of the Dayton constitution also reflects the mixture of consociational and federal elements. There are six Bosnian judges, four appointed by the Federation and two appointed by the RS, while there are additionally three international judges, which are appointed by the Chair of the European Court of Human Rights (Article VI.I[a]).

B. Entities, cantons and municipalities

When assessing the distribution of competences in Bosnia, it is important to take a look at the organisation of the entities. Both entities existed before Bosnia and Herzegovina was recreated as part of the Dayton Agreement. The RS was created in 1992 in order to unite those territories in Bosnia in which Serbs lived and to prepare for their eventual secession from Bosnia (and later integration into Serbia). The constitution of the RS has 137 articles and is substantially longer than the constitution of Bosnia. The constitution is more detailed and demonstrates the ambitions of the RS to become an independent state. It has been changed numerous times since 1992, and even the preamble highlights the century-old fight of Serbs for freedom and independence. Having said this, we must also

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6 While there are no ethnic criteria for the Bosnian judges, in the past there have always been two Bosniak judges, two Croat judges and two Serb judges. The international judges are not allowed to hold Bosnian, Serbian or Croatian citizenship.
7 The constitution, including all changes since 1992, can be found at http://www.ohr.int/?page_id=68220 [accessed: 18.04.2017].
point out that Article 3 of the RS constitution clearly states that Bosnian law is superior to the law of the entity, while at the same time allocating residual powers to the entity.

Figure 1: Political organisation of Bosnia and Herzegovina: The RS and the 10 cantons of the Federation
The Federation of Bosnia and Herzegovina comprises ten cantons:

<table>
<thead>
<tr>
<th>No.</th>
<th>Canton</th>
<th>Centre</th>
<th>No.</th>
<th>Canton</th>
<th>Centre</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Una-Sana</td>
<td>Bihać</td>
<td>6</td>
<td>Central Bosnia</td>
<td>Travnik</td>
</tr>
<tr>
<td>2</td>
<td>Posavina</td>
<td>Orašje</td>
<td>7</td>
<td>Herzegovina-Neretva</td>
<td>Mostar</td>
</tr>
<tr>
<td>3</td>
<td>Tuzla</td>
<td>Tuzla</td>
<td>8</td>
<td>West Herzegovina</td>
<td>Široki Brijeg</td>
</tr>
<tr>
<td>4</td>
<td>Zenica-Doboj</td>
<td>Zenica</td>
<td>9</td>
<td>Sarajevo</td>
<td>Sarajevo</td>
</tr>
<tr>
<td>5</td>
<td>Bosnian Podrinje</td>
<td>Goražde</td>
<td>10</td>
<td>Canton 10</td>
<td>Livno</td>
</tr>
</tbody>
</table>


As demonstrated in Figure 1 above, the Federation of Bosnia and Herzegovina consists of ten cantons. Three of the cantons have a Croat majority (Posavina, West Herzegovina and Canton 10), five have a Bosniak majority and two are mixed (Central Bosnia and Herzegovina-Neretva). While the constitution of the Federation is longer than the constitution of Bosnia and Herzegovina, it is substantially shorter than that of the RS. This is the result of the organisation of the Federation into ten cantons, which each have their own constitutions and decision-making powers. These cantonal constitutions are all longer than that of the Federation and they are also more detailed. The constitution of Canton Sarajevo, for example, has 51 Articles, which describe the areas of competence and the organisation of the canton.8

At both entity and cantonal levels, there are strict consociational power-sharing rules, an analysis of which would go beyond the purpose of this chapter. It is, however, important to highlight that the current power-shar-
ing mechanisms at entity, cantonal and municipality level are the result of an intervention by the High Representative,\(^9\) who imposed changes to the relevant constitutions as a result of an important Constitutional Court ruling, which stated that entities and cantons cannot consider themselves ethnically homogeneous but have to respect the constitutional order of Bosnia, which defines three constituent peoples (and ‘the Others’) (Constitutional Court 2000).

It needs to be highlighted, however, that the RS is organised centrally, with an entity government and municipalities which have very little decision-making powers and whose main role is the implementation of legislation. The Federation, in contrast, is decentralised, with many decision-making powers given to the cantons and, in the case of the two mixed cantons, also to the municipalities. This follows the logic that territorial units, which take major decisions, should be ethnically homogeneous.

III. Distribution of competences

As can be seen from the description above, Bosnia consists of a political system which is multilayered and complicated. The decentralised and asymmetrical nature of Bosnia’s federal system further complicates an analysis of the distribution of competences.

A. Structure of the distribution of competences

Article III of Bosnia’s constitution regulates the distribution of competences. In its first section (Article III.1), it lists all the areas of competence of the institutions of Bosnia and Herzegovina, before highlighting that “all

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\(^9\) The position of the High Representative (HR) was created as part of the Dayton Peace Agreement in order to ensure that an international civilian envoy oversees the implementation of the civilian aspects of the Dayton Agreement. His powers were extended in 1999 (the so-called Bonn powers) to include the power to suspend, change and impose laws, and to dismiss officials who obstruct the implementation of the Peace Agreement. Numerous High Representatives have used these powers extensively; however, since 2006 the HR has abstained from substantial intervention. Today, it is mainly a symbolic office, which serves as an ultimate guarantor of the Dayton Agreement and a final deterrent for those threatening to undermine the fragile peace in the country.
government functions and powers not expressively assigned in this Constitution to the institutions of Bosnia and Herzegovina shall be those of the entities” (Article III.3a). This means that the powers of the central institutions are limited to those explicitly stated in the constitution, while the residual powers lie with the entities.

As a result of the substantial decentralisation of the political system, the competences of the institutions of Bosnia and Herzegovina are very limited. Article III.1 only lists the following areas of competence for the central institutions: a) foreign policy and foreign trade; b) customs and currency policy; c) immigration and asylum policy; d) criminal law (limited to cooperation with Interpol and between the two entities); e) air traffic control; and f) communication and transport policy between the two entities and with international partners. It is therefore no surprise that after the re-building of Bosnia’s institution at the end of the war in 1995, there were only three ministries at the central level. While this number has tripled, Bosnia still lacks state-wide ministries for economy, education and agriculture.

The most important responsibilities in the areas of taxation, security and defence, and all aspects of social policy were given to the entities. In the Federation, most of these responsibilities were further decentralised and decision-making power placed with the cantons. As discussed above, this highlights the different organisation of the two entities. While major decisions in the RS are taken by the RS Assembly, and municipalities only serve as instruments of policy implementation, in the Federation it is the cantons that are the main decision-making bodies. According to the constitution of the Federation (Section III, Article I), the Federation is responsible for defence policy, citizenship policy of the Federation, economic planning, the fight against terrorism and organised crime, licensing of frequencies, energy policy and limited aspects of taxation. Other important policy areas, such as social policy (health, social welfare), environmental protection and the administration of natural resources, are defined as shared areas of competence between the Federation and the cantons (Section III, Article 2). The cantons have exclusive powers in the areas of policing, education, culture, the civil service, local economic development, welfare and taxation (Section III, Article 2).

From a comparative perspective, it is surprising that most competences, which are traditionally seen as attributes of statehood, are given to the entities and not the central state. This is the case for defence policy, policing and taxation. Furthermore, according to Article III.2, entities also have
certain powers in foreign policy. They can sign international agreements with other states and international agreements, if the institutions of Bosnia and Herzegovina agree, and they can develop “special parallel relations” with their neighbouring countries. While these “special parallel relations” do not require the approval of the central state, they are limited because they cannot threaten the sovereignty or territorial integrity of Bosnia and Herzegovina.

Framework legislation or the competence to legislate in an area more generally was not foreseen in Bosnia’s constitution. Instead, the RS has consistently insisted on the separation of powers as outlined in Dayton, because it feared that further decision-making competence for the central state would weaken the entity and ultimately threaten its existence. In the Federation, however, framework legislation has been applied widely, for example in economic policies. In 2000, the Constitutional Court strengthened the power of the central state and the institutions of Bosnia and Herzegovina by arguing that the list provided in Article III.1 should not be seen as complete and closed, but as a qualified list. In particular, the Constitutional Court argued that based on the distribution of competences and the overall structure of the constitution, the institutions of Bosnia and Herzegovina have a responsibility to pass framework legislation that will affect the entities (Constitutional Court 2000, Decision Part IV, paragraphs 24, 31 and 34). This, so the court argues, is particularly important for the provision of equal fundamental rights and freedoms across the entities and in the area of economic integration (the movement of goods, services, capital and people, Article I.4). The Constitutional Court concluded that in order to ensure the functionality of the Bosnian state and to prevent any form of disintegration, it is important that the institutions of Bosnia, entity institutions and cantons work together in these areas and are jointly responsible for them.

Hence, Article III.1 should not be interpreted as an automatic guarantee for the entities as holders of the residual powers. The provisions about state institutions such as the Presidency and the state parliament also allow for the transfer of powers to the institutions of Bosnia. For example, Article V.5(a) states that the Presidency is also (jointly) commander-in-chief of the military, despite the fact that the responsibility for defence and military affairs was given to the entities. Decision-making, Constitutional Court decisions and agreements between the different levels have shaped Bosnia’s constitutional politics, with the result that they do not reflect the reality of the Dayton constitution anymore.
The different organisation of the entities has also influenced the role of municipalities. While municipalities are units of decentralised administration and have very little decision-making powers, they are much more important in the Federation. In particular, in the two cantons shared by Bosniaks and Croats (Central Bosnia and Herzegovina Neretva), there has been a substantial devolution of decision-making powers to the municipalities in education, culture and economic planning. As stated above, this was done in order to ensure that decisions are made at a level in which there is relative ethnic homogeneity. This is a core principle of Bosnia’s constitutional set-up. Decisions are mainly made at levels in which one of the constituent peoples has a clear majority.

**B. Implementing the distribution of competences—selected policy areas and finances**

The implementation of decision-making powers has also differed between the different levels of the federal system. While the central level has struggled since 1995 to take important decisions and implement them, the same has not been the case for the entities and cantons. The central level suffered because of ongoing tensions between Bosniak, Serb and Croat elites. It lacked financial and material resources and its re-establishment relied on external support. The entities, on the other hand, were already in existence in 1996, and their systems had been established years before the new Dayton framework came into force. Furthermore, the RS and the cantons in the Federation had been in charge of taxation and tax collection, which gave them access to financial resources, which the central level, which had no direct taxation powers, lacked. The situation of the central level has been continuously improving since 1996, first because it was supported by external actors and external financial assistance, and later because it got access to independent finances (see below). At the same time, it has to be concluded that the entities and cantons lost their privileged position in the system because the central level has been able to take on more responsibilities and has been able to sustain itself. Furthermore, increased debt as a result of high expenditure on welfare and social policy has also limited the possibilities for the entities and cantons (Maglajić and Rašidagić 2011).

Even today, there are frequent disputes between representatives of the entities and the central level over the distribution of powers. This is particularly the case in the areas of transport, infrastructure and economic devel-
opment. Competence disputes are also often the case in the Federation because of an ongoing push for more cantonal autonomy. Croat cantons have also questioned the right of the Federation to issue framework legislation, and have generally been more sceptical and recently even hostile towards the Federation’s institutions.

It is also important to highlight that the complicated decision-making procedure at central level has had a direct effect on its ability to implement its decision-making powers. Decisions at the centre need not only the approval of the two chambers of parliament, but they also need to be approved by the representatives of each entity in each chamber of parliament. This allows MPs from the RS, for example, to block any decision at the centre by abstaining from their vote. In addition, each of the three members of the Bosnian Presidency has a veto right and the ability to halt and delay legislation. Finally, it has to be mentioned that entities and cantons are mainly responsible for the implementation of decisions; hence, non-implementation can also be used as a tactic to delay important decisions or prevent implementation completely.

The next section looks at the changes in the distribution of competences in two selected policy areas (security and defence policy and citizenship policy), before a brief discussion of the distribution of powers in the area of public finances and taxation concludes this section on the current distribution of powers.

1. Security and defence policy

According to the Dayton Agreement and the constitution, all aspects of security and defence policy fall within the competence of the entities. These include the military and the police, the secret services and border control. This provision highlights the decentralised nature of post-war Bosnia, as it is common in federal states that military affairs are the responsibility of the central institutions and not of the subunits. However, the arrangements reached in Dayton foresaw the existence of two armies in Bosnia, one army controlled and financed by the RS, and one army uniting Croat and Bosniak forces under the control of the Federation. Yet, the armies of the Croats and Bosniaks did not fully unite under a joint command and a single structure, so after 1996, Bosnia continued to have three armies under the control of three different and independent institutions. It was only after 2002 that the Croat part of the Federation army was properly integrated in-
to Federation structures. These arrangements were a reflection of the situation in Bosnia in the summer of 1995, when fighting ceased and peace negotiations began. They reflected the existence of different armies with different command structures and based on ethnic affiliation. After 1996, this arrangement became more and more burdensome for the entities, as the maintenance and financing of the military structures absorbed a large proportion of their budgets. This became particularly visible after 2000 when, as a result of a reduction in tensions and the positive effects of NATO peacekeepers, a new conflict became more and more unlikely. Democratic changes in Croatia and Serbia in the same year further reduced tensions in the region and the likelihood of a new conflict. In addition, more active interventions by different High Representatives after 1997 meant that a process of centralisation was underway, which also affected existing security provisions. For example, in 2000 a law was passed by the High Representative to unite the border control service in Bosnia. This responsibility was given to the central institutions of Bosnia, and a new border security agency was created, which was financed and under the control of the central level rather than the entities. In 2004, the High Representative passed a law creating a federal police force, and in 2003 a dialogue started about reforming the military structures in Bosnia. The result of this dialogue was comprehensive military reform in 2005, which was supported by NATO and supervised by the High Representative. The reform foresaw the creation of a new Ministry of Defence at the central level, and the centralisation and unification of all military structures under one command. Today, military reform is still considered one of the big success stories in Bosnia because it was based on an inclusive process, on agreement between the different actors and on clear conditionality stipulated by NATO. As a reward, Bosnia became a member of NATO’s Partnership for Peace Programme and it has since continued its integration into NATO structures, without a clear political commitment to NATO membership. While Bosniak and Croat elites are in favour of NATO membership, Serb elites are much more sceptical. A similar reform process regarding the unification of police structures started in 2004. However, it has not led to the same results and policing remains the responsibility of the entities (and the cantons in the Federation) (Bassuener 2015).
2. Citizenship and fundamental rights

Bosnia’s citizenship law is complicated and in many respects unique. While Bosnia’s constitution highlights the existence of a form of Bosnian citizenship, it remains unclear how this is awarded and by whom. Article 1.7(e) states that the entities and the institutions of Bosnia and Herzegovina can award Bosnian citizenship. However, the constitution also outlines that being a citizen of one of the entities is a prerequisite for Bosnian citizenship. From a constitutional point of view, the central state is more important since the internationally recognised citizenship is that of the state of Bosnia and Herzegovina (and not the citizenship of the entities). However, in political practice it is the entities that administer and have the final say in awarding (and revoking) citizenship. Because of this special status of the entities, and their influence on awarding citizenship, Bosnia’s system has been characterised as a form of fractured citizenship (Dzankic 2015: 75).

Furthermore, when discussing Bosnian citizenship policies, it is important to take into account important decisions made by international actors that have a direct effect on citizenship legislation. These include decisions by the High Representative concerning the design of the Bosnian flag and state symbols, as well as the introduction of a new citizenship law in December 1997.

Holding Bosnian citizenship, nevertheless, does not mean the same rights for all Bosnian citizens. As mentioned above, ethnic criteria play an important role in the composition of Bosnia’s institutions. For example, only members of the three constituent peoples can become members of Bosnia’s Presidency and the House of Peoples at the central level. This was declared illegal and a form of discrimination by the European Court of Human Rights in December 2009. The court ordered Bosnia to change its constitution in order to ensure that members of all ethnic groups can stand for election to these important state institutions (European Court of Human Rights 2009). Despite efforts by the European Union (EU) and the Venice Commission of the Council of Europe to support constitutional reform in Bosnia and implement the decision of the court, no changes have been instigated so far. Elites of the different ethnic groups have not been able to agree on the reforms required, and there remains a dispute between those that see the court decision as a first step towards a fundamental overhaul of the Dayton constitution, and those that support minimal changes to the constitution, just enough to satisfy the court and the EU.
3. Finances

The distribution of finances in Bosnia is unique from a comparative perspective and when focusing on the distribution of competences. The central level had no independent income until 2006; its only revenue resources were customs fees and support from international donors. The constitution describes the financing of the central level in Article III.2 (b) as follows: “Each Entity shall provide all necessary assistance to the government of Bosnia and Herzegovina in order to enable it to honour the international obligations of Bosnia and Herzegovina.” Furthermore, Article VIII.3 states that “The Federation shall provide two-thirds, and the Republika Srpska one-third, of the revenues required by the budget [of the central state level], except insofar as revenues are raised as specified by the Parliamentary Assembly.” The central level relied completely on the entities for financial support, which substantially impacted on its ability to take and implement important decisions. In the first post-war years, the RS regularly refused to contribute to the finances of the central level, which threatened its sustainability and ability to act.

This arrangement, in which the central level is completely financially dependent on contributions from the entities, is very unusual. In most federal systems, central level and subunits share taxation powers and revenue income in order to ensure that each level has access to independent financial resources. In this regard, Bosnia could be compared to the arrangements in the European Union, which also depends on contributions from its Member States to sustain itself and to act. Some authors have argued that the taxation powers of the entities and the centre’s financial dependence on the entities takes Bosnia closer to a confederal model of governance (Spahn 2002). Many international actors, including the European Union and the Council of Europe, share this critique and highlight that the financial arrangements in the constitution are one of the most problematic areas in Bosnia’s constitutional quagmire. As a result of this critique, the High Representative started a reform process in 2003 (Keil 2013: 68ff.; Werner, Guihery and Djukir 2006), which targeted Bosnia’s taxation system and aimed for more unity and a fairer distribution of income. The tax reform of 2006 introduced a countrywide value added tax, which is collected by a newly created central agency. The income from this tax is then shared between the central level, the entities, the cantons and the municipalities, therefore ensuring for the first time that the central institutions have independent access to financial resources. This has not only in-
creased the effectiveness of the central level and its sustainability, but it has also increased its independence from the good will of the entities, thereby contributing to a more stable and sustainable political system.

**IV. Areas of competence: interpretation and control**

In case of controversy, the control and interpretation of competence are exercised by the Constitutional Court of Bosnia and Herzegovina. The court is responsible for decisions on controversies between the state and the entities, the “abstract” control of legislation upon the initiative of members of the Presidency, the president of the Council of Ministers, the president and the two vice-presidents of the Chambers of Parliament or a quarter of the members of each chamber both at the central level as well as at entity level (Art VI.3[a]).

Numerous controversies have been decided by the Constitutional Court regarding in particular (the limitation of) state competence and the participation of entity institutions in the creation of new areas of competence for the central level and/or institutions. While the Dayton Agreement required dynamic implementation, in the entities, in particular in the RS, a defensive attitude prevailed which tried to use the text of the Dayton Peace Agreement as a line of defence against any expansion of central level competence beyond the minimum accepted in the DPA.

In various decisions, the Constitutional Court has clarified in particular the meaning of the areas of competence of the state listed in Article III.1 (Steiner and Ademović 2003, 2010). According to the constitutional judges, this list cannot be considered an exhaustive one; this also means, however, that the residual powers of the entities do not automatically comprise all the subject matter not mentioned in that list. In addition to the state Presidency’s civil command control over the Armed Forces (at the time of the decision still subdivided into three bodies), which also follows

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10 Apart from these procedures, which are central to controversies regarding competence, the Constitutional Court also decides on individual complaints regarding alleged violations of fundamental rights, appeals against judgements based upon constitutional or fundamental rights issues as well as in a preliminary reference procedure upon submission by judges, the so-called incidental control of legislation (Article VI.3[b]).
from Article V.5(a), the Constitutional Court confirmed the central level’s competence in establishing a federal police force.¹¹

The controversial establishment of a State Court, not foreseen in the Dayton Constitution, has been justified by the Constitutional Court with reference to systemic arguments; as such, a State Court is necessary above all for meeting the international obligations of the state regarding the guarantees for adequate and comprehensive protection of fundamental rights against legal measures adopted by state institutions.¹² A kind of subsidiary power of substitution vested in the state emerges from a comprehensive analysis of different decisions in the field of protection of fundamental rights vis-à-vis the entities, at least as long as the latter cannot or do not guarantee these rights at the highest possible level themselves (Steiner and Ademović 2010: 584). In those areas and subjects, exclusive competences of the entities become concurrent powers which can in principle be used, according to the specific situation and with some discretion, by the institutions of Bosnia and Herzegovina in the form of “framework legislation”.

This orientation led to further decisions in favour of state powers, for example regarding controversies concerning the privatisation of enterprises and banks (due to the necessity of guaranteeing property rights), as well as regarding the determination and regulation of official languages by the entities: in both cases, framework legislation by the central level was considered necessary for coordinating the different legislation in the entities in order to guarantee minimum standards in the protection of fundamental rights, as well as institutional guarantees for a “pluralistic society” and a “market economy”.¹³

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¹¹ *State Border Service*—SBS; according to the interpretation of Article III.5(a), 1st period, alt. 3 chosen by the Constitutional Court, the conditions for its application do not necessarily have to be given in a cumulative manner. In the concrete case, approval by the National Assembly of *Republika Srpska* was not necessary and the complaint was consequently rejected, Constitutional Court U 5/98, Partial Decision II (in particular, paragraphs 12 and 26); in the same way U 25/00 (para. 31).

¹² Constitutional Court U 26/01 (para. 24).

¹³ For the concept of framework legislation, see Steiner and Ademović 2010: 589. The decisions quoted there are: on privatisation U 5/98-II (paragraphs 28 and 29); on the regulation of official languages U 5/98-III (paragraphs 57–59) and U 5/98-IV (paragraphs 34 and 63ff.).
Apart from the possibility of constitutional amendments being used to change competence order, which has not been done so far, the Dayton Constitution provides for various mechanisms of cooperation and coordination. These were designed to work as counterweights vis-à-vis the dominant centrifugal tendencies.

A. Procedures for changing the distribution of competence

The tripartite Presidency “may decide to facilitate inter-Entity coordination on matters not within the responsibilities of Bosnia and Herzegovina as provided in this Constitution, unless an Entity objects in any particular case” (Article III.4). However, this call for horizontal cooperation of the entities, coordinated by the Presidency (with its three representatives elected in the entities), is already weak in its formulation: “the Presidency may decide” and “unless an Entity objects”. Thus, in practice this provision does not play any major role.

Apart from horizontal coordination the constitution expressly provides for a procedure permitting the vertical transfer of powers from entity level to the central level (Article III.5). Thus, it is possible, at least in principle, to transfer every power to the central level on the basis of negotiation and consensus (i.e. dependent on political will). In addition, the competence areas referred to in Annexes 5 to 8 of the Peace Agreement are supposed to be exercised by central institutions.14 As a kind of reserve or spare power, the state institutions also have the competence to exercise the functions “necessary for the guarantee of the sovereignty, territorial integrity, political independence and international legal personality of Bosnia and Herzegovina”.15 In all these cases, it is not only possible to exercise transferred powers, but also to establish the institutions necessary for exercising them.


15 See Steiner/Ademović 2010: 607ff for the use of the “sovereignty-clause” in Article III.5 as one of the three independent sources for the establishment of state powers, who refer to decisions U 9/00, U 26/01 (paragraphs 21–26) and U 42/03.
As the two transfer clauses in Article III.5 (a) and (b) allow for dynamic evolution of the constitution, they are highly controversial due to their opposing positions on the role and the nature of the central level. Many reforms have been based upon this flexibility clause, e.g. the establishment of a High Judicial and Prosecutorial Council (HJPC), an authority for indirect taxation (ITA) and the defence reform as well as the resulting reorganisation of the military (Steiner and Ademović 2010: 592). A new area of competence for the central level can be based upon the use of the flexibility clause under one of the following three conditions: (1) an agreement between the entities; (2) if foreseen in annexes 5 to 8 of the Peace Agreement; or (3) if necessary for guaranteeing the sovereignty, territorial integrity, political independence and international legal personality of the Bosnian state. There are two agreements concluded by the entities on the transfer of powers, according to category (1), in order to implement the tax reform described above (2003) and for the defence reform (2006). New central institutions have been created which invoke sovereignty and territorial integrity, according to category (3), in particular the State Border Service and the State Court. Article III.5 (b) does not only oblige the entities to start negotiations on further transfers of powers to the central level; it is also considered an independent basis for competence transfer to the central level.

Despite of the remarkable decentralisation of the political system, the Bosnian constitution also comprises a supremacy clause in favour of federal legislation. According to this provision, the Dayton constitution enjoys supremacy vis-à-vis all contrasting provisions in central level legislation as well as in the entity constitutions and in their legislation (Article III.3(b)).

For the continuous validity of the entity constitutions, which were adopted before the Dayton constitution came into force, the former had to be adapted in order to guarantee their conformity to the latter (Article 16 For the Constitutional Court these are “three different categories, independent from each other”; U 9/00 (para. 10). 17 Article III.5 (b) is considered the basis for the agreement between the entities (and the Bosnian Minister of Justice) by the Constitutional Court regarding “the transfer of certain Entity powers through the establishment of a High Judicial and Prosecutorial Council” (2004); U 17/05 and U 11/08 confirm the validity of the agreement even years after the six-month period foreseen in the article had expired.
XII). The superior position of the Bosnian constitution corresponds with the power of the Constitutional Court to control conformity to the constitution, which is necessary in order to enforce this supremacy (Article VI. 3).

B. The extraordinary powers of the High Representative of the International Community

In practice, the most important mechanism for coordination has been the High Representative, in particular in the first decade after the end of the war. This institution of the international community, outside the constitutional system, was established by Annex 10 of the Peace Agreement. Due to the political blockade of the central institutions in the first few years after the war, the High Representative increasingly became an actor himself. Consequently, in 1997 he was endowed by the Peace Implementation Council meeting in Bonn with his own operational powers (“Bonn Powers”). These far-reaching powers included the dismissal of office holders obstructing the implementation of the Peace Agreement, as well as the right to adopt legislation and other legal acts from domestic institutions. From 1998 to 2006, these coercive and substitutive powers were widely used to impose numerous reforms aimed at strengthening the central level, against the will of elected office holders or against respective vetoes in the institutions.

Among the many examples there are the establishment of further ministries at central level, the establishment of the State Court for civil and criminal matters (the Dayton Constitution only provides for the Constitutional Court at state level) as well as a State Prosecutor, a State Border Police and a State Secret Service Agency.19

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18 This adaptation has never been expressly provided for, which has led to the challenge of some provisions at the Constitutional Court. The judgement in the “Constituent Peoples Case” (U III-5/98), which deals with the conformity of some provisions of the entity constitutions to the Dayton Constitution was implemented only by means of constitutional amendments imposed by the High Representative in 2002 (see above).

19 These institutions were established between 2000 and 2006 by international decree by the High Representative; this is also true for the aforementioned examples of the VAT system, the merger of the three armed forces and the establishment of civilian command over these unified forces.
Since 2003, the international community has been increasingly criticised for its paternalistic approach as well as for a lack of accountability. The fact that the far-reaching coercive powers are neither subject to express limits nor to sufficient external and independent control\textsuperscript{20} raises questions regarding the Rule of Law principles to be implemented in Bosnia, but which should also apply to the international community’s actions. Of particular interest is thus the relationship between the Constitutional Court, as the guarantor of the constitution (and of the constitutional system), and the High Representative, as the guarantor of the implementation of the Peace Agreement, as the latter has actively contributed to shaping reality in Bosnia as well as the constitutional system.

The Constitutional Court considers the Dayton Peace Agreement with all its annexes as one comprehensive system, in particular for questions of interpretation. In accordance with the constitution (Annex IV), the court abstains from dealing with issues regarding the examination of the constitutional conformity of the other annexes or the extraordinary powers of the High Representative. The justification of the latter powers is seen in parallel and simultaneous exercising of state sovereignty and international powers in the name of the sovereign state and in terms of “functional duality”: while the constitutional judges are not able to control (the decision regarding) the use of the extraordinary and international powers originating from outside the constitution, they may control the legitimacy of single legislative or administrative provisions, in so far as these have been adopted, thus replacing the respective decision of domestic institutions. In those cases, measures based upon extraordinary powers also have to fit within the existing constitutional system.\textsuperscript{21}

In particular, the establishment of the State Court (November 2000) and the High Judicial and Prosecutorial Councils—first done in the entities, but also done at central level in 2004—have been repeatedly challenged by leading politicians of the RS, as those institutions were established by international decree and without any constitutional basis (later on, legislation adopted by the parliament of Bosnia and Herzegovina confirmed their establishment). On various occasions, the RS authorities threatened to

\textsuperscript{20} The discussion on Bosnia and the powers of the High Representative has been strongly influenced by Knaus and Martin’s (2003) work, who compare Paddy Ashdown’s mandate as High Representative with British Imperial rule over India.

\textsuperscript{21} For these questions and the cases decided by the Constitutional Court in particular, see Steiner and Ademović 2003: 114f., as well as Marko 2003.
hold a referendum against these institutions and against the validity of their acts on the territory of the RS, thus questioning the authority of the international community as well as Bosnia’s statehood (the true political objective behind these threats).

The initial dominance of the international administration (“international”, i.e. foreign judges and prosecutors, as well as the Human Rights Chamber, police mission etc.) has been drastically reduced in the last 15 years; in the course of increasing and gradual Europeanisation their tasks are nowadays carried out by domestic institutions.22 This raises new questions of coordination between the levels of government, in particular in the process of moving closer towards the EU, which requires uniform representation vis-à-vis European institutions, as well as coordination of technical and financial assistance, and also exerts considerable pressure on the comprehensive system through the conditionality principle. For issues related to European integration, a coordination department has been created, which is intended to guarantee horizontal coordination among the central ministries, as well as vertical coordination between central state institutions and the entities.23

C. Reform of the distribution of competences

The procedure for amending the distribution of powers, according to which constitutional amendments have to be adopted by a two-thirds majority in both chambers of the Bosnian parliament, has only once been used successfully. The district of Brčko was introduced into the constitution in 2009 and then recognised as an autonomous district. Despite various initiatives for constitutional reform (Perry 2015a), which in April 2006 even led to a vote in parliament on the so-called April Package, no constitutional changes have so far been agreed upon.

Prior to the formal procedure for constitutional amendment, as laid down in the constitution, informal processes are of fundamental impor-

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22 This has been the result of the successful completion of the mandate of some of these international organisations and also because more and more powers were transferred from international organisations to local actors; see, for example, Rehs 2006 and Kaplan 2004.

23 Directorate for European Integration (DEI); online: http://www.dei.gov.ba [accessed: 20.04.2017].
tance in Bosnia. Negotiations on constitutional reform have been a domain of the chairmen of the big political parties, not of leading members of parliament, although some of these party leaders do not even have an elected mandate. In addition, international actors exert considerable influence on the frame of the debate that demands certain amendments. These include the High Representative (until 2006), but also the US (for the April Package) and the EU (in particular since 2006) (Perry 2015b). Until 2009, their focus was on how the efficiency and efficacy of the Bosnian state could be improved. Thus, important reform proposals concentrated on limiting the numerous veto rights, simplifying decision-making procedures, as well as on strengthening the Council of Ministers and the centralisation of further areas of competence through the creation of new ministries at central level (Keil 2013: 138ff). Since 2009, though, the debate has changed considerably. The primary objective is no longer a comprehensive reform of the constitution, but the implementation of the aforementioned Sejdić-Finci judgement of the ECtHR. Despite the EU’s focus on the implementation of the judgement after 2009, as part of the conditionality of Bosnia’s path towards EU accession, no progress has been made so far, which has also reflected in Bosnia’s lack of further progress in EU integration.

Apart from the high institutional hurdles of such a reform, this is explained by major actors’ lack of political will. The leading elites of Bosniak, Serb and Croat political parties still exclusively follow their own particular interests without any consideration for the development of the comprehensive system. They still have diametrically opposed views on the Bosnian state and the role of the constituent peoples. While Bosniaks would only approve a reform if it significantly strengthened the central institutions by adding to their areas of competence, the representatives of Bosnian Serbs strictly oppose any centralisation attempt. The political elites of the Bosnian Croats have put the creation of a third “Croat” entity on the political agenda in recent years, as Croats perceive themselves to be discriminated against and excluded in Bosnia as well as in the federation (Bieber 2013).

It is evident that still today there is no common understanding of what the Bosnian state is among the (political representatives of the) three constituent peoples and that Bosnian Serbs and Croats increasingly refuse to cooperate within the current framework of the political system (Keil and Perry 2015: 3–5). The complexity of the system as well as the continuous domination of nationalist parties, with politicians putting their own personal interests above anything else, have contributed to the country’s stag-
nation. Since 2006 the High Representative has not taken any major decision, as the EU has taken over the coordination and evaluation of the reform process in Bosnia. However, the effects of EU conditionality (and its “transformative power”) appear limited, in particular regarding reforms; the progress reports containing annual evaluations issued by the EU Commission have thus been nicknamed “no-progress reports” (Woelk 2012: 109).

VI. Future prospects

Nearly ten years after the initial judgement, there is no immediate prospect of the Sejdić-Finci ruling being implemented. The question of how to guarantee the institutional representation of citizens who do not (want to) affiliate themselves with one of the three constituent peoples still divides political elites. In the current debate on a major reform of the Bosnian constitution, three categories can be distinguished. Representatives of Bosniak political parties argue in favour of a strong reduction or complete abolition of ethnic criteria; this is unimaginable for Serb and Croat politicians. In particular, Croat representatives link any implementation of the Sejdić-Finci judgement with demands to strengthen Croats in Bosnia. Representatives of Bosnian Serbs strictly oppose any further centralisation, even in the context of the implementation of the ECtHR judgement. However, its implementation may—at least potentially—mark the beginning of a major reform project if political elites could agree not only upon the abolition of inherent discrimination in the Bosnian constitutional system, but also on the establishment of efficiency and democracy as fundamental principles for the division of powers in Bosnia.

Apart from these fundamental considerations, other voices calling for fundamental reform of the political and constitutional system emphasise the system’s drastic lack of efficiency. As regards Bosnia’s future integration into the EU, the strengthening of the central level and its institutions is at the centre of these concerns and key to managing the process of preparation for EU accession (Keil 2013: 93). Despite the fact that in recent years conditionality has reached its limits, the EU still plays an important role in the Bosnian reform process.

Recently, even centrifugal forces have raised their voices again, challenging the foundations on which the current system is built. At the end of 2015, the ruling elites in the RS announced a referendum on criminal law...
reform in order to prevent the establishment of an independent court at state level as well as an independent State Prosecutor. According to their argumentation, these institutions are the result of an illegal process of centralisation against the interests (and the autonomy) of the RS, and they will accept it only after approval by the population. Many commentators highlight that these developments are the first public questioning of the processes of state-building and strengthening of the capacities of central institutions since 2006, when direct intervention by the High Representative ended. Further referenda may follow suit, as announced by the government of the RS. There is a particular danger that the RS will call for a referendum on the independence of the entity, thereby completely ending Bosnia’s post-war constitutional architecture and threatening peace in the country. Bosnia and Herzegovina has one of the most complex and complicated political systems in the world. The process of post-war reconstruction has led to a certain degree of centralisation and strengthening of the central level and its institutions. However, this process has mainly been directed from the outside by international actors and has hardly found local acceptance or support. The method of punctual “constitutional corrections” applied so far neither allows systematic examination or adjustment of the substance of the Dayton Peace Agreement, nor does it solve the legitimacy dilemma: it is impossible to achieve fundamental constitutional reform or even a substitution of the Dayton-constitution through judgements made by the Constitutional Court or by means of coercion through the High Representative’s powers of substitution. As a fundamental decision in the constitutional sphere, such a change needs to be based upon wide political consensus and needs to include the participation of the population (Chandler 2006).

Thus, central questions for Bosnia’s statehood remain, while the current system is being increasingly questioned even in its fundamental elements. The distribution of powers in Bosnia’s complex federal system mirrors the problematic situation in the country in general. Functionality and efficiency as criteria only play a minor role in a system which remains characterised by divisions along ethnic lines, discrimination and exclusion.

24 In January 2016, a referendum was held in RS against the implementation of a judgement by the Constitutional Court, which had declared the Serbian National Holiday in that entity unconstitutional. Again, this is an open challenge to the current constitutional system and to the Constitutional Court’s authority as a defender of that system.
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Part 2:
Regional States and European Union
Italy: The Pendulum of “Federal” Regionalism

Günther Pallaver and Marco Brunazzo

I. Introduction and theoretical approach

Italy is not a federally constituted state, since it lacks a number of characteristic constitutive elements. In particular, Italy does not have a regional Chamber of Deputies endowed with corresponding competences. Over the last several decades, the state has taken on a number of reformative steps towards federalism, but it finds itself in a sort of pendulum, swinging back and forth between phases of centralisation and decentralisation (Baldini and Baldi 2014: 87).

Our historical starting point is the second half of the nineteenth century, when the state underwent unification through unity and centralism, although even back then there were voices in favour of Italy becoming a federal state. After the Second World War the issue of regionalism was again taken up. For the architects of the new republic, decentralisation constituted the antithesis of fascist centralism. That way, the various political cultures would return to the respective regions (Putnam 1993) and their particularities (Grasse 2005: 129ff.), and the regions themselves would make an important contribution to the country’s economic development. Although regionalism was, practically speaking, disappointingly fleshed out in the 1948 constitution, the foundations were laid for a form of decentralisation which could potentially be enhanced.

Since the passage of the 1948 constitution, there have been a number of attempts to reform Italy’s institutional architecture—including the relationship between the centre and the periphery—in order to overcome the trials and tribulations of the Italian Republic: e.g., deficits in democracy, economic and social inequality, inefficiency, instability and the loss of central steering capacities (Bartolini 1982: 203) as well as the practice of “surviving without governing” (Di Palma 1977). Within the logic of “dissociative federalism”, these reformative steps indicate an incremental increase in difference and a decrease in uniformity, which is expressed in changes to institutional intra-state architecture and social relationships (Grasse 2012: 798).
Since the 1970s, however, the numerous institutional attempts at reform have either failed or have had a very weak impact. One suitable theoretical explanatory approach for this development is historical institutionalism. It views institutions as products of their origins and continuity and change as “formal and informal procedures, routines, norms and conventions embedded in the organisational structure of the polity or political economy” (Hall and Taylor 1996: 938). From this perspective, institutions pertinently shape the interests, actions and objectives of the actors, who introduce their endogenous preferences and thus influence the outcome of political decision-making processes (Steinmo and Thelen 1992: 1). Similarly, sociocultural norms and values affect institutions, particularly in the area of institutional changes, just as much as historical framework conditions influence the distribution of power and protagonists’ preferences as well as institutional effectiveness (Thelen 2002: 91).

Institutions point to a developmental path whose starting point may be located historically and which is shaped by a specific institutional logic of operation (Ikenberry 1994; Mahoney 2000: 507). Institutional changes are thus seen as processes of increasing gradual shifts, which need not occur exclusively via sudden institutional ruptures (Mahoney and Thelen 2010: 1). These endogenously or exogenously caused “critical junctures” (Capoccia and Kelemen 2007: 341), which question the dominant institutional logics of action or condition them in novel ways, may in Italy be ranked beside the far-reaching political crisis situations from 1943 to 1948, during the transition from the First to the Second Republic from 1992 to 1994, and in the crisis years between 2011 and 2013: in other words, starting with the end of the Berlusconi era to the parliamentary elections of 2013 (Edelmann 2016: 54ff.).

The institution’s logics of action introduced in the Italian constitution of 1948—which stemmed from the country’s experiences with fascism and the political polarisation between the Christian Democrats and the Communists—was based on the principles of proportional distribution and diffusion of power. In the context of the new constitutional architecture’s definition, the primary aim was to balance the power between these two blocks and avoid a concentration of power; it was less a question of efficiency (Edelmann 2016: 58). For decades, the political actors’ preferences remained stable in Italy, which was why the mechanisms relating to how the institutions maintained themselves did not change. As shall be shown below, even far-reaching political crises did not lead the predominant logics of action to decisively veer from their path.
The attempt to change the institutional logics of action in Italy has so far always been connected to a central political leader personality, to Change Leadership (see Blondel 1987; Burns 1978; Elgie 1995; Helms 2000: 411). Such a personality is distinguished by their strong, innovative will. They also have the necessary political institutional power position and personal leadership skills at their disposal to dominate the reform process and to impose their convictions as regards innovation (Edelmann 2016: 69). However, the Change Leader’s attempt to create public consensus for their reforms is countered by various possible veto players, with the result that one may assume the following thesis: The initiatives in the second half of the past century, which aimed at changes in the constitutional architecture of Italy in favour of the regions and towards federalism, were neither based on new logics of action nor on successful Change Leadership. Renzi’s government (2014–2016), which wanted to replace the old operative logic of power diffusion and proportional representation with concentration of power and efficiency, in spite of their Change Leadership, was countered by a series of veto players who held on to the old logics of action, with the result that the most comprehensive constitutional reforms so far, those of 2016, failed.

II. Historical starting point and the Constitution of 1948

For a long time, Italy was considered a centralised, united state, which in the course of its unification process had united a number of more or less independent regional states and which between 1859 and 1918 had annexed various portions of the Habsburg Monarchy. This type of unification process affected the architecture of the Italian constitution and the relationships between the centre and periphery, as can be illustrated by considering today’s regions with normal and special statutes. This process of “unification by incorporation” was accompanied by a gradual process of centralisation in order to achieve administrative uniformity, social levelling among the quite heterogeneous populations and the nationalisation of the elites (cf. Vandelli 2012; 2013).

Under the Albertine Statute (Statuto Albertino), the imposed constitution of 1848, which at first was in force in the kingdom of Sardinia-Piedmont and later, from 1861 to 1946, in the kingdom of Italy, there was only limited leeway for any type of decentralisation. Below the level of the national state, regional administrative bodies of the province authorities were
in place, as were municipalities, which were administered according to
model of the French *Departements* by prefects (appointed governors)
(Ghisalberti 2002: 19ff.). Occasional demands for decentralisation were
refused because the ruling elites feared losing control to their political op-
nonents (Grasse 2000: 96).

The numerous regionalist and autonomous voices that came to the fore
in the wake of the First World War vanished completely during the fascist
seizure of power. So began the authoritarian and centralist new order of
the unitary state, which eliminated the last bit of the remaining autonomy
of the municipalities and provinces. Indeed, by contrast, it heavily en-
hanced the status of the prefects as controlling organs of the centre and of
the regime (Ghisalberti 2002: 357ff.)

Even during the war, and not coincidentally, the Resistance (*Resistenza*)
against the fascist and Nazi regimes demanded democratic renewal of the
state under regionalist federal auspices through the removal of the prefect
system. Among its most important position papers, the “*Carta di Chivas-
so*” of 1943, included a demand for a federal republic on the basis of ex-
tensively self-administering regions and cantons (Giuliano 2008).

The country’s negative experiences with fascism led the newly re-estab-
lished democratic parties to become more understanding towards calls for
decentralisation. The Republic’s constitution, established in the course of
Italy’s democratic reorganisation after the end of the Second World War
and of the dialectic between continuities and ruptures, represents the new
beginning’s core. It was written by all political forces united with the *Re-
sistenza’s “arco costituzionale”* (constitutional arc) (Florida 1995: 5).

Replacing the liberal *Rechtsstaat* (state under the rule of law) with a
new *Rechtsstaat* and a social welfare state, however, became particularly
arduous when it became necessary to find a fundamental consensus among
the mass parties—which by now had become the state’s founders and rep-
resentatives—on the purpose of the state architecture and organisation.
The Christian Democrats, generally speaking, argued for a vertical
(though not exactly federal) separation of powers, and thus for a strength-
ening of the regions. They did this because of their basic opposition to a
centralist state and because of the principle of subsidiary: a fundamental
principle developed by the Catholic Church.

Conversely, the left-wing parties put on the brakes when it became an
issue of moving towards decentralisation, because they viewed it as an ob-
stacle to social reforms, which the state were supposed to implement
(starting) from the centre. The compromise between both big political

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camps, which operated amid the logic of power diffusion and a system of concordance, ultimately foresaw the establishment of a decentralised, unified state (Barbagallo 1996). Considerations for a federal system by the Costituente (constituent national assembly) were a priori not taken into account: out of fear that the unity of the state might break down, but also out of mutual distrust between the parties (Ventura 2002: 113). The upshot was that after the consolidation of their power as a result of the parliamentary elections of 1948 (Ricolfi 2012: 31), the Christian Democrats suspended the renewal of the institutions. This involved the Constitutional Court, The High Council of the Judiciary, the legal institution of the Referendum and implementation by the regions.

The regions, provinces and municipalities were dealt with in articles 114 to 133 of the constitution of 1948 (Falzone et al. 1976: 364ff.). The 20 regions were divided into normal statutes (Piedmont, Lombardy, Veneto, Liguria, Emilia-Romagna, Tuscany, Umbria, Marche, Lazio, Abruzzo Molise, Campania, Puglia, Basilicata, Calabria) and five had special statutes (Aosta, Trentino-South Tyrol, Friuli-Venezia Giulia, Sicily, Sardinia), whereas Aosta and Sicily had received a special statute prior to the new constitution and Friuli-Venezia Giulia as of 1963 (Nevola 2003). The senate, according to the constitution, was to be elected on the regional level (Art 57), but it is not a regional representative.

The constitution of 1948 defines Italy as a “regionalised unified state”. Art. 5 of the constitution determines the unity and indivisibility of the Republic, but also the state’s duty to recognise local autonomies and to foster them. In this vein, according to Art. 115: “The regions are established as autonomous bodies with their own prerogatives and tasks according to the principles laid down by the constitution”. To this extent, the state of Italy is required to orient its legislation towards decentralisation and self-administration. The regions have been raised to a constitutional level but are not units of a federal government. The centre cedes certain competences to the peripheral territorial bodies, but there is no division of powers in a federalist sense of the word. The regions administer their competences by way of the regional council and the regional government elected from it, which is headed by a president.

Under the constitution of 1948, the regions were to be conferred administrative and political tasks, with the result that the regions, in relation to the centre, obtained self-administration, albeit a tentative one. The anticipated legislative autonomy in Art. 117 hardly came into force because the regions, among other things, were granted only competitive legislative
This resulted in legislation in the framework of the principles developed by the government’s laws under the precondition that these regulations contradicted neither the state’s interests nor those of other regions (Art. 117). The competences of the regions were comprehensively listed; everything else fell within the state’s remit. The right to launch legislative initiatives, including initiatives for changes to the constitution and abrogative and affirmative referenda, was thus severely restricted (Arts. 71, 75, 121 and 138). The tripartite system of territorial autonomy was thus constituted by regions, provinces and municipalities, accompanied by further territorial mergers, such as the association of mountainous municipalities (comunità montane), associations of municipalities (unioni di comuni) or the associations of the islands (comunità isolane) (Grasse 2012: 800).

Compared to the regions with normal statutes (ordinary regions), the regions with special (or autonomous) statutes were endowed with many broader competences and primary legislative power. They also had much more generous financing, which was essentially provided by the centre. Yet it was still a far cry from financial autonomy. This meant that until 1970, the regions with ordinary statutes, in the absence of legal and practical implementation, remained “frozen”, whereas the regions with special statutes (Friuli-Venezia Giulia as of 1963) could move along their path to self-administration from the very beginning. In this way, Italy was a regionalised, unified state. However, since it diverged from that—because of its five regions with special statutes—it was an “asymmetrically” regionalised, unified state.

1 Art. 117 of the constitution: “For the following areas, the regions have legal and binding principles within the framework of state laws on the condition that these principles do not contradict the state’s interest or that of any other region. Orders for civil servants and the administrative bodies are dependent on the region: municipal borders; local city and region police; fairs and markets; open pilgrimage or health and sickness assistance; handicrafts and professional training as well as school counselling; museums and libraries in the local bodies; urban development; the tourism and hospitality sector; streetcars and transport services; road construction, water pipes and public works of regional interest; inland navigation and harbours; mineral and thermal water circulation; stone quarries and peat-ditch; hunting; fishing and inland water; agriculture and forestry, handicrafts and other described areas as per the constitutional laws. The laws of the Republic may transfer the power of attorney to the region to exempt necessary by-laws. Online: http://www. verfassungen.eu/it/ital48.htm [accessed: 10.10.2015].
III. Regional emergence

The practice of decentralisation began once the institution of the region was implemented (law 108/1968): in other words, twenty years after the Italian constitution came into force. In 1970 the ordinary regions were finally able to elect their regional councils. In 1971 the regional statute was adopted. Transfers of power and of financial resources followed (law 281/1970). Nevertheless, reservations towards the regions still existed on the part of the federal state and its bureaucracy. Thus, the implementation of the decrees of 1972, which aimed to transfer competences, was extremely restrictively handled. After long and controversial debates, law 382/1975 was passed and, as a consequence, so was the decree of 1977; both the law and the decree delegated legislative and administrative functions more decisively. With corresponding legal measures between 1975 and 1978, the state’s administrative personnel were assigned to regional programmes in the framework of public policy areas, such as healthcare and transport (Cotta and Verzichelli 2008: 196).

The new regional governments, a few of which consisted of centre–left and left-wing coalitions, exerted considerable political pressure on the central government to speed up the renewal process. All in all, however, it must be pointed out that the regional experience was rather disappointing. Restrictive guidelines determined what the regions could implement. Since the regions only had competitive legislative competence, national legislation, in the framework of which the regions had to operate, was able to delay, prolong or even sabotage initiatives. Furthermore, the regional laws were subjected to pre-emptive control by the federal state—namely with respect to their legality in the sense of regional competence and compatibility with constitutional principles, with fundamental state norms, with the national interest and with the interest of other regions. It even afforded the central government the opportunity to appeal to the constitutional court against a regional law—one that had already been passed (ex post). All of this led to the regions with non-autonomous statutes predominantly becoming functioning administrative bodies and much less autonomous legislative organs (cf. Grasse 2000: 208f.).

The regions with the ordinary statute were only minimally endowed with financial resources. According to Art. 119: “The regions have financial autonomy within the forms and limits set by law; these laws they accord with the finances of the state, the provinces and the municipalities. The regions are accorded their own taxes and shares of the federal taxes
according to the necessities of the regions for the realisation of the necessary tasks in the carrying out of their normal competences”. Thus, the regions on principle were entitled to financial autonomy, but this was ultimately determined by the centre (Grasse 2005: 84).

For a long time and to a large extent as a result of these framework conditions, the possibilities of regional autonomy were not taken advantage of. The regions’ efficiency also left much to be desired. An unclear relationship between the central government and the peripheral governments remained (Hine 1993: 271). Indeed, Robert Putnam (1993: 48) looked sternly at the regions and spoke of a “Kafkaesque combination of lethargy and chaos.”

But not all regions could be lumped together. In spite of the institutional homogeneity, there were glaring differences in the policy output of the northern regions at times, which were more active and enterprising, and which conducted more efficient administration and management of finances vis-à-vis the regions of the south and the islands. Above all, historical and structural framework conditions burdened the regions’ unequal development. Italy’s regional system was based ultimately on a parallelism of central and regionally autonomous structures, which led time and again to conflicts as regards competences, to overlaps, and also to inefficiencies and blockades. Italy was thereby neither united nor federalist but rather a hybrid system of an asymmetrical and regionalised unified state.

Between 1970 and 1990 there were a number of demands for reform, such as the Socialists’ project “Grande Riforma” (Acquaviva and Covatta 2010; Bull and Pasquino 2009: 16), which in particular called for more democracy “from below” and greater efficiency from regional institutions. Several territorial bodies, not only regions, were dissatisfied with their narrow autonomy and demanded greater margins for manoeuvre, which related to competences and financial safeguards. In the 1980s, various civic movements rose up to become protagonists of the peripheries. Subsequently, the Lega Nord rose up too, and vehemently at that. As the new political party connecting localism and regionalism, it called for radical and political renewal, and in doing so it accelerated Italy’s political transformation process (Bull and Gilbert 2001; Diamanti 1996).

Amongst others, state law 142/1990 regulated the autonomy of the municipalities, transferred more tasks and responsibilities to them, introduced rules on transparency in the administration, rules in favour of direct democracy, and instituted a type of ombudsman (difensore civico). In this way, the responsibilities and tasks of Italian municipalities became largely
uniformly organised. Between 1991 and 1993, in order to offset the general disenchantment with politics and political parties, which in Italy were above all provoked by bribery scandals (tangentopoli), new electoral systems were introduced on all levels: the state, regions, provinces and municipalities (Tarli Barbieri 2010: 81).

IV. Sluggish reform process

But reform was not only limited to the electoral systems. Rather, in the wake of far-reaching crises at the beginning of the 1990s, the demand for substantial reform of the central state institutions was raised by broad segments of civil society and by new political parties. This related to a crisis of the political class and parties as well as political institutions and national identity (Bull and Rhodes 1997). This great difficulty, accompanied by a black financial and economic crisis, reached into the state institutions, their rules and procedures and the “material” interpretation of the constitution, which had been bent by the parties and placed into their service.

As of the 1960s, reform project proposals would be guided by three demands: apply the constitution, return to the constitution and reform the constitution (Basso 1958). At the end of the 1970s, the demand for a Grande Riforma (great reform) finally took shape (Amato 1980). During these years, the call for renewal (Barbera 1991) led to three bicamerale (two-chamber commissions): The “Commissione Bozzi” elaborated a reform proposal headed by Liberal Party member Aldo Bazzi. It was never discussed in parliament, however (Cheli 2000: 9). The second bicamerale was set up in 1992 and was chaired by former DC (Democrazia Cristiana/Christian Democrat Party) Prime Minister, Ciriaco De Mita, who was subsequently replaced by a representative of the Communist Party, Nilde Jotti. Because of the turmoil surrounding the bribery scandals, however, there were few prospects for any substantial success (Barbera 1990; Bonini 1993). Two fundamental difficulties were on the political agenda of the Commissione De Mita/Jotti: i) the reform of the electoral system, initiated and pressured by a referendum; and ii) issues regarding Italy’s federalism, which in the wake of the Lega Nord’s electoral victory in 1992 had become politically quite expedient. None of them led to political consensus, however. The electoral law was changed by the 1993 referendum, and Italy’s timid federalisation had to wait until 2001 to obtain its first breakthrough (Pallaver 2003: 28).
The third go at reform followed a far-reaching political crisis in which the old party system imploded and was replaced by a new and fragile one. The reform happened under the leadership of left-wing Democratic Party Secretary and later Prime Minister Massimo D’Alema. The new combined majority electoral system (1993), which had replaced the proportional one that had been in force since 1948, also required an amendment to be made to the central constitutional institutions, since these were essentially orientated towards a proportionally representative and consociational democracy.

The “Commissione parlamentare per le riforme costituzionali” (Bicameral Commission) was established by a constitutional law in January 1997 and consisted of 35 deputies and 35 senators. The Commissione was responsible for the revision of the second part of the constitution, entitled “Organisation of the Republic”: i) to change the form of the state; ii) to reform the form of government; iii) to reform the perfect bicameral system (bicameralismo perfetto); and iv) to reform constitutional guarantees. From the very beginning, the Lega Nord wished to enshrine the “right to secession” into the constitution; this, however, was rejected. The main goal was to transform the “regionalised unified states” into some sort of “federal state”. Therefore, the heading chosen for the second part of the new constitution was “The Republic’s Order of Federation”. But the longer the proceedings lasted, the more the federal orientation faded. In the end, terms such as “federalism” or “federal” could no longer be found in the text, since the reformers had agreed on minimalist and rather more “potentially federal reform work”, which was to strengthen the regions. A substantial novelty was the de jure equal status among municipalities, provinces, regions and the national state, even though this was done in gradations regarding functions and competence and within the logics of the subsidiary principle. What was important was that the regions were to receive general legislative competence—excepting certain competences which expressis verbis would be reserved for the state—and financial autonomy in order to sufficiently cover the region’s competences. Lastly, the regions were allowed to determine autonomously their statutes and electoral system (Pallaver 2003: 30).

Within the institutional reforms (e.g., state president, government, courts, referenda, electoral system, European integration), regional and local territorial units were at the centre of the pressure for reforms. Their participation in the national decision-making process resulted in the reorganisation of the bicameral system. The 630 deputies were planned to be
reduced to 400; the 315 senators to 200. Yet the senate’s transformation into a true chamber of the regions was quickly rejected. Instead, the senate, as a Camera delle garanzie, was to be set up for the election of constitutional judges, the High Council of the Judiciary or the members of independent authorities. The Chamber of Deputies as Camera politica was to receive exclusive control of the government and sole legislative competence—except, for instance, for constitutional changes, electoral legislation, the judiciary, broadcasting or local governments (Vassallo 1997: 694).

With regard to competences of the regional and local bodies, the Senato integrato dai rappresentati delle autonomie was to convene: that is, the senate, enlarged by 66 district councillors, as well as provincial and regional councillors. The bicamerale passed the reform package in a timely manner, but it still failed due to the about-face by opposition leader Silvio Berlusconi and to the lack of enthusiasm from the government parties.

In spite of the bicamerale’s failure, the reform process continued. Simultaneously to reforming the bicamerale, Prime Minister Romano Prodi (1996–1998) began to reform those regulations of the regionalist system which did not require a constitutional amendment and thereby a requisite majority. An administrative reform took place under the direction of Franco Bassanini, the minister for public services and regional affairs, which newly attributed functions to the state, regions and other local bodies. In this way, Bassanini reformed the administrative system by means of political-administrative interventions and measures of decentralisation in a federalist sense, whereby a number of administrative competences, together with financial funds, were ceded to the regions (amendment to the local and regional financial constitution of 1997/2000) (Gilbert 1999: 161). In 1999, apart from the administrative reform, a constitutional law was passed which newly regulated the position of the regional presidents (the governatori of the regional government) and the statutory autonomy of the regions. Now there could be direct elections of the governatori, which were granted the principle of policy guidelines, as long as the regional statute did not plan something else (Baldini and Vassallo 2001: 127).

2 Cf. Atto Camera 3931/Atto Senato 2583 and Atto Camera 391-A/Atto Senato 2583-A.
3 On the political level, strengthening the regional executive, among other things, occurred by means of reforming the electoral system: the introduction of the direct election of the president and a majority bonus (cf. Vandelli 2012).
this way, the new governatori received stronger democratic legitimacy. The regions were also entitled to grant themselves a statute that did not require the approval of the (national) parliament, as had been the case up until then. Henceforth, the question of the statute’s constitutionality could only be broached in the space of 30 days.

Giuliano Amato’s government (2000–2001) concentrated on the reform of Title V of the constitution: regions, provinces and municipalities. A constitutional reform passed in September 2000 referred to the work of the bicamerale, which led to strong political and administrative enhancement of the importance of the regions (Legge costituzionale 2001).

The central points of reform affirmed that municipalities, provinces, metropolitan areas, regions and the state make up the Italian Republic (cf. Camera dei Deputati 2002). Rome received a special statute. On the basis of a new sensibility towards ethnic minorities, asymmetrical regionalism and bilingual designations were introduced in the following regions: Valle d’Aosta/Vallée d’Aoste and Trentino-Alto Adige/Südtirol (South Tyrol). Namely, on their initiative, the regions could be conferred further competences (but not the other way around: from the region to the national state). Yet these additional competences were limited to the competitive competence between the national state and the regions, to environmental protection, to general educational guidelines and to guidelines for the justices of the peace.

The most important amendment concerned the reversal of the competences between the national state and the regions and included an exhaustive enumeration of the national state’s competences and of the attribution of all other competences to the regions.4 In the constitution of 1948, the opposite principle was valid. This thus signified the most marked advance

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4 The state (Art. 117 para 2) has exclusive legislative powers in the following matters: a) foreign policy and international relations of the state; relations between the state and the European Union; right of asylum and legal status of non-EU citizens; b) immigration; c) relations between the Republic and religious denominations; d) defence and the armed forces; state security; armaments, ammunition and explosives; e) currency, savings protection and financial markets; competition protection; foreign exchange system; state taxation and accounting systems; equalisation of financial resources; f) state bodies and relevant electoral laws; state referenda; elections to the European Parliament; g) legal and administrative organisation of the state and of national public agencies; h) public order and security, with the exception of local administrative police; i) citizenship, civil status and register offices; l) jurisdiction and procedural law; civil and criminal law; administrative judicial sys-
towards decentralisation and federalism. In addition, the regions’ political autonomy was strengthened: the regions were now directly involved in setting up communal norms and were able to conclude agreements with other states or territorial bodies (also on the national state level).\textsuperscript{5} Apart from this, numerous issues remained in the competing legislation of the state and the regions.\textsuperscript{6}

In terms of financial autonomy, the reform did not deviate much from the traditional paths. Rather, the issue was adapted into the new constitutional framework, which had resulted from the strengthening of the regions. The position of the regions and their autonomous margin of manoeuvre were reinforced by the fact that an entire series of control instru-

\begin{itemize}
  \item m) determination of the basic level of benefits relating to civil and social entitlements to be guaranteed throughout the national territory;
  \item n) general provisions on education;
  \item o) social security;
  \item p) electoral legislation, governing bodies and fundamental functions of the municipalities, provinces and metropolitan cities;
  \item q) customs, protection of national borders and international prophylaxis;
  \item r) weights and measures; standard time; statistical and computerised coordination of state data, regional and local administrations; works of the intellect;
  \item s) protection of the environment, the ecosystem and cultural heritage.
\end{itemize}


\textsuperscript{5} However the national state may step in for the regional bodies—that is, for the metropolitan areas, provinces and municipalities—if they do not comply with international treaties or communal guidelines, or in cases in which public safety, the unity of the national law and the economy, or civic and basic social rights are interfered with (Pallaver 2003: 34).

\textsuperscript{6} According to Art. 117 para 3, the following areas are part of competitive legislation:

\begin{itemize}
  \item international and EU relations of the regions;
  \item foreign trade;
  \item job protection and safety;
  \item education, subject to the autonomy of educational institutions and with the exception of vocational education and training;
  \item professions;
  \item scientific and technological research and innovation support for productive sectors;
  \item health protection;
  \item nutrition;
  \item sports;
  \item disaster relief;
  \item land-use planning;
  \item civil ports and airports;
  \item large transport and navigation networks;
  \item communications;
  \item national production, transport and distribution of energy;
  \item complementary and supplementary social security;
  \item harmonisation of public accounts and coordination of the public finance and taxation system;
  \item enhancement of cultural and environmental properties, including the promotion and organisation of cultural activities;
  \item savings banks, rural banks, regional credit institutions;
  \item regional land and agricultural credit institutions.
\end{itemize}

In the subject matters covered by concurring legislation, legislative powers are vested in the regions, except for the determination of the fundamental principles, which are laid down in state legislation. The regions have legislative powers in all subject matters that are not expressly covered by state legislation. Online: http://www.senato.it/documenti/repository/istituzione/costituzione_inglese.pdf [accessed: 27.02.2017].
ments on the part of the state was abolished: such as, the “state interest” or the state’s preventative control of regional laws. The state could henceforth appeal in front of the Constitutional Court against regional laws only within a certain time frame.

In this context, the subsidiary principle represents the central political key to understanding Italian constitutional reform; it is also relevant for the distribution of competences among territorial bodies in the sense of vertical logic and for fostering the assumption of tasks by social protagonists in the sense of horizontal logic. Since the constitutional law was passed in the second (parliamentary) reading only via the absolute majority of the government parties, it was submitted to a constitutional referendum. With voter participation of 34% (and thus no quorum for the referendum’s legal validity), 64.2% voted in favour and 35.6% voted against.

Still, this constitutional reform, which should have been a substantial step in the direction of federalism, contained a few decisive shortcomings. The terms “federalism” or “federal” did not appear in the reform text; nor did it include a chamber of the regions or regions and local territorial bodies. This ultimately points to the fact that the little political will behind Italy’s endeavours to become a federal state was too weak. Interim regulations were also lacking, with the result that for a more centralistically oriented government, like Berlusconi’s (in spite of Lega Nord), it was easy to interpret the reform regulations as restrictively as possible and to delay the reforms’ implementation. Quite soon problems arose in trying to harmonise the new reforms in the constitution’s second part with its first, general part. Nonetheless, the door to asymmetric federalism had been opened (Palermo et al. 2007).

After the parliamentary elections of May 2001, the centre–right-wing alliance under Silvio Berlusconi replaced the centre–left-wing alliance in the government. This new government, pressured by its coalition partner Lega Nord, called for an amendment to the reform that had been put into effect in 2001: among other things, it called for a chamber of regions as a counterpart to the strengthening of the executive by means of the direct election of the prime minister. After various projects aimed at dividing Italy into three macro-regions (cf. Diamanti 1993; Passarelli and Tuorto 2012) and subsequently after the call for a secession of the north of Italy (Diamanti 1996), the Lega Nord demanded “devolution” based on the example of Scotland. In accordance with this, the regions were to be granted the chance to receive executive competence in the areas of schools, healthcare and regional (local) police. In the sense of the “two-speed approach”,

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the taking-up of these competences was to be immediately realised by regions with (appropriate) organisational and financial capacities; the other regions were to take on the same competences at some later point (Pallaver 2003: 35). This reform was rejected in 2006 by the constitutional referendum (with voter participation of 52.5%) by 61.3% against 38.7% in favour (Pasquino 2015).

V. The performance of the regions

Although the Italian regions have long been characterised by substantially similar institutions and, at least as regards the ordinary statute regions, have exercised the same powers, their institutional performance—i.e. their capacity to solve collective problems raised by a certain context—has been very diverse (Vassallo 2013a; for a historical survey with emphasis on economic policy aspects, see Daniele and Malanima 2007).

Also, the reforms introduced since the mid-1990s have not made the regions substantially different from each other in their institutional features. Although the constitution grants regional administrations relatively wide margins of freedom in determining the rules on the election of their presidents and councillors—and consequently their system of government—all the Italian regions have adopted a neo-parliamentary system characterised by direct investiture of the president of the region and the regional councils. This does not mean that the institutions have not changed with respect to the past. On the contrary, the reforms have significantly empowered the presidents of the regions, who, besides the strong legitimacy deriving from their direct election, also enjoy large majorities in the regional councils. At the same time, the reforms have reduced the role of the councils, which in the past were instead central to the selection of the governing majority. As a consequence, the regional governments are today substantially more stable than in the past.

The extensive empirical research conducted by Vassallo and his colleagues, however, draws conclusions that are only partially different from (and complementary to) those reached by Putnam (1993). Levels of civic culture and economic affluence, as Putnam also argued, are still important factors in explaining the differing performances of Italian regions on many (but not all) policies. Nevertheless, the institutional reforms have been important. In the words of Vassallo (2013b: 33), “the North-South divide, also in terms of the quality of administrative performance, is still substan-
tial, and it seems bound to continue. The good news is that, among so many culpable omissions in its self-reform, politics has made a useful choice in recent years. Introducing the direct election of regional presidents and neo-parliamentary governments has produced government stability where it previously did not exist: Therefore, at least in some areas of public policy, it has increased the chances that, even in socially and economically adverse conditions, regional institutions are somewhat better at performing the tasks for which they were created.

A. The reforms of some public policy areas

Institutional reforms are not the only reforms that modify the relations between the central state and regions in Italy. The new distribution of competences among the various institutional actors envisaged in the 2001 Reform of Title V of the constitution required the adoption of specific regulations in a number of policy areas. However, the new legislation has not solved the ambiguity of the real attribution of competence in widely overlapping domains (for example, in the field of environmental norms or of the norms related to territorial planning) and has, in contrast, contributed to fuelling the dispute between the state and the regions before the Constitutional Court. In addition, even where efforts have been made to achieve real decentralisation of competences, new problems have arisen following the outbreak of the economic and financial crisis. As a result, in many cases the state has tried to take back at least part of the competences it lost. Consequently, a contradictory and conflictual relationship between the centre and periphery has emerged. One can consider three major policy areas as examples: health policy, fiscal federalism and regional participation in the bottom-up phase of national European Union (EU) policy.

In the field of healthcare, Italy has experienced three stages of decentralisation (Ferrera 2005). The first one, which took place in the 1970s and 1980s as a response to the increasing difficulty of centrally managing a widespread health system, was in fact initiated in 1978 with the creation of local health units (unità sanitarie locali, USL) and with the attribution of steering powers to the regions. The second phase took place during the 1990s under the strain of the public finance crisis and the emergence of political actors strongly in favour of decentralisation (or federalism) processes with territorially concentrated consensus, such as the Northern League. During this period, the national health system (Sistema sanitario...
nazionale, SSN) was regionalised: the regions were considered preferable to the municipalities in the management of the services because they can develop more economies of scale. Legislative Decree No. 502 of 1992 for the reorganisation of healthcare regulations, Legislative Decree No. 446 of 1997 providing for the possibility of increasing regional taxation in order to finance the health sector, and the reform of Title V of the constitution in 2001 were the main regulatory steps of this phase. The third phase started with the new century. During recent years, in fact, “the regions have been able to create very different institutional arrangements in terms of supply configuration, buyer-producer relations, access to the regional healthcare system (Sistema sanitario regionale, Ssr) by private service providers, freedom of choice of the patients’ care structure” (Pavolini and Vicarelli 2003: 203). However, in this third phase, the central government has not been watching: on the contrary, it has tried to control the level of regional health spending more effectively by imposing serious budget constraints. In 2001, therefore, the first agreement between the national government and the regions was approved, in which the government pledged to increase the state’s contribution to SSN funding, provided that the regions adopt mechanisms to control health spending and, where necessary, to recover from potential budget deficits. This agreement was then revised in 2005 and 2007. To date, seven of the current 21 SSRs continue to accumulate deficits and state control activities tend to concentrate mainly on them. However, as France (2008: 18) writes, “The seven ‘regions in difficulty’ are in such dire financial straits that they have been prepared to accept severe limitations on their freedom of action. This exercise of central spending power represents a dramatic break with the period pre-2001 when state financing was granted virtually unconditionally”.

Non-dissimilar dynamics can also be observed in the second policy area considered, that of fiscal federalism. The need for greater control of public spending and the need to respond to political pressure stemming from federalist parties’ affirmation (or, in any case, in favour of limitation of the central state’s power) is at the origin of the reform of the tax levy system. The enabling law of 5th May 2009, n. 42, has initiated a process of redefining the economic and financial relations between the state, regions and local authorities with two essential goals. The first is to strengthen the accountability of local administrators towards their citizens. The legislature, in other words, considered that the regions directly exercising the tax authority could make citizens more aware of the merits (or lack) of the choices made by the political class. The second goal is to promote more
effective public spending. It was pursued by overcoming the criterion of historical spending and adopting the standard of cost/needs criterion. In other words, the legislator sought to overcome the inefficiencies that had led to the allocation of funding calculated on past spending in favour of a more equitable, effective and efficient mechanism. In short, the enabling law was concerned, on the one hand, with making the regions more transparent, and, on the other hand, with continuing to provide the local authorities with relatively stable and sufficient financial resources to provide the services they were required to deliver.

Fiscal federalism has, however, encountered two interrelated obstacles. The first concerns the adoption of implementing decrees, which, after the first two years since the enabling law came into force, has undergone a major slowdown (Grasse 2016: 368). The second hurdle is the outbreak of the international economic crisis that led the Economic and Monetary Union countries to sign the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union (also known as the “Fiscal Compact”) in 2012. This treaty forced Italy (and other European countries) to enact a constitutional reform on 20th April, 2012, with Constitutional Law n.1, entitled “Introduction of the principle of budgetary balance in the Constitutional Charter”. In fact, the need to comply with tight budgetary constraints at European level has led to a halt in the process of Italy adopting fiscal federalism. As a consequence, a process started which led to further limitation of the spheres of local authorities’ financial autonomy and an increase in the central state’s capacity to impose constraints and limitations on the autonomy of the regions themselves (Lo Duca 2014).

The third policy area considered here concerns regional participation in the ascendant phase of European law. The approval of the Treaty of Maastricht and, lastly, the Lisbon Treaty have forced the governments of the EU Member States to reconsider the role of regions and territorial entities in defining their European policy. After all, there are more and more numerous decisions taken by the EU that affect the competences of subnational institutions (Brunazzo 2005). In addition, the Lisbon Treaty itself aims at enhancing the role of the representative institutions, particularly at local and regional level. Article 42.2 of the TEU, for example, recalls that the EU “shall respect the equality of Member States before the Treaties as well as their national identities […] inclusive of regional and local self-government”. Article 5.3.1 TEU stipulates that, in accordance with the principle of subsidiarity, the EU will intervene in areas not falling within its exclusive competence “only if and in so far as the objectives of the pro-
posed action cannot be sufficiently achieved by the Member States, either
at central level or at regional and local level”. Finally, the Lisbon Treaty
emphasises the principle of proximity, namely the fact that decisions must
be taken “as close as possible to the citizens” (Ingravallo 2013).

In Italy, these EU reforms have gone hand in hand with the adoption of
the 2001 constitutional reform and the adoption of laws which aim to
strengthen the involvement of the Italian regions in EU decision-making.
In particular, the so-called Legge La Loggia of 5th June, 2003, No. 131,
then replaced by Law No. 234 of 24th December 2012, has sought to regu-
late an area of policymaking attributed to the monopoly of the national
government as part of foreign policy for a long time.

Law No. 234/2012 therefore establishes the Inter-ministerial Committee
on European Community Affairs (Comitato interministeriale per gli affari
 europei, CIAE), whose objective is to contribute to the government’s poli-
cy lines in the process of forming the Italian position in the preparation
phase of EU acts. Once defined as guidelines in the CIAE, they are com-
municated to the European Policy Department (Dipartimento Politiche
Europee), which prepares the unitary definition of the Italian position to
be subsequently represented, in agreement with the Ministry of Foreign
Affairs, at EU level. Secondly, the law requires that the special session of
the State-Regions Conference (Conferenza Stato-Regioni)7, which is de-
voted to European issues, be convened every four months (instead of the
previous six). Finally, it stipulates that the government is obliged to submit
draft European legislative acts to the State-Regions Conference and the
Conference of Presidents of their assemblies, in particular when matters
falling within the competence of the regions are affected. Nevertheless,

7 The Permanent Conference on Relations between the State, the Regions and the
Autonomous Provinces of Trento and Bolzano was established by Legislative De-
cree no. 281 of 28th August 1997 in order to foster cooperation between the activi-
ties of the state and those of the regions and autonomous provinces. It constitutes
the main link between central government administrations and the regions. The
State-Regions Conference is the venue where the positions of actors from different
institutional levels are represented, and the seat where the government acquires the
regions’ opinion on the most important administrative and regulatory acts of region-
al interest. Moreover, it is the place where loyal cooperation between the central
and regional administrations can become a reality, and where the regions can con-
tribute to the government’s choices in matters of common interest. In addition, it
meets in a special community session to address all aspects of EU policy, which are
also of regional and provincial interest (Carpani 2007).
Drigani (2013) remarks that regional involvement is still limited and ultimately coincides with the role played by the State-Regions Conference. However, even in this case regions are weak. For example, if the regions do not agree, the government can proceed in any case in defining its position. Secondly, the regions have to agree with each other before meeting with the government, which is obviously not easy. In short, “... it emerges that the state can only lead the ascending phase alone, given that the regions do not have a role of real influence” (Drigani 2013: 943).

VI. Constitutional reform and a new trend towards centralism

During the 16th legislative period (2008–2013), Italy’s severe financial and economic crisis led to a reconsideration of limiting regional autonomies based on the legislative and administrative autonomy that had been consolidated in 2001. The weakening economy was the main factor that had persuaded those leading this process. In 2012, Prime Minister Mario Monti (2011–2013) introduced a draft of a constitutional law, which foresaw re-centralising the constitution in regard to regional autonomy. The mandate for the reform was to realise the federal state’s legal and economic unity. Similarly, Enrico Letta’s government (2013–2014) appointed a commission on constitutional reform, which foresaw inter alia the reform of the system of the regions and of the local district bodies and thereby the reduction of competitive legislation. Both initiatives came to naught (cf. Edelmann 2016: 291–314).

Following Italy’s extremely critical years—2011 to 2013, when a government of “experts” was more answerable to the (republic’s) president than to the parliament and as the country was saved from economic disaster—new elections (2013) were held and a transitional government was formed. Matteo Renzi took over the leadership of the Democratic Party (2013) as well as the office of prime minister (2014).

In order to replace the old logics of action with proportional distribution and diffusion of power through a new logic of effectiveness and power, Renzi’s government introduced a novel process of reform. This was meant to realise these goals through a new electoral system and constitutional reform (Bull 2016: 89ff; Edelmann 2016: 325ff.).

In May 2015, the Italian parliament passed a new electoral law entitled Italicum, which has the following characteristics: a majority bonus of 340
seats out of altogether 630 seats (54%) for the one party which receives at least 40% of the votes. If no party list receives 40%, there will be a run-off between the top two opponents. The victorious list receives the majority bonus. On the national level, there is a threshold of 3% (cf. Legge 2015).

The final constitutional reform was passed by parliament in April 2016, for which a referendum was called on 4th December (for a constitutional referendum, unlike for an abrogative referendum, a simple majority without a minimum quorum of participation is sufficient) (see Ministro degli interni 2016a), based on the following reform intentions: i) overcoming the equally balanced bicameral system; ii) reducing the number of MPs; iii) reducing the overhead expenses of the public institutions; iv) eliminating CNEL (National Council for Economics and Labour); and v) revising Title V of the second part of the constitution (Disegno di legge costituzionale 2016).

According to the reform proposal, the Italian parliament was to continue to consist of two houses: a Chamber of Deputies and a Senate. However, the political weight was to clearly shift towards the former. The government would require (a vote of) confidence only from the chamber, which would be responsible for the government’s political alignment and control. The new senate was to represent the territorial bodies: namely, the regions and municipalities. The latter was to comprise 100 members, whereby 95 were to come from the regions. Five senators may be appointed by the head of state to serve for seven years; they should be among those people who have honoured the nation through their outstanding achievements in the social, scientific, artistic and literary fields. Former presidents of the republic, as had been the case up to now, would remain senators. However, the aforementioned 95 senators would no longer be elected directly; instead, 74 would be sent by the 19 regional parliaments and by the two provincial parliaments of the autonomous provinces Trento and Bolzano, and 21 would be sent from the ranks of mayors (Romboli 2015).

The concentration of legislation in the Chamber of Deputies was intended to correspond to the concentration of power in the centre at the expense of the sub-state regional territorial bodies. The autonomy of the regions, which had been strengthened in 2001, as well as the “federalism of taxation” had not delivered the desired results, according to the government. On the contrary, a number of scandals in some regions brought to light poor administration of public resources and thereby discredited the regions in the eyes of public opinion (Bilancia and Scuto 2015: 7).
As an important step, the constitutional reform additionally included the elimination of approximately 100 provinces,\(^8\) with the result that apart from the approximately 8,000 municipalities and nine metropolitan areas with administrative powers below the national state level, there would only be 20 regions that conducted territorial administration. The expected advantage for the state was administrative rationalisation and a reduction in costs. As a complementary measure, competing competences would be transferred to the state. These competences, in which the state had set the essential principles by which the regions could organise their corresponding affairs, had been strongly expanded in the course of the constitutional reform of 2001. This had allowed the regions to be fortified in their organisational possibilities. The argument was made that such competitive competences had led to permanent conflicts between states and regions and to an accumulation of legal proceedings before the constitutional court; thus the regions were again to be significantly restricted in their areas of competences (which, as stated above, would now go to the state) (Marcelli and Giammusso 2006). Furthermore, the state’s exclusive competence was to be greatly expanded once more.

An exception in the new distribution of competences was to be accorded to the five regions with special statutes (Sicily, Sardinia, Aosta, Friuli-Venezia Giulia and the two autonomous provinces Trento and Bolzano). For these a particular protective clause was planned in the interim. This clause implied that the provisions of Chapter IV of the constitution (the distribution of competence and supremacy clause) would not be applied until their statutes were revised, which was to be carried out on the basis of agreements with the regions and the autonomous provinces.\(^9\)

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\(^8\) With the law of 3rd April 2014 n. 56, most provinces in regions with ordinary statutes were transformed into second-level administrative bodies with restricted elections, while ten provinces were transformed into metropolitan areas. Online: http://www.gazzettaufficiale.it/eli/id/2014/4/7/14G00069/sggl. http://www.gazzettaufficiale.it/eli/id/2014/4/7/14G00069/sg [accessed: 03.04.2017].

\(^9\) For the region Trentino-South Tyrol, especially for the province of Bolzano, an international safeguard of autonomy from the Gruber-De Gasperi Agreement of 1946 was added, as were subsequent agreements between Italy and Austria. The Constitutional Court had already established a legal framework for the formulation of “agreement” (di intese), all the more so since this term can be found in the current constitution (Art 8 para 3). The Constitutional Court upheld the opinion that the parliament wields the regulative sceptre. Cf. Constitutional Court decisions No
The constitutional reform appeared to be aimed at reorganising and simplifying competences between the state and the regions (Bilancia and Scuto 2015: 22). In fact, however, the regions would have lost competences and thus political weight. The transfer of the coordination of public finances and the tax system from a competitive affair to the exclusive competence of the state alone substantiates this process as one of centralisation. In this context, an important contribution regarding the tendency towards new centralisation is played by the Constitutional Court, which in terms of conflicts of competence, such as in the framework of competitive authorities, generally speaking decides in favour of the state and not the regions (Parisi 2011: 370).

The debate between those who were pro and contra such a constitutional reform was fiercely and contentiously carried out: between both political camps (as well as within each camp) and among scholars (cf. Ceccanti 2016; Crainz and Fusaro 2016; Fadda 2016; Guzzetta 2016; Rodotà, 2016; Rossi 2016; Settis 2016; Zagrebelsky 2016).

This constitutional reform was rejected in a referendum on 4th December, 2016. Voter turnout was 65.5%, with 59.1% voting against and 40.9% voting in favour (Ministero degli interni 2016b). The only ones that voted for the reform with a majority were the regions Trentino-South Tyrol, Emilia-Romagna and Tuscany. As a result of this outcome, Prime Minister Renzi stepped down. The constitutional reform was put on hold for the time being, and a month later the Constitutional Court declared important portions of the newly introduced electoral system, which had not yet been put into practice, unconstitutional (Corte Costituzionale 2017; Dickmann 2017).

VII. Summary and explanatory model

In the immediate post-war period and again soon after the political stabilisation of the 1950s and 1960s, Italy ranked as a country in need of reform. This was in order to reverse the state’s lacking efficiency and its diminishing steering capabilities. As a result, there was a delay in the regionalisation that had been planned in the 1948 constitution. Establishing the re-

gions and thus realising decentralisation was carried out only as of 1968, at which point Italy started on its path towards “a regionalised, unified state” for the first time. As was already intrinsic in the Costituente (constituent assembly), the definitive birth of the regions occurred in the logics of action to safeguard power. The political actors of both big subcultures had no interest in making a substantial change to the constitutional architecture; rather, they persisted with the logic of power diffusion and political concordance and thus with a consensus-oriented party democracy. Ultimately, this also held true for the Grande Riforma launched by Bettino Craxi, for both of the later parliamentary explorative committees and for the Bicamerale Bozzi.

This was also true for the four constitutional reform projects elaborated in the so-called Second Republic: i) Bicamerale De Mita/Jotti; ii) Bicamerale D’Alema; iii) Reform of the Constitution’s Title V; and iv) the Devolution project\textsuperscript{10}. Both bicamerale commissions failed and the two other reforms were approved by the parliament, but only by the respective government majorities. The reform of Title V, as advanced by the centre-left government and which led to a strengthening of the regions, was confirmed by a constitutional referendum. However, the subsequent centre-right-wing government essentially thwarted its resulting implementation. The Devolution reform succeeded in overcoming the parliamentary hurdle, but it was ultimately rejected by a constitutional referendum.

As regards each of the four attempts at reform, Edelmann (2016: 266ff.) convincingly shows that just as in the First Republic, the political system was determined by dynamic path dependency. Despite the obvious Critical Juncture (the end of the Cold War, corruption scandals, civic protests, the party system’s implosion), the institutional logics of action and the preferences by the protagonists—in the sense of power diffusion and proportionality—remained unchanged, despite the communicative orchestration of innovation and rupture with the past.

Nor was there any Change Leadership. De Mita and Jotti had been socialised in the First Republic’s concordance culture; D’Alema was a representative of the old actors’ preferences; Berlusconi withdrew his support

\textsuperscript{10} The two constitutional commissions of the 16\textsuperscript{th} legislative period (2008–2013), that is, the Commissione per la revisione dell'ordinamento della Repubblica and the Commissione Quagliariello, did not produce any definitive results. For this reason, they are considered of little relevance and have not been taken into account in our analysis.
for the reform when his own interests (in the judiciary) were not taken into account. Thus the motivation for reform simmered on a low flame: Negotiation processes stalled; divergences on substantial matters were not overcome; and the decentralisation of the state was called into question time and again. Despite parliament passing the Title V reform (Prodi’s government, confirmed by constitutional referendum) and the Devolution (Berlusconi’s government, rejected by constitutional referendum), both reforms were characterised by path-dependent continuity of the elite’s preferences and by the absence of a Change Leader. In both cases, there was strong pressure from civil society (in particular in the north) and from the Lega Nord to lead Italy on the federal path, with the result that one could have expected an institutional path-divergence development. In the first case, although reorganisation of competences emerged between the state and the regions, uncertainties regarding competitive competences remained. Moreover, coming to a decision in favour of a Chamber of Deputies for the regions seemed impossible. In the second case, although a Senato federale was set up, it foresaw no substantial distinctions in its functions. Here, too, the Devolution remained inconsistent. The backdrop to this was the lack of will towards innovation on the part of the respective leaders who, despite varying motivational frameworks, were oriented towards safeguarding power in the logic of the established actors’ preferences (Edelmann 2016: 270).

After the Critical Juncture (serious debt and financial crisis, political crisis) in the final period of the Berlusconi era and after a short intermezzo in 2013, Letta’s interim government was capable of little more than a declarative policy on constitutional reform. In 2014, Matteo Renzi became prime minister and he declared that reforming Italy would be his main objective (cf. Renzi 2013; Edelmann 2016: 325ff.). Renzi has been generally credited with institutional, path-divergent logics of action. He aimed at replacing power diffusion and proportionality with a concentration of power and efficiency in order to introduce a sociopolitical process of modernisation within the framework of a majoritarian democracy (Galli et al. 2015). To this end, the new electoral system should have served with its majority bonus, along with his policy of “scrapping” the old political class within his party. For precisely this reason, he has been ranked a Change Leader (Bordignon 2014: 1; Pasquino 2014: 548). Despite resistance within his own party, and due to his strong personal leadership, he succeeded in pushing through his constitutional reform project in parliament. Yet here the path towards a federal order started to unravel. Whereas the role of the
regions had been strongly enhanced in 2001, precisely in view of Italy’s efficiency and economic innovation, the same argument about efficiency was used in the course of the reform of 2016 to weaken the regions again in favour of the central state. The elimination of the perfect bicameralism and the senate reform connected with it, the rationalisation of the legislative process in favour of the Chamber of Deputies, which thus supported the executive branch, and the recentralisation and intensive trimming of regional competences should have constituted the path-divergent, institutional logics of action.

But in December 2016, this did not happen: the constitutional reform was clearly rejected. A whole range of veto players opposed the Change Leadership. These included political elites (opposition parties, but also some members of the governing PD), academic elites (above all constitutional lawyers) or media elites (coverage of the constitutional reform ranged from critical to outright rejection). Thus, the institutional logics of action of the past continued.

Since Italy’s unification, the development of its territorial constitutional architecture, alongside the tension between the centre and periphery, may be summed up as follows:

*Figure 1. The development of the organisation of the state of Italy, 1861–2017*

| Centralised, unified state (1861) | Regionalised, unified state with five special autonomies (1948) | Asymmetrical regional state (1970–72) | Semi-federal regional state with increasing asymmetry (as of 2001) |

Source: Grasse 2012: 800, and adaptations by the authors.

Following its national unification in 1861, Italy was set up as a centralised, unified state. It remained so with varying hues until the end of fascism and the Second World War. The republic’s democratic founding, with its constitution of 1948, laid the basis for a regionalised, unified state, which by virtue of its five special autonomies transcended the principle of homogeneity through differentiation. Establishing regions at the beginning of the 1970s led Italy into an asymmetrical regional state. As a result of the constitutional reform of 2001, we can speak of a semi-federal regional state with increasing asymmetry, because the legal status of those regions
with a non-autonomous statute was constitutionally strengthened, because these regions were able to extend their competence at varying speeds, and because the regions with a special statute differentiated among themselves more and more. Yet, there was still no Chamber of Deputies on the regional level. In the logics of dissociative federalism, the next and decisive reform measures should have transformed Italy into a federal state. The constitutional reform of 2016, however, would have let the pendulum swing back in the direction of centralism. Although this was unsuccessful, one may observe the wind of political public opinion now blowing in the federalists’ faces.

References


Spain: Complexity, Counteracting Forces and Implicit Change

César Colino and Angustias Hombrado

I. Introduction: The Spanish autonomic state and the historical development of power distribution

This chapter tries to understand the political basis for the allocation, exercise and changes in the distribution of competences in the Spanish territorial model. To that end, this first section offers an overview of the creation of the Spanish autonomic state; the main rationale and essential features of the model designed by the 1978 Spanish constitution; and the dynamics that have emerged from there. Afterwards, section two looks in more detail at these dynamics by examining a selection of areas of competence in several policy areas. Section three explores the evolution and change in the distribution of competences through various—formal and informal—mechanisms and the problems associated with them. The final section provides some short concluding remarks.

Arguably, the current system of competences has historical antecedents in the territorial model established by the 1931 republican constitution, which was in turn partially based on the 1920 Austrian constitution. Three territories, namely Catalonia, the Basque Country and Galicia, voted for statutes of autonomy under the II. Republic in the 1930s; for that reason, they have come to be known as “historical” Autonomous Communities (hereafter ACs). Valencia, Andalusia and the Canary Islands also prepared regional statute projects, but the outbreak of the Civil War prevented respective referendums for their approval being called (Aja 2014; Biglino 2013; Blanco Valdés 2014; Muñoz Machado 2012; De la Quadra-Salcedo Fernández 2014).

During the transition to democracy, between 1976 and 1979, action based on executive and constitutional deliberations showed a clear will to accommodate the regions with nationalist movements and important historical claims for self-government, as confirmed by the creation of provisional regimes of autonomy (the so-called preautonomías or regimenes preautonómicos) in several regions. At the same time, there were increasing movements on the part of some central and regional elites to respond
to the societal pressures felt by most of the population across all the Spanish regions and put an end to economic and political centralism, which was identified with dictatorship at the time; whereas the necessity of more general devolution was associated throughout the country with democracy, better governance and economic development. The establishment of thirteen pre-autonomy regimes predetermined the final evolution of the model with 17 ACs. Without a doubt, the proximity of decision-making and rationalisation of public management and policies, which are considered usual rationales of decentralisation in many countries, only came as a side effect and were used as an ex-post justification; but it was clear that the main drivers of decentralisation were political and not functional in nature.

The first motivation mentioned seemed to lead the system towards asymmetrical devolution at the start, whereas the second required general decentralisation, with the result that an open formula combining the two possibilities was found. The diagnoses behind regional politicians’ striving for autonomy were different, as seen in their discourses. In regions with strong political identities and nationalist movements, autonomy was conceived as the recovery of previous historical experiences of autonomy. In underdeveloped regions, political autonomy seemed to entail new opportunities for economic development in a time of international crisis instead. For many people here, both among the regional elites and the larger population, devolution was perceived as a means of avoiding a repetition of the internal emigration of the previous decade, which would also enable the return of emigrants.

Some authors have defined the Spanish territorial organisation as “sub-constitutional” and “pre-constitutional” (Fossas 1999). It was sub-constitutional because the devolution process was not completely regulated in the constitutional pact. Devolution was inspired by the principle of choice or voluntariness (the so-called principio dispositivo), inherited from the experience of republican decentralisation in the 1930s. According to it, the initiative to accede to devolution was left to the very territorial entities that would benefit from autonomy, and had to be negotiated with the central government. It was left to the Regional Statutes of Autonomy—approved by the national parliament—to flesh out the main aspects of autonomy, such as the responsibilities and internal organisation of each region, always within the framework of some exclusive central competences and the basic constitutional principles of unity, equality and solidarity. These charters or statutes of autonomy are both national organic laws and the basic institutional—quasi-constitutional—norms of the regional entities.
They were utilised to complete what the constitution had left open for the sake of successful consensus-building; and they had to be approved and reformed through a procedure that represented some kind of pact between the regional parliaments and the Spanish one. Due to their own amendment rules and the fact that they could not be unilaterally amended by the Spanish parliament, the statutes of autonomy gained higher constitutional status.

The aforementioned provisional regimes of autonomy also made the model pre-constitutional to some extent. In fact, prior to the approval of the constitution and beginning with Catalonia and the Basque Country, thirteen pre-autonomy regimes were passed in 1977 and 1978, which granted those regions limited responsibilities but a strong symbolic relevance during the transition to a consolidated democracy. These pre-autonomy regimes promoted both a striving for autonomy within the regional elites throughout the country, alongside the emergence of a regional political class and organisations. All this laid out an institutional path dependency towards autonomy all-round, which would predetermine the final evolution of the model with 17 ACs.

A clear initial distinction was made, with the consensus of all the political parties, to favour the ACs with the historical demands of self-government, so that they acquired the higher level of autonomy more quickly (article 151.1 SC). The constitution delayed this possibility for the rest of the regions for a five-year period (article 148.2 SC). In practice, starting from 1982, two groups of ACs could be distinguished: the first one made up of seven ACs with a high degree of autonomy—including the three so-called historical nationalities; and a second group of ten ACs, with a lower level of autonomy. By the end of the 1990s, however, all the ACs had established virtually the same regional institutions and achieved the same competences.

The initial institutional design and some social forces in the system operated in favour of diversity. As a result, some de jure asymmetries affecting several dimensions were entrenched in the constitution: the constitutional recognition of co-official languages, with implications for education, cultural policies and citizen rights derived from traditional civil law systems in six ACs: Catalonia, Galicia, Navarra, Valencia, the Balearic Islands, Aragon and the Basque Country; the constitutional recognition and protection of the special economic–fiscal arrangements—larger tax autonomy, tax collection systems—of the Basque Country and Navarra; and a special economic–fiscal regime for the Canary Islands with special provi-
sions on VAT (Agranoff 1999; Colino 2007a). Other asymmetries were also implemented in several policy areas or in exercising competences in practice. For example, some services and competences have only been decentralised to some ACs in sectors such as active employment policies, control of savings banks, road traffic control and the responsibility for prisons and penal establishments. And regional police forces have been created in the Basque Country and Catalonia and Navarra, whereas other ACs have refused to take on this responsibility so far.

Yet, over time, the Spanish autonomic state increasingly evolved, through the repeated adaptation of some regional statutes and political praxis, as a virtually homogeneous or symmetrical cooperative federal model. Moreover, and despite various peculiarities due to its social basis and its peculiar emergence and evolution, this model was to become a fairly decentralised one, with shared responsibilities and finance as the prevailing *modus operandi*. This does not mean that decentralising, centrifugal and asymmetric tensions have not been at play in the Spanish model all along. But these tendencies have been counteracted by the central government’s decentralisation policies attempting to avoid the negative effects of asymmetry and inequality among regions. The evolution of the system thus shows the interplay of two different forces: decentralisation and asymmetry on the one hand, and recentralisation and *re-symmetrization* on the other (Moreno 1997; Aja and Colino 2014; Maiz et al. 2010).

As a case of devolutionary federalism, the dynamics of the Spanish system have been characterised by the dominance of *self-government* as the main interest of regions rather than *shared government*, which has led to centrifugal dynamics (Blanco Valdés 2014). Since the beginning, three institutional elements have conditioned the evolution of the autonomic system, namely the existence of nationalist parties, the electoral system and the open system of distribution of competences. The electoral system has dramatically hindered the emergence of third statewide parties and has left the stability of the central government in the hands of nationalist parties whenever one of the two major statewide parties did not reach an absolute majority in congress. Moreover, those nationalist parties have tended to use their privileged position in institutional dynamics to gain concessions in terms of power and resources for their territories. The constant revision of the system has only been possible through an open-ended constitutional arrangement that allowed the system to be adapted and changed through the jurisprudence of the Constitutional Court or through transfer laws and delegated powers.
During the late 1980s and the 1990s, regional institutions were institutionalised, democracy was consolidated and regional political classes and bureaucracies were established. Motives for decentralisation in the 1990s and 2000s were no longer mainly based on historical claims, but several new drivers of change emerged (Colino 2008b):

• First of all, the regional elites’ perception of increasing demands from regional societies in a context of global competition has forced ACs to compete with each other for private investments in European and international markets and domestically for public investments from the central government and the EU. For example, some regional politicians have explained Barcelona’s and Catalonia’s declining position in the Spanish economy as a consequence of the central government’s public investment in the capital at their expense. This has caused resentment amongst Catalan parties, adding pressure for more devolution.

• Second of all, decentralisation of most welfare state functions by the late 1990s produced ever-growing regional spending on health and other services, which led to adaptive reactions by regional politicians and bureaucracies in response to new governance problems and insufficient resources. While all ACs have asserted the need for additional funding, the rationales behind their demands have varied: Some have complained about aggravated pressure on their budgets due to a growing immigrant population. Others among the wealthiest regions, such as Catalonia, have opposed the continuous subsidizing of less prosperous regions. Conversely, the latter have expressed their support for existing inter-territorial solidarity schemes.

• Last but not least, the conditions of regional party politics and electoral competition, featuring the long-lasting presence in office of nationalist parties in three ACs (the Basque Country, Canary Islands and Catalonia) and their position in the national parliament as potential coalition partners has been a further factor that has favoured decentralisation. Indeed, accommodating the demands of regional nationalist parties has been a continuous driver of incremental devolution of powers, financial resources and institutional reforms. Not only have sub-state nationalist parties been willing to exchange their support for various governments at the centre in return for concessions on devolution (Heller 2002), but their demands have also had a spillover effect in increasing the number and strength of regionalist parties in almost all other ACs. Parallel to this development and partly facilitated by it, regional party
leaders and organisations within statewide parties have become increasingly assertive and they have gained a growing influence in the ruling bodies of the parties. Ultimately, the overall outcome of electoral competition dynamics has been to exert additional pressure on Madrid to instigate further decentralisation.

On the other hand, several institutional factors and groups, such as public officials of the central government and to some extent public opinion, have gravitated more towards centralisation. In the early years of the decentralisation process, it was thought that the state public administration had to turn more to general coordination and planning tasks, with the result that it was recommended to shrink an unnecessarily large public administration body, which was more appropriate for the previous centralised political system (Jiménez 2010: 107). Yet, there is empirical evidence of the central political–administrative system’s resistance to make the principle of decentralisation and the exercising of competences by the ACs effective. These include the central government’s reluctance to devolve staff and means (sometimes because their competences were not clear); civil servants’ refusal to be transferred to regional administration; or even politicians’ fear of losing power. For example, the initial staff transfers in education were incomplete because they did not include teachers of correctional institutions or specific schools for the military, who were transferred much later (Aja 2014: 161). Furthermore, the Constitutional Court’s extensive interpretation of certain empowering clauses also worked against diminishing the central state public administration.

In perspective, it could be said that the functioning of the system has been underpinned by two main tensions. First, a vertical tension between regional governments wanting more resources from the centre and seeking legitimation from their citizens, and the central government seeking to preserve its capacity to determine some policies and its legitimation. Second, a horizontal tension between some ACs, with nationalist governments seeking special recognition and competences to differentiate themselves from the others and the rest of regions aspiring to similar treatment whenever that happens (Agranoff 1999; García Morales and Roig 2001; Beramendi and Maiz 2003; Bustos 2004). In a very open institutional arrangement, asymmetrical devolution has led to decentralisation demands in all regions, which have, in turn, triggered new attempts at asymmetry.
Vertical or horizontal tensions have prevailed at different stages of the process, while other periods have featured a combination of both.

II. Theory and actual dynamics: finances and material and functional expansion and overlapping in exercising competences in various sectors

The vertical allocation of competences is the result, first of all, of the interplay between the constitution and the regional statutes of autonomy, whereas the Constitutional Court has also played a crucial role in shaping it. Much like other federal countries, the Spanish constitution contains several provisions dealing with this question. Specifically, it sets the ceiling of competences that can be achieved by the ACs. Moreover, the Spanish constitution provides for the formal pre-eminence of the central government by granting it constitutional reform powers, as well as establishing “prevalence”, “residual” and “supplementary” clauses in its favour. Unlike other federal countries, however, the final allocation of competences corresponds to each AC, which, making use of the voluntariness principle and within the limits contained in articles 148 and 149 SC, is in charge of defining its own competences in its respective regional statute of autonomy.

As for constitutional jurisprudence, and contrary to criticisms often raised by nationalist parties that the Constitutional Court has always leaned towards centralisation and has exclusively served the interests of the centre, it has actually often undertaken the task of curtailing the constitutional provisions in favour of the central state, so as to safeguard the interests of the ACs. Thus, for example, it effectively discouraged the application of harmonisation laws after its ruling 76/1983; and it has also virtually deactivated the residual clause (art. 143 SC) (Sáenz 2014: 21).

1 For instance, the central state, through the senate, enjoys special powers to suspend autonomy if an AC is alleged to have violated the obligations imposed by the constitution (article 155 SC); and the organic laws of transfers and harmonizing laws also allow it to adapt the distribution of competences without reforming either the constitution or the statutes of autonomy (article 150 SC). For a more detailed discussion of these legal mechanisms, see Aja (2014); Muñoz Machado (2012); Bilbao (2013), Biglino (2013); De la Quadra-Salcedo (2013); or Sáenz (2014).
Beyond legislation and the formal allocation of competences, the exercising of competences by the ACs rests on effective decentralisation and the transfer of public expenditure and public revenues. From 1978 to 2014, 1994 royal decrees were passed pertaining to the devolution of powers from the central government to the seventeen ACs and the two autonomous cities of Ceuta and Melilla (Ministerio de Hacienda y Administraciones Públicas de España 2015). This required the actual transfer of staff for devolved competences and services to be exercised and the commitment to pay for the effective costs that incurred. Thus, for example, during the first 15 years more than 800,000 people moved from central to regional public administrations. Currently, almost half of public expenditure is managed by territorial administrations, while the participation of the central administration barely goes above 20 per cent of total public expenditure (and the remaining 30 per cent relates to the management of social security).

In practice, the exercising of competences reveals some flaws that have not been solved over time. For a start, the Spanish central state has tended to exceed its authority, encroaching upon regional competences. At the same time, the mistrust between the ACs and their reluctance to cooperate among themselves has facilitated the central state’s abuse of its coordination competence. These facts have created a perception of high vulnerability among the ACs, leading to a great volume of conflicts related to competences which have been brought before the Constitutional Court², as well as a wide scholarly agreement on the need for a better balance between the centre and the regions, proposing a set of guaranteed intangible competences for each of them (Sáenz 2014: 20; Aja 2014: 175).

In this connection, it could be said that the evolution of the allocation of competences has been greatly influenced by the central government making extensive use of various instruments to increase its executive competences in various policy areas, such as industry, housing, city planning, tourism, agriculture, fisheries or trade, all of which fall within the scope of influence of the ACs (Jiménez 2010: 113f.). This material and functional

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² In fact, the number of conflicts is comparatively much higher than in other federal countries, such as Germany. And in spite of variations from period to period and depending on the type of procedure through which the conflicts are channelled and tabled, the Constitutional Court has seen an average of 50 conflicts every year. Mainly for this reason it has incurred a delay of between 8 and 10 years in ruling on them (Aja 2014: 182f.).
expansion of state competences has been achieved basically through five traditional channels (see, for a general vision, Viver Pi-Sunyer 2013; see also Bernadi 2007; Corretja 2013; Sáenz 2014). According to Viver Pi-Sunyer the five ways are:

1. The so-called “framework” or “basic legislation” (bases) has for the most part been established through royal decrees, ministerial orders and implementing acts rather than statutory laws. As for their contents, basic regulations go into extraordinary details almost without exception, whereas those defining only minimum principles or minimum standards are virtually non-existent.

2. The horizontal or crosscutting competences provided for in articles 149.1.1 and 149.1.13 SC. The wording of these provisions—which refers to guarantees of equal conditions in the exercising of constitutional rights and duties and the basic rules and coordination of general economic planning—permits almost any state intervention, whereas the Constitutional Court has failed to define any useful parameters of constitutionality to limit their content and scope.

3. The spending power and subsidising activities of the central state constitute another means whereby the state has broadened the scope of its competence, acting in areas of AC competence, conditioning their policies and duplicating their activities.

4. A fourth path is the supraterritoriality principle applied to phenomena that fall under regional jurisdiction. This supraterritoriality occurs wherever the state, in competences allocated to the AC, artificially creates objects of competences located in various or all of the AC (for instance, the creation of vocational training reference centres or centres of accreditation for environmental certifying companies or plans for civil protection.). The reformed statutes of autonomy, particularly those of Catalonia, Andalusia and Aragon have opposed the so-called territorial connection point, so that the regional government would remain responsible for the object within its territory, whereas this does not prevent collaboration techniques between ACs or with the central government.

5. A fifth channel is that of the state’s almost entire monopoly on transposing European directives, even in areas within the exclusive competence of all the ACs. This prominence is usually justified via an expansive interpretation of Article 149.1.13 SC, although it should be acknowledged that the AC’s apathy in this sphere has often prompted ac-
tion from the central government, which is responsible to the EU (Viver Pi-Sunyer 2013).

The central parliament’s interpretation of its framework and cross-cutting competences seems to suggest that it has regulated all kinds of policy areas, including those within the exclusive competence of the Autonomous Communities according to the regional statutes of autonomy, such as housing, trade and business opening hours, culture, activities and cultural products such as books, libraries, cinema, tourism or sport. Some ACs have complained that this has limited, if not prevented, actual regional legislative capacity in all these areas (Corretja 2013).

However, Gallego et al. (2005) have shown that AC governments have the capacity to implement innovative policy options and policy experiments; e.g. there are major differences among ACs in terms of their "welfare regimes" in both substantial terms (degree of policy divergence from national policies, state–market mix) and in operational terms (complexity of policy network, management instruments in service provision e.g. public–private mix).

Under these conditions of the central state’s expansive exercising of competences, the ACs have been faced with the choice of either giving up exercising their own competences, exercising them fully or legislating by only filling the gaps left by central government laws. Whenever they have chosen to act on those sectors of public activity—and many of them have indeed done so—such situations have resulted in a great many cases of legislative and executive overlapping and duplication of competences (see Viver et al. 2012).

A. The role of public finance in the exercising of competences

Almost half of public expenditure in Spain is currently managed by regional and local governments. The central government’s share in spending is around 20%, plus 31% managed by social security, which is a central area of competence but is calculated separately. A large share of central public spending—more than 40%—relates to money transfers to the other tiers. As with other components of the Spanish territorial system, the financial constitution appears to have evolved from a tacit deal between the central government and the ACs. The former has been willing to intervene in some basic public services and maintain its legitimation in a redistribu-
tive role at the cost of taking the blame for collecting most taxes and for all policy failures, even for those that were no longer its responsibility. The regional governments for their part have been prepared to allow for this central intervention as long as the centre keeps injecting more resources into the system and they do not have to bear the electoral cost of collecting taxes or take the blame for policy failures vis-à-vis their citizens’ complaints. With the current degree of task decentralisation and spending responsibilities, this deal seems no longer sustainable. In fact, with the crisis, several ACs have attempted to utilise and/or increase their tax autonomy.

The Spanish financial constitution has been evolving from a system based on centralised tax collection and a prevailing reliance on conditional transfers to a system that increasingly relies on tax sharing, regional own source tax revenues and unconditional equalisation grants (Colino and Kölling 2014). However, regional taxes are heavily regulated and inflexible, leaving almost no space for genuinely different regional revenue decisions. While ACs have some leeway in changing tax credits, deductions and the tax rates of shared taxes, and may also establish surcharges on central taxes, they have to follow an identical tax base and tax definitions. Currently, regional governments receive a fixed percentage of tax revenues collected by the central government from several taxes. Regional governments have the competence to increase the rate of the personal income tax paid in their territories and full autonomy on certain taxes (asset transaction tax, stamp duty, inheritance tax, transport tax, tax on the sale of certain hydrocarbons, gambling tax and fees related to particular services: e.g. tuition fees). The fiscal equalisation scheme, through several funds, supplements the gap between the funding needs of ACs and their tax capacity. This equalisation system seems to have fairly redistributive effects. There have been criticisms from the wealthiest regions, who argue that the systems is far too redistributive and lacks clear distributive criteria and incentives for subsidised regions to improve their performance.

The last reform of the funding system in 2009 resulted in an increase in shared taxes (raising the share of personal income tax for regions from 33% to 50%, the VAT share from 35% to 50% and the excise tax share from 40% to 58%). Of these taxes, 75% are allocated to the Fund to Guarantee Public Services, which is divided among the ACs according to adjusted population criteria. The remaining 25% are allocated to the AC where they were generated. The equalisation system has thus
The funding formula guarantees funds to ACs irrespective of their fiscal performance and whether they decide to establish new taxes or increase tax pressure on their citizens to obtain more revenue. This has led to a lack of responsibility on the part of regional politicians and therefore to them exceeding the well-known soft budget constraints, with no incentives to raise their own revenues through taxation. Regional governments resort to permanent bargaining and bilateralism with the central government, horizontal competition and blame-shifting. Moreover, the existence of the special charter system for the Basque Country and Navarra, which produces more per capita funding for them, and the frequent renegotiation of the system has led to continuous expectations of further resources from the central government, and therefore to regional overspending and rent-seeking.

These financial arrangements have brought about limited revenue autonomy for the units, a lack of accountability among regional governments before their citizens and the lack of clear distributive criteria for the equalisation mechanisms. The model has produced considerable autonomy for regional spending and low autonomy for revenues, with generally no incentives for regions to use their tax autonomy. In this situation, sanctions and controls in deficit and borrowing cannot be strictly applied and do not seem to work either in the period of growth or in economic downturn. At the same time, even before the current financial crisis most ACs complained about lacking sufficient resources to manage their areas of competence, especially those dealing with welfare services such as health and education. Some experts have also pointed to the fiscal arrangements’ inequity in terms of per capita funding in different ACs.

Furthermore, as mentioned above, the central government may establish programmes of conditional or matching grants/subsidies in an area that no longer falls within its range of competence (Pomed 2008; Aja 2014: 178). While this conditional funding has reached a certain development, it is possibly less relevant than in other federal states. In several rulings in the 1980s and more specifically ruling 13/1992, the Constitutional Court declared that the central government lacks any independent spending power that is not related to a substantive specific area of competence. It may devote resources to objectives that fall within the competence of the ACs slightly changed into a system that only partially equalises (80% of needs), but is frequently adjusted.
but, provided that subsidies are territorialised or allowing ACs to participate in defining whether or not such subsidies can be territorialised, their processing and management needs to be left to the ACs. In practice, however, due to inertia, the reluctance of central public officials to renounce the utilisation of central subsidies or the willingness to maintain certain social functions, the central government has continued to exercise some subsidising activities beyond its scope, in the end leading to an increasing jurisdictional conflict before the Constitutional Tribunal. This conditional financing has usually been channelled through the system of sectoral ministers’ conferences and by way of intergovernmental agreements (convenios). When the system was first implemented, this central spending power was used mostly as a way of further financing regional policies, compensating for the lack of regional revenue and central transfers. With the evolution of the system and the increase in regional tax revenues, this spending power has been much less used and its rationale has increasingly been the promotion of policies regarded by the central government as being of national interest (Sáenz 2014).

For example, in the federal budget for 2014, the amounts transferred to regional governments were only of €4.496 million. Of this conditional funding, 65% is accounted for by three main items: the long-term care system and other grants for the social security system (€1.431 million), subsidies for the development of regional active labour market policies (€1.244 million) and land transportation, especially for metropolitan railways in Madrid and Barcelona (€247 million).

B. Selected examples of the exercising of regional competences: decentralisation and centralisation without constitutional amendment

As is well known, the real influence of different tiers of government adapt to socio-economic and political circumstances without the need for constitutional amendment or even without formal delegation of powers. One of the main mechanisms by which this happens is judicial interpretation of competences, which in practice may produce a constitutional mutation in the exercise of authority due to several factors (Benz and Colino 2011). The development of the Spanish territorial model gave the Constitutional Court great power to interpret the competences of the ACs, which in some cases has expanded regional influence and in other cases has upheld the expansive interpretation made by the central Spanish parliament (Blanco
Valdés 2014). In this section, we seek to present examples of how exercising competences can evolve without constitutional amendment or changes to legal regulations. We describe three cases of expansion of regional competences where they did not have jurisdiction in the constitution (justice administration, foreign action, immigration) and three cases of expansion of central authority within the remit of regional competences (housing, labour relations, tourism).

1. Justice administration

As far as the judiciary and of competences related to justice are concerned, the process of legislative and administrative decentralisation in Spain has not run parallel to a similar level of judicial decentralisation. In fact, the judicial system rests on the principle of jurisdictional unity and a rigid interpretation of it, “according to which recognizing the institutional autonomy of any entity other than the central state would entail the break-up of such a principle”. Article 149.1.5 of the Spanish Constitution declares the matter of justice as an exclusive power of the central state which, in turn, severely restricts the opportunities for the ACs to intervene in this field. However, in a somehow inappropriate way, the ACs used the provision of article 149.3 SC to include a subrogation power in their statutes of autonomy, which was accepted by the Organic Law of the Judiciary through which the ACs gained influence in some specific aspects of the justice administration, such as being consulted on the creation and reform of court circumscriptions and most importantly competences regarding administering courts and their material and personal resources (Cabellos 2013; Capelleras 2014). The amended Statute of Autonomy of Catalonia (and the Statute of Andalusia, the regulation of which is practically identical) sought “to exhaust […] all the possibilities for Autonomous Community involvement in the area of justice administration”, by specifying the particular (sub)resources over which the regional government can intervene, for example through the monitoring of adequate and sufficient knowledge of Catalan by magistrates, judges and public prosecutors (art. 102 Catalan statute); regulatory, executive and management authority over non-judicial staff (art 103 Catalan Statute) as well as construction and refurbishment of court buildings and the buildings of the Office of the Public Prosecutor and the provision of goods and equipment (art. 104 Catalan Statute).
2. Foreign action

Something similar could be regarding international relations (art. 149.1.3) which were defined by the constitution as being exclusive of the central state. They have become gradually shared due to the activity of the Constitutional Court, which, through action or omission, has contributed decisively to the consolidation of these power transfers with a case law clearly favourable to the assumption of jurisdiction in the matter by the Autonomous Communities. The changing global circumstances and Spain’s membership of the European Union also serve to explain the development of regional foreign activities and some sort of international and European relations conducted by the Spanish ACs, including development aid to developing countries (Colino 2007b; Hombrado 2008). Partly because of the absence of a general regulation on the matter, regional foreign activities have proliferated exponentially and they are multifaceted, as shown by international journeys undertaken by regional premiers and ministers; the establishment of foreign representation offices and delegations of both a political and economic nature; international agreements; cross-border cooperation; promotion of international trade; attracting investments; cultural and linguistic international projection; support for emigrant communities; or even international aid for developing countries. These have run parallel to the gradual institutionalisation of permanent structures within the regional governments and public administrations in order to manage the issues, and some already considerable budgetary resources devoted to foreign action and international aid for developing countries.

According to the court’s interpretation, the constitutional reservation only relates to a traditional and restrictive understanding of international relations as referring to issues of security, defence and peacekeeping missions, treaties, recognition of states, external representation, the signing and ratification of international treaties or representation in international bodies and institutions. In its case law, the court recognises Spanish regions have the capacity to undertake action with international projection if they are necessary or convenient for exercising their own internal rules. More recently, the amended regional statutes of autonomy now contain specific competences which affect foreign affairs. The foreign activities of the ACs entail both positive and negative implications for Spanish foreign policy. On the one hand, it expresses the need to adapt public policies to a globalised world. On the other, however, there is a risk that organisations...
and actions will proliferate in a disorderly manner, waste resources and potentially spark conflicts regarding its symbolic character and the image of the state abroad (Colino 2007b).

3. Immigration

As for immigration, according to Art. 149.1.2, the central state is exclusively responsible for approving legislation on aliens and border control, but all problems associated with education and welfare fall under the jurisdiction of the ACs (Montilla y Vidal 2007). The regional governments have been increasingly involved with extensive policies for the integration of immigrants. Given the scope and policy implications of foreign immigration which has occurred particularly since the 1990s and 2000s, the ACs most exposed to this phenomenon have tried to exploit the loopholes within the central government’s exclusive competences in this field, and more specifically, in the case of Catalonia, followed also by Andalusia, in their amended statutes of autonomy, which now define the authority of their respective ACs in the processing of work permits for foreign employees and self-employed persons willing to establish a business in their region. The Constitutional Court has mostly supported this interpretation, allowing regional competences in this policy area to be exercised.

4. Housing

Housing was an exclusive power of the ACs established in their statutes of autonomy in accordance with Art. 148.1.3 SC (Ponce 2008; Tejedor 2015). However, the importance of the housing sector for economic development and promoting equality of living conditions has led the central government to take a dominant role in this field through the use of central parliament’s horizontal competence, such as its Competences on general planning and coordination of economic activity (article 149.1.13 SC) and on the bases of credit management (article 149.1.11 SC), and so it has been acknowledged and upheld by the Constitutional Court. As a matter of fact, the state has continued to deploy public policies on housing, as shown by the significant resurrection of the national Ministry of Housing in 2004. The promotional activity in the field of social housing takes the form of granting qualified loans as well as direct financial aid, which com-
prises both the subsidisation of credit and also subsidies to the developer or purchaser. The involvement of the Spanish central government in housing policy mainly takes the form of central government funds aimed at supporting private development and the acquisition of subsidised housing for sale (Garrido 2013). In other words, the state has used horizontal clauses of competence as well as its spending power and capacity to act in this field. Within this framework, the central government is allowed to provide financial resources, which it distributes between the ACs by means of agreements with them, and it also signs agreements with banks and financial institutions to grant qualified loans and direct payments to these institutions.

5. Labour relations

In the field of labour and work relations, the Spanish constitution allocates exclusive legislative powers to the central parliament (article 149.1.7 SC), leaving executive and implementation competences to the ACs pursuant to their Statutes of Autonomy. In practice, however, the central government also exercises extensive executive functions. As in other policy areas, the number of staff (more than 10,000 workers, 9,500 of whom are employed by the Spanish Public Service of Employment) seems disproportionate for an area where the central government has been constitutionally endowed with only legislative responsibilities. There is a broad array of executive and management functions carried out by the central government, ranging from the management of programmes and promotional activities to procedures to validate and certify professional qualifications. In all these cases, the central government relies on a criterion of supraterritoriality to assume these functions when activities or subjects are not circumscribed to the territory of a single region or, based on other reasons, recommending coordinated or homogeneous action in this sector of activity (see Viver et al. 2012).

6. Tourism

In the field of tourism, too, article 149.1.13 SC (general planning of the economy) has been used by the central government to justify its legislative and implementation activities. As a result, regulatory duplications have
become quite frequent, basically due to promotional activities undertaken by the central government through planning instruments used concurrently with the funding activities of the ACs and the creation of administrative bodies or agencies with executive functions in the field of tourism, such as the Instituto de Turismo de España (staffed with 550 employees in 2012) (Viver et al. 2012).

III. Reform and evolution of the distribution of competences: internal and external factors

A. General consideration

Apart from judicial interpretation, there are other mechanisms with which to change the distribution of competences in the Spanish system. Together with the general rule which allows areas of competence to be modified through the amendment of the constitution or the regional statutes of autonomy, the Spanish constitution also provides for a mechanism for the transfer of powers through one organic law (Art. 150 SC) (Bilbao 2013). This has been the most frequent technique used to modify the vertical distribution of competences. It was used to increase the competences of Valencia and the Canary Islands in 1982, to compensate for the fact that their statutes were passed via the ordinary track. Years later, it was also used in 1987 to rationalise the competences in the field of transport or to enlarge the scope of competences of ACs as laid down in article 148 SC through the “autonomic pacts” passed in 1992. With a more limited scope, organic transfer laws have served to cement several powers of the ACs of Galicia (1995) and the Balearic Islands (1996), or transfer traffic police to Catalonia (1997).

The most recent attempt to change the distribution and exercising of vertical competences in the Spanish model was the round of regional statute reforms in the mid-2000s (Colino 2008a). One of the main objectives of this reform was to rescue the exclusive regional competences and the attempt to shield them through the creation of a detailed and exhaustive list of competences in the form of sub-competence. Dissatisfied with the distribution of competences and the way they were exercised during the first decade of the 21st century, Catalonia, followed by Andalusia and seven more ACs, began a process to reform their statutes in order to improve their self-government by broadening their scope of competence. By
making use of the so-called voluntariness principle (article 149.3 SC), they sought to take on all the competences that had not been reserved for the central government by means of reinterpreting rather than undertaking formal reform of the constitution. For example, article 11.2 of the original Statute of Autonomy of Catalonia gave that region the power to implement labour legislation except in the field of immigration; when changed, the new statute of autonomy of Catalonia was able to expand its implementation competences over immigrant workers, which was not against the constitution.

Another technique used to expand regional competences within the context of these reforms was to break down all fields of concurrent competences into areas of sub-competence, and define those sub-matters that did not fall within basic statewide legislation as exclusive regional power. In this fashion, the reforms sought to expand regional powers and replace shared and concurrent competences with exclusive regional powers wherever it was possible. Both techniques were rejected by the Constitutional Court in its ruling 31/2010, in which it prohibited reinterpreting the SC in such terms, reminding that the competences of the central government are those provided for in the constitution, so no statute of autonomy can condition or limit them.

An interesting novelty of the reformed statutes of autonomy is the creation of ‘participation competence’ in powers that formally lie with the central government; for example, article 117 of the reformed statute of Catalonia allows the Catalan regional government (Generalitat) to participate in the planning, programming and management bodies of rivers and water basins that run through more than one AC. Since the power in these cases ultimately rests with the central state, the ACs very often do explicitly refer to central parliament legislation, which has to organise their participation.

This process of statute reforms was conditioned by the polarisation of Spanish politics during the first of Rodríguez Zapatero’s mandates (2004–2008), which rendered constitutional reform impossible, even in the minimalist fashion proposed by the Spanish prime minister in his investiture speech in 2004. This led subnational actors to explore the possibility of reform in the subnational space. The political window of opportunity opened when a left–nationalist coalition was in power in Catalonia and the socialist party was governing at the central level. The ideational and technical elements of the reform drew on the notions of both a forever open constitution and the constitutional role and status of the regional statutes of au-
tonomy. Accordingly, by amending one regional statute of autonomy, it was possible to limit the central government exercising its constitutional competence, and to establish a new interpretation of the constitution.

That means that although regional statute reforms were technically not a formal constitutional amendment, they did imply reform with constitutional implications for the system. This time the process began with one unilateral regional initiative. This is an extremely important difference with previous rounds of reforms of the Spanish federal system, when the then two main statewide parties came to political agreements on closing the territorial map in 1981 (UCD-PSOE), and on homogenising the competences of ACs in 1992 (PP-PSOE) in the federal arena. In this recent round, although the two main statewide parties agreed about all the other regional statutes of autonomy, the main opposition party was to be excluded from the agreement both in the Catalan arena and in the central political scenario regarding the Catalan statute reform. This was to trigger recourse to the Constitutional Court by the main opposition party and its intervention at the ratification stage, and consequently the failure of several of the reform goals (Colino and Olmeda 2012).

B. The effects of the recent crisis on competences and reform prospects: reinforcing previous tendencies?

The recent fiscal crisis and the European requirements of fiscal consolidation policies and regulatory or “structural” reforms to provide budget stability and competitiveness, especially affecting regional governments, appear to be having the effect of reinforcing some previous tendencies in the system, such as centralisation and the increasing financial dependence of ACs on the central government (Colino and Del Pino 2014; Medina 2014; Tudela 2015).

For example, the law passed to implement the amended Art. 135 of the Spanish constitution to ensure fiscal discipline in combination with the conditional liquidity loans with which the central government is providing loans for ACs has substantially altered the previous legal framework and fiscal governance arrangements. It has also informally affected the distribution of competences and intergovernmental relations and coordination, giving the central government, mostly with the acquiescence of the Constitutional Court (Viver Pi-Sunyer 2013; Fernández Llera 2015; De la Quadra-Salcedo Janini 2014) and part of public opinion, unprecedented
control of regional budgets and policies, and at the same time largely blocking the regions’ attempts to use their regional taxation capacity despite regional attempts to create new regional taxes\textsuperscript{4}. All this seems to be jeopardizing regional autonomy guaranteed in the constitution, without having reached most of the fiscal consolidation targets set by the central government. Moreover, due to the current party constellation and the stand-off between the People’s Party (PP) government and the new secessionist Catalan government, the central government has been unwilling or unable thus far to negotiate a new model of fiscal federalism or make an effort to distribute the fiscal adjustment endeavours and consolidation targets more fairly among the three levels of government, and instead have chosen to ignore provisions in the law and postpone its overdue reform.

Moreover, the so-called structural reforms initiated by the PP government since 2012 in a non-consensual way and as part of the austerity programme, related to areas such as public administration, local government competences (Aja et al. 2014; Almeida 2015; Navarro and Zafra 2014), banking, the promotion of the Spanish single market, education, foreign action and the state foreign service, have been approved without the advisable and necessary regional input through the existing cooperation channels and without much concern for the territorial distribution of competences and its likely negative impact on regional autonomy, resources and the functioning of the territorial model. This has led to increased intergovernmental conflict and legal litigation—most of the laws passed for these reforms have been challenged by regions before the Constitutional Court—and even some manifestations of regional governmental resistance, boycotting or non-implementation of some central policies and laws. Moreover, citizens’ discontent and opposition to central government policies may have manifested itself in the results of the 2014 European and the 2015 regional, local and national elections, in which the ruling PP lost six regions to the opposition left anti-austerity parties and did not achieve a majority in the central parliament.

\textsuperscript{4} In his ruling in 2014, the Constitutional Court upholds the Organic Law on Budgetary Stability and Financial Sustainability, but with no less than 5 dissenting votes against, out of a total of 12. The dissenting opinions clearly argue for declaring it unconstitutional and void, on the grounds that it commits several excesses against regional autonomy.
Conclusions

The Spanish case presents us with a clear example of the gap between the constitutional distribution of competences and the practical dynamics of exercising them. In a very complex setting, both political and technical, the evolution of the system has been determined mainly by constitutional indeterminacy and by judicial interpretation, and has responded to different tendencies in the system, in some cases showing clear signs of decentralisation to respond to autonomy demands and centrifugal pressures, and in others responding to coordination and homogenisation demands. The apparent balance between these two poles has been different in different periods of the system, and attempts to reform the system have proven difficult.

References


Devolution in the United Kingdom: An Ongoing Process

Malcolm Harvey

I. Introduction

The United Kingdom remains de jure a unitary state, with an uncodified constitution based upon the principle of parliamentary sovereignty, the principle that laws passed by the UK Parliament carry precedence over all other state institutions. Parliamentary sovereignty has historically played a substantive role in political debate in the UK, with foundations in the battles between the crown and parliament in the English Civil War in the mid-seventeenth century to the present day discussions about the UK’s relations with the European Union. The British constitutional theorist A. V. Dicey (1915: 24ff.) argued that

“parliamentary sovereignty is [therefore] an undoubted legal fact. It is complete both on its positive and on its negative side. Parliament can legally legislate on any topic whatever which, in the judgment of Parliament, is a fit subject for legislation. There is no power which, under the English constitution, can come into rivalry with the legislative sovereignty of Parliament. No one of the limitations alleged to be imposed by law on the absolute authority of Parliament has any real existence, or receives any countenance, either from the statute-book or from the practice of the Courts.”

Legally this remains true: the UK holds true to the principle of parliamentary sovereignty, at least in theory. In practice, the last century has seen significant change to the UK’s constitution, and relations both internal (between the component nations of the state) and external (between the UK and the EU, which it joined in 1973) have played a significant role in altering the extent to which parliamentary sovereignty remains “the bedrock of the British constitution”.¹ While recognising that the UK’s membership of the EU also constitutes a significant extent of pooled sovereignty, this chapter focuses on the consequences of the process of devolution in the UK initiated by the Labour government in the late 1990s for the principle

of parliamentary sovereignty. The argument of this chapter is that the principle remains in legal theory but in practice, particularly given the political constraints not only of party politics but also of multilevel governance, the UK has *de facto* become a decentralised polity. The UK Parliament retains the theoretical sovereign power to dissolve any of the devolved institutions it has created, but (and, particularly since those institutions were delivered by a popular mandate through referendums) it is constrained politically.

**II. Accommodating the distribution of competences in the political system**

Based upon the principle of parliamentary sovereignty, the UK parliament retains supreme authority over the devolved institutions created in 1999 (the Scottish Parliament, the National Assembly for Wales and the Northern Irish Assembly) and 2000 (the Greater London Authority). The system of devolution designed by the Labour government in the late 1990s was asymmetric in nature and took into account the diverging bottom-up demands for decentralisation—and, when that demand was not apparent, as was the case in North-East England, which rejected a devolved institution in a 2004 referendum, it was abandoned. Of the UK’s component nations, this left the majority of England—with the exception of London—without a devolved institution to represent its interests. As a consequence, institutions in Scotland, Wales and Northern Ireland can deliver legislation within their specific devolved areas of competence, whereas England, representing 85% of the UK population, cannot. According to Vernon Bogdanor, the adoption of this model of asymmetric devolution represented the “most radical constitutional change” in the United Kingdom since the Great Reform Act of 1832 (1999: 1). While the process of administrative devolution—that is, the ability of the respective Secretary of State to administer legislation within their competence—had been ongoing for decades, the democratisation of that process presented a distinct challenge to the UK’s “unitary and centralised” constitution (Lijphart 1999: 17). And with respect to each of the devolved nations, the nature of devolved powers and the method of delivery were slightly different in each case.
A. Scotland

By way of a referendum in September 1997, the Scottish electorate approved the Labour government’s proposals to establish a Scottish Parliament, with 74.3% of those voting in favour. A second question, proposing that the Scottish Parliament have the ability to vary the basic rate of taxation by up to 3 pence, was also passed, with a lower affirmative vote of 63.5%, still a comfortable margin in favour of the proposal. The pre-legislative referendum did two things: it entrenched the principle of a devolved Scottish institution as the preference of the Scottish electorate, binding the UK Parliament (politically, if not legally) to deliver legislation to that end. Secondly, the margin by which Scotland had voted in favour ensured that delivery of the legislation should be rapid, and that the devolved competences should be extensive. In particular, the vote in favour of tax-varying powers gave credence to the argument that the parliament should be much more than the “assembly” that had been offered in the previous devolution referendum in 1979.

The result was the Scotland Act 1998, legislation which established the Scottish Parliament. The 1998 Act utilised a reserved powers model, detailing only the powers which would be reserved by the UK Parliament—issues such as defence and foreign affairs, social security, energy and constitutional matters. By implication, anything that was not named under the reserved powers section was considered to be the competence of the Scottish Parliament. This included exclusive powers over health, education and justice. Scotland had continued to have separate legal and education systems after the 1707 Act of Union, devolution of competence in these areas was both practical and desirable for the UK Government. Initially, vertical congruence in governing parties—with Labour in majority government at UK level and leading a coalition for the first two terms of the Scottish Parliament—meant that any potential tension derived from the distribution of competences between levels was limited, and most often dealt with informally within the Labour party. While more formal channels were created with the devolution settlement—in particular, the Joint Ministerial Committee, established to assist in the coordination of public policy across government levels—it was used infrequently and, as a consultative body, to limited effect (Cairney 2012: 234). Where there was agreement on a devolved issue (or, occasionally, when Scottish ministers felt it politically prudent to allow an issue to be dealt with at the UK level) an informal mechanism, the Sewel motion, was utilised in order to allow the UK Par-
liament to legislate. This was used frequently during the first two Scottish Parliamentary terms (76 times between 1999 and 2007), limiting the need for the two parliaments to coordinate or pass duplicate legislation and further emphasising the informality of intergovernmental relations (Cairney 2012: 236). Conflict has largely been avoided even when the congruence of governing parties has disappeared; though on several occasions, as will be discussed in the following section, conflict has allowed the Scottish Parliament to utilise their competence in particular areas to alter UK Parliamentary intentions in others.

B. Wales

The Welsh Devolution referendum occurred one week after the Scottish referendum, and was a much closer affair. On a turnout of just 50.2%, the Welsh electorate voted narrowly for the National Assembly for Wales by just 6,721 votes, 50.3% of those voting. The “inauspicious start” such a narrow mandate provided for devolution in Wales meant that devolution was not universally popular (Rawlings 2003: 49). As a result, the form of devolution delivered by the Government of Wales Act 1998 created an institution without constitutional precedent, a unique scheme of elected executive devolution which did not have the devolution of new powers to the new Assembly as its purpose but the democratisation of the existing functions of the Secretary of State for Wales (Trench 2010: 119). The administrative powers which had been vested in the Welsh Office were now given over to the new National Assembly for Wales as a corporate body—to the institution itself rather than individual ministers themselves. This lack of an institutional division between the executive and deliberative functions of the National Assembly for Wales led to significant problems and confusion in the early years of the Assembly’s existence (Trench 2010: 121). The result was a “remarkable degree of constitutional volatility” and a process which has evolved in a flexible and ad hoc manner (Trench 2010: 118). Since the devolution referendum in 1997, Wales has seen three Wales Acts (1998, 2006 and 2014), three commissions, a convention, a review of procedures and a further referendum which itself has provided the National Assembly for Wales with legislative powers the original Government of Wales Act did not envisage (Harvey 2011: 91). The reforms to devolution in Wales will be discussed below, but it is clear that the asymmetrical nature of devolution meant that questions about the extension of
Welsh devolution to mimic the Scottish model were never far away (Wyn Jones 2001). The experience of devolution taught both institutions the limitations of their powers, and pressed upon members—even those without nationalist leanings—the desire to extend their remit beyond that which had originally been granted. Thus devolution in the Welsh setting, which started out with limited powers over secondary legislation, rapidly saw discussions about constitutional change become a part of the political agenda.

C. Northern Ireland

Even in the UK’s asymmetric, devolved system, Northern Ireland is a case apart, predominantly due to the volatile history of the region. In the wake of the Irish War of Independence and the establishment of the Irish Free State, of which Northern Ireland opted out of, the Parliament of Northern Ireland was established in 1921. Originally constituted as a “Home Rule” parliament by the Government of Ireland Act 1920, which would have created a similar institution in Southern Ireland, before it was overtaken by event, the institution had near free rein over all domestic issues affecting Northern Ireland, with the exception of the monarchy, armed services and some taxes. As a result of the increased levels of violence in Northern Ireland in the 1960s, the parliament was suspended in 1972, and direct rule from the UK government through Orders in Council was instituted.

The Sunningdale Agreement in 1972 was the UK government’s first attempt to re-establish devolution in Northern Ireland, but with limited support among both Unionist and Nationalist communities the Agreement collapsed in 1974. A further attempt was made in 1982, and while an assembly was established, it did not achieve the substantive devolution expected and was subsequently abolished again in 1986. Direct rule was restored with the Good Friday Agreement of 1998. Passed by referendums in both the Republic of Ireland and Northern Ireland, the Good Friday Agreement contained provisions to advance the peace process in Northern Ireland. As well as dealing with issues of policing and weapons decommissioning—two controversial issues in Northern Ireland—the Agreement saw the UK government repeal the Government of Ireland Act 1920 and in its place establish a devolved legislature and power-sharing executive. Like the Scottish institution, a reserved-powers model was utilised; though this consisted of three tiers of powers, rather than two. “Excepted mat-
ters”, such as powers over currency, the monarchy, defence and taxation, are powers which remain the purview of Westminster and are not suitable for devolution. “Reserved matters” in this context are powers which remain under Westminster control but which may be suitable for devolution. These include issues such as control over civil aviation, firearms and telecommunications. Any areas of competence which are not explicitly named under these two sections in Schedule 2 and Schedule 3 of the Northern Ireland Act 1998 are known as “transferred matters”, and the Northern Ireland Assembly has the power to legislate in these areas. These matters include similar areas to those which are devolved to Scotland and Wales, such as health, education and justice, and further powers which Scotland and Wales do not have, such as legislative power over pensions, social security and child support.

**D. London**

A further different model of devolution exists in the UK’s capital city, London. The Greater London Authority (GLA), established in 2000, bridged the gap between local councils and central government as a strategic regional authority, reminiscent of the Greater London Council, which was abolished by Margaret Thatcher’s government in 1986. The unique (for the UK) form of government in London consists of an elected mayor, who carries out the executive functions of the GLA, and a 25-member London Assembly, which scrutinises the work of the mayor. Prior to the re-establishment of a London-wide body, the strategic functions of what had been the Greater London Council were taken on by quangos or joint boards, lacking in democratic accountability. Re-establishing a citywide regional authority therefore fulfilled two functions: devolution of power to a body with a specific remit for the City of London, and adding a further layer of democratic oversight.

The competences of the GLA operate in a significantly different manner to those of the other devolved institutions. Rather than the legislative power of the Scottish Parliament, Welsh Assembly and Northern Irish Assembly, the GLA has responsibility for clear policy areas but provides only strategic direction. Policy implementation is the purview of functional bodies which are answerable to the GLA. There are four functional bodies which provide services in key devolved areas. The Mayor’s Office for Police and Crime (MOPAC) is responsible for the strategic oversight and
budget for the Metropolitan Police. Transport for London (TfL) provides the transport services in London, with a budget set and a board appointed by the mayor, who assigns the transport strategy to be delivered. The London Fire and Emergency Planning Authority (LFEPA), with a board comprising London Assembly members, local councillors and mayoral representatives, is responsible for and runs the London Fire Brigade and deals with action to be taken in the case of an emergency. The London Legacy Development Corporation (LLDC) is responsible for developing the site of the 2012 Summer Olympics, hosted by London. In addition, the mayor is also responsible for developing strategies in the areas of housing, the environment, planning and development, arts and culture, health inequalities, and economic development and regeneration. The mayor’s budget in 2015–16 was just under £17bn (€24.4bn), which, as several commentators have noted, is a substantial sum of money for a devolved institution which has limited powers (Hill 2015). For that reason, while it is important to recognise the devolved institution in London, the remainder of this chapter will focus on the devolved nations of the UK.

III. Exercising powers—selected examples

A. Devolved finances

The system of finances in the UK is (like most other systems, with the exception of Spain and the Basque Country, where the latter collects taxation and pays the central government for services) dependent upon the central government allocating resources to the devolved institutions. The devolved institutions receive the majority of their funding in the form of a block grant from the UK Treasury. The year-on-year changes to the block grant are determined largely by the Barnett Formula, a somewhat controversial mechanism which aims to make sure that any changes in funding to services in England is matched for the devolved institutions. The Barnett Formula only applies to like-for-like spending in areas that the devolved institutions have control over (such as health and education, while reserved issues, such as defence, are not included). The Treasury then takes into account the level of “comparability”—that is, the extent to which services delivered by United Kingdom government departments correspond to services within the budgets of the devolved administrations in terms of their primary function (HM Treasury 2010). It also takes into
account the respective country’s population share as a proportion of England, Scotland and Wales or Great Britain. In the majority of cases, the corresponding UK department deals with spending only in England, so the population proportion is that of England. For 2015–16, in Scotland this is 9.85%, for Wales 5.69% and for Northern Ireland 3.31%. The formula thus looks like this (HM Treasury 2010):

<table>
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<tr>
<th>Change to UK department’s programme</th>
<th>x</th>
<th>Comparability percentage</th>
<th>x</th>
<th>Population proportion</th>
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The UK Treasury calculates the comparability percentage based upon the level at which the services that the UK government department provides correspond with the services provided by the devolved administrations’ departments. For example, education is a wholly devolved area of competence—each of the devolved administrations have full budgetary control in these areas, so the UK government’s Department of Education deals with services solely in England. This means that the comparability percentage for education is 100% for all three nations. Contrastingly, the UK government’s Department of Transport maintains responsibility for a limited amount of the competence in Scotland, slightly more in Wales, but none in Northern Ireland. This means that the comparability percentage is different for each of the devolved institutions in this case: 100% for Northern Ireland, 98% for Scotland and 73.1% for Wales. It is important to note that, despite the fact any additional funding made available to the devolved legislatures through the Barnett Formula is directly related to spending in specific policy areas in England, the money is not ring-fenced. This means that the respective governments in Belfast, Cardiff and Edinburgh do not have to increase the budgets of the same departments that the increased funding arose from: the Barnett Formula relates only to the revenue side of devolved finances.

B. Policy divergence

For the 2015–16 financial year, as a result of the block grant and the Barnett Formula, the Scottish Parliament received a budget of around £30.1bn (€42.1bn), the National Assembly for Wales had a budget of approximately £15.3bn (€21.4bn) and the Northern Irish Assembly had a budget of
£10.2bn (€14.3bn) from the UK Treasury. These are substantial budgets and give the devolved institutions the opportunity to increase spending on particular priorities or to diverge from UK government policy in certain areas. However, a recurring issue with the devolved institutions, particularly in Scotland although increasingly now in Wales as well, is the scope of those institutions to fundamentally alter how spending is distributed within their respective areas of competence, but with limited or no power over revenue-raising (Harvey 2015: 251). The lopsided devolved settlements, with their onus on spending, has meant that parliamentary debates within the devolved institutions have focused on expenditure and have seldom strayed into discussions of revenue-raising which remain outside their remit. As a result of this, the respective governments of these institutions have been able to focus on specific spending priorities and, provided they had the space within their budget to finance those priorities, the central government allowed them the scope to do so. This has led (in some cases) to more social democratic policies being delivered by the devolved legislatures, which have tended to have more left-of-centre governance than the centre.

This situation is most pronounced in Scotland, and there are several examples of distinctly “Scottish” policy outcomes as a result of devolved governance. Perhaps surprisingly, the first of those—the decision by the Scottish Executive in 2002 to provide free personal care for elderly people in Scotland—was delivered in spite of the vertical congruence in governing parties. Initially, it was a policy that was considered unaffordable, but the elevation of Henry McLeish to First Minister (after the sudden death of Donald Dewar) saw the policy pursued, in spite of opposition from his own cabinet in Edinburgh. Further opposition was provided by the UK Treasury, ostensibly worried that the UK government would have to deliver a similar policy UK-wide and that the cost implications were not sustainable. McLeish did not bow to pressure—he believed free personal care was the right thing to do and also wanted to deliver a distinctive policy for the Scottish Parliament—and the policy of free personal care remains in place over a decade later (Taylor 2002: 38ff.). This was the first financial test of the devolution settlement; the UK Treasury remained opposed to the policy, and at their behest, the UK Department of Work and Pensions (DWP) removed a substantial benefit to those who were to receive free personal care, and the sum required to be met by the Scottish Executive instead. The DWP resisted calls to devolve the money—pointing out that the Scottish Executive was responsible for the decision and that, in the
post-devolution period, Scotland would have to take some responsibility for its own finances. The dispute was conducted in private—with no recourse to Joint Ministerial Committees—and, after Jack McConnell replaced McLeish as First Minister, the Scottish Executive backed down.

When Labour was replaced in government in the Scottish Parliament by the Scottish National Party (SNP) in 2007, and by a Conservative–Liberal Democrat coalition at Westminster in 2010, there was an expectation that intergovernmental relations would be adversely affected and that more tensions would arise between the central and devolved institutions. Instead, a “strong level of continuity in UK–Scottish relations” persisted (Cairney 2012: 235). The wider constitutional question—the prospect of a Scottish independence referendum, eventually held in 2014 and providing a negative response—meant that both sides proved reserved in their interactions with one another. A long-time SNP policy to abolish university tuition fees was passed with support from the Scottish Liberal Democrats in 2008, though their manifesto commitment to write off the debt of Scottish students proved too expensive to implement. Two years later, the UK government allowed universities in England and Wales to charge up to £9,000 a year in fees, providing further divergence in tertiary education policy.

C. Policy convergence

There has also been policy learning across the devolved institutions, with the National Assembly for Wales abolishing charges for National Health Service (NHS) prescriptions in 2007, the Northern Irish Assembly following in 2010 and the Scottish Parliament doing so in 2011. NHS prescriptions in England, which remain under the purview of the UK Parliament, have been retained and in 2015 cost £8.20 (€11.20) each, creating divergence between the devolved institutions and central government in health policy. However, under the McConnell administration, the Scottish Executive delivered a ban on smoking in enclosed public places, which came into force in March 2006. The same laws were passed and enforced in Wales and Northern Ireland from April 2007, and in England (as a result of UK legislation) in July 2007, emphasising that the centre was also willing to learn from the devolved legislatures. Similarly, for environmental reasons, Wales introduced a charge of 5 pence (7¢) for plastic carrier bags in 2011; Northern Ireland did so in 2013, and Scotland in 2014. On this occasion,
the UK government also legislated for the charge in England and introduced it in 2015.

D. Conflicting competence

Devolution of power invariably leads to some practical issues and anomalies in the division of specific areas of competence. The Scotland Act 1998 did just that in a curious example. Schedule 5 of the act listed powers reserved to the UK government, one of which was responsibility for the Hovercraft Act 1968, with the specific exception of the “regulation of noise and vibration caused by the hovercraft” which was devolved to the Scottish Parliament (Lynch 2001: 16). While the practicalities of negotiating jurisdiction in this case may have given headaches to the Secretary of State, whose job it was to determine whether the Scottish Parliament legislating in this area was ultra vires, this issue was not likely to prove controversial or result in tension between central and devolved governments.

By contrast, the issue of nuclear power, and more specifically the building of new nuclear power stations, has been more controversial. Nuclear power resides within the broad competence of energy policy, an issue which is reserved to the UK government. However, planning permission for nuclear power stations resides with Scottish ministers as a result of the UK Electricity Act 1989. Prior to the establishment of the Scottish Parliament in 1999, this manifested as executive devolution and was the responsibility of the Scottish Office, headed by the Secretary of State for Scotland. As the Secretary of State was a member of the UK government, this presented no difficulty: if the UK government wanted to build new nuclear power stations in Scotland, the Secretary of State would oblige by providing permission. However, with a legislative body established, that executive power was passed to Scottish government ministers, who thus had the final say over whether plans could proceed (Cairney 2011: 124). When the SNP took over as a minority government in the Scottish Parliament in 2007, they made no secret of their opposition and, in response to the UK government’s consultation on nuclear power, formally rejected building new nuclear power stations in Scotland. When the UK government announced a list of prospective sites for new power stations in April 2009, none of the sites were in Scotland (or in Northern Ireland, which also has control of planning permission devolved it). While the UK government was thus respectful of the division of powers on the issue and did not
overrule the devolved legislature, it was quick to point out that it believed the decision not to allow new nuclear power stations in Scotland was short-sighted, and that it left open the potential for Scotland to have an energy deficit which would require importing electricity from England in the future.

**IV. Competence reform**

Devolution, in the words of Ron Davies, is a “process, not an event”. And as Davies explained further, devolution is not a “journey with a fixed end point”, nor an “end in itself but a means to an end” (1999: 15). Of course, when Davies made this oft-quoted declaration, he was Secretary of State for Wales in the UK Government, attempting to balance the wafer-thin support for the Assembly indicated in the 1997 referendum with the desire by some to see a more powerful body in Cardiff, while assuaging the fears of Welsh Labour MPs that devolution would be beneficial. Nevertheless, his comment was prescient in two ways. First, the devolution of powers was never intended to be an end. Instead, it allowed a different institutional body responsibilities in areas in which it could deliver policy divergence: a means to deliver different ends in different places where different policies were required. Second, devolution was a new principle for the UK constitution, and without having historic experience of regional legislatures, it was difficult for the UK government, civil service or indeed expert witnesses to be certain about the roles and responsibilities that would best fit the specific requirements of each institution. Thus, although former Labour leader John Smith described devolution as “the settled will of the Scottish people”, the devolution settlements themselves were never intended to be final. Devolution has been a five-decade-long process in the UK thus far, and with the constitution firmly on the political agenda as a (partial) result of the electoral and policy success of nationalist parties in Scotland and Wales, as well as the ongoing power-sharing settlement in Northern Ireland, it shows no signs of disappearing.

**A. Wales**

Since the National Assembly of Wales was established in 1999, constitutional reform has had a near permanent place in elite-level debate in
Wales. While *Plaid Cymru* (the Welsh nationalist party) were frustrated by the lack of legislative powers the Assembly was originally devolved, those frustrations were balanced by a desire to see the Assembly succeed (McAllister 2000: 599). Indeed, the “corporate body” model of devolution delivered to Wales was unpopular within the Assembly and with *Plaid Cymru*’s Lord Elis-Thomas as Presiding Officer, reform of the Assembly procedures was quickly undertaken, and a traditional separation between executive and Assembly was quickly implemented. The Richard Commission, established in 2002 to examine how devolution in Wales could be improved, recommended a larger Assembly elected by single transferable vote. While those suggestions were ignored by the UK government, it did respond with a White Paper which accepted the confusion the corporate body model had caused and recognised the need to formalise the changes which had already come into existence (Wales Office 2005: 6). In addition, the White Paper proposed a new Wales Act (legislated for in 2006) providing for some legislative powers to the Assembly, with the option of moving to full legislative powers in twenty clearly articulated policy areas if the public indicated a desire to do so (2005: 21). The White Paper was clear that such a move would “represent a fundamental change to the Welsh settlement” and that a referendum would be required to verify the electorate’s desire for such a change (2005: 25). The precedent established by the 1979 and 1997 devolution referendums meant that an argument could be made for a referendum to be held if any considerable change to the devolution settlement was to be made. Political expediency (in particular, internal divisions within the Labour party) meant that provision for a referendum was a shrewd means of making sure the legislation was passed. Civil servants made the point

“[that] the 1997 referendum set up the NAW with executive responsibilities, and giving it legislative powers is a fundamental change to the system. The 1997 referendum did not provide a mandate for that, therefore there is a case that a referendum was required.”

In the meantime, the National Assembly for Wales could apply for powers on an individual basis through Legislative Competence Orders. The All-Wales Convention, a key part of the coalition agreement between Labour and Plaid in government after 2007, formed the basis of a consultation with the public on the issue of further powers, and when it recommended

2 Author’s interview with Senior Welsh Assembly Government Official (July 2010).
the move to full legislative powers, the referendum was scheduled for 2011. At the same time, the Holtham Commission (2010), also established as part of the coalition agreement, examined the financial settlement in Wales, recommending that the Assembly acquire powers over income tax, corporation tax and stamp duty, as well as borrowing powers and the revision of the Barnett Formula to improve the level of block grant in Wales. At a time when the Assembly had not even received the legislative powers outlined in the 2006 Act, the Holtham recommendations appeared rather bold, and though welcomed by political parties in Wales, several Assembly members distanced themselves from some of the recommendations, fearing that the proposals would have a detrimental effect on the referendum. While those fears were perhaps justified, the referendum passed comfortably, and the Welsh Assembly received the legislative powers outlined in the Government of Wales Act in time for the beginning of the 2011–16 Assembly.

After the 2011 referendum (and as a partial response to the ongoing constitutional developments in Scotland, see below), the Welsh First Minister, Carwyn Jones, continued to press the case for further devolution to Wales, including more fiscal powers. In response, the UK government established the Silk Commission, which was charged with two objectives: to recommend powers which would improve the financial accountability of the Assembly, and to consider what further powers the Welsh Assembly might be devolved to. Reporting in two parts, the first saw 33 recommendations on the fiscal question which were published in November 2012 and, building on the Holtham recommendations, also proposed the devolution of stamp duty, business rates and landfill taxes, providing borrowing powers for the Assembly and allowing the Assembly a tax-varying power by 2020, subject to a referendum. The UK government implemented these recommendations, alongside others on the regulations surrounding elections to the Assembly in the Wales Act 2014. The second part was published in March 2014 and included 61 recommendations to improve the powers of the Assembly. These included devolution of energy projects of up to 350 MW, devolution of speed limits and drink drive laws, and the adoption of a “reserved powers” model of devolution in the same vein as in Scotland and Northern Ireland. The UK government published a White Paper in March 2015 which took on board much of the Silk Part II recommendations and, in addition, recommended the devolution of powers over elections to the National Assembly for Wales (HM Government 2015).
After the 2015 UK general election, these proposals formed part of the Wales Bill 2015 announced in the Queen’s Speech.

B. Scotland

The constitutional settlement was largely absent from political debate in the Scottish Parliament for the first session. This was unsurprising when the extent of parliamentary business (52 Scottish Executive-introduced bills were passed in this period), the vertical congruence of governing parties and the death of the first Scottish First Minister (Donald Dewar) and the subsequent resignation of the second (Henry McLeish) are taken into account (Mitchell et al. 2003: 126). The focus of the Scottish Executive under its third First Minister, Jack McConnell, and the parliament itself, was to provide stability after the turbulence of its early years. Indeed, it was McConnell’s intention to be seen to be “doing less, better”, thereby moving the Parliament into the background whilst still delivering the services the public expected (Keating 2010: 111). A coalition with the Liberal Democrats, which had served the whole first session of the Scottish Parliament, was re-established after the 2003 election and helped to provide stability to the Parliament’s organisation—particularly in light of growing public unrest at the cost of the new Holyrood building. They also contributed to a continued lack of constitutional debate, with parliament continuing to function relatively benignly under the rules established in the Scotland Act 1998—with two exceptions.

Firstly, the Liberal Democrats, in the latter part of the second parliamentary term, established a commission under the chairmanship of the Scottish Parliament’s outgoing Presiding Officer Lord Steel, which set out the case for extending the Parliament’s powers to include fiscal power as a precursor to a federal UK (Steel Commission 2006: 110–120). Secondly, the re-election of Alex Salmond as leader of the SNP in 2005 (though not returning to the Scottish Parliament until the 2007 elections) saw the party talk more freely about the limitations of devolution, fiscal autonomy and the potential for independence. However, at this stage, talk was cheap: the SNP were not in a position to deliver constitutional change.

That situation changed after the 2007 Scottish Parliament election, with the SNP’s ascension to minority government. The constitutional question became a central part of the political debate. The SNP Scottish government established “A National Conversation”, a government consultation
on the constitutional future of Scotland. For the SNP, this represented something which they had never before had the opportunity to do: engage the public through the apparatus of government on the issue upon which the party was founded. It was built as an attempt to do three things: build support for independence; engage the political and governmental establishment in Scotland on the constitutional debate; and maintain the issue of independence on the political agenda in Scotland. Agenda-setting was key to the SNP’s strategy of normalising the constitutional debate. Perhaps even more crucially, the consultation engaged the civil service in Scotland in the process, preparing the wider Scottish government for the possibility of independence and what it would mean for government.

The Scottish government’s constitutional activities prompted the larger opposition parties in the Scottish Parliament—staunchly pro-Union—to launch their own consultation, the Calman Commission, to consider alterations to the devolution settlement (but precluding independence from their discussions). The two processes continued in parallel, without actively engaging with one another, creating a decidedly “disjointed constitutional debate” (Trench 2008: 14). In the space of three years or so, the constitutional debate in Scotland had moved on from discussions as to whether change was required to the shape and form that change should take (Crawford 2010: 95). Indeed, the UK government was moved to act upon the recommendations of the Calman Commission, presenting a Scotland Bill (which was to provide the Scottish Parliament more control over some taxes, including stamp duty, landfill tax and a portion of income tax, as well as borrowing powers) before the UK Parliament in November 2010. However, the election of the SNP as a majority government in May 2011 meant that, despite receiving royal assent in May 2012, the Scotland Act 2012 was overtaken by events. In particular, the agreement to allow the Scottish Parliament to legislate for an independence referendum, the subsequent long referendum campaign and the fact that support for independence registered at 45% was taken as an indication that the Scottish electorate desired change.

In the days leading up to the referendum, opinion polls had suggested the outcome was very much in the balance. This prompted the leaders of the three largest UK parties, including the Prime Minister, to announce

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3 Author’s interview with Kevin Pringle (Scottish Government Special Advisor) (May 2010).
4 Author’s interview with a senior Scottish Government Official (March 2010).
their commitment to bestowing further powers on the Scottish Parliament if Scotland voted to remain in the Union. “The Vow”, as this announce-ment became known, spawned a further devolution study—the Smith Commission—which, under a very tight timescale, hastily produced recom-mendations including devolution of all income taxes, a proportion of VAT, increased borrowing powers, as well as the permanence of the Scot-tish Parliament to be enshrined in UK legislation. Draft clauses for a new Scotland Bill were published in January 2015, in accordance with “The Vow”. These took into account that a UK general election was due in May 2015, though each of the UK parties had committed to delivering a new Scotland Bill based upon these clauses after the election. After the elec-tion, the majority Conservative government announced a Scotland Bill to enact these clauses, drawing substantially upon the recommen-dations of the Smith Commission. However, with the SNP winning 56 of the 59 Scottish seats in the House of Commons in the 2015 election—more than the combined total number of seats they had won in UK elections since 1945—in addition to the substantial increase in political engagement brought about by the independence referendum and vocal opposition in Scotland to the UK government’s austerity programme, the Prime Minister announced he would consider further devolution once the Smith Commis-sion recommendations had been implemented.

C. Northern Ireland

While the Northern Irish Assembly has been suspended four times as a re-sult of historic tensions and distrust between unionist and nationalist par-ties and communities and the inherent difficulties of maintaining a power-sharing agreement between the two sides, the competence of the Assem-bly, as established by the Good Friday Agreement, have largely remained. The most recent suspension, between 2002 and 2007, was only concluded after talks between the UK and Irish governments and the political parties in Northern Ireland produced a substantive outcome: the St Andrews Agreement. The Agreement stipulated that, in exchange for the nationalist Sinn Féin moving to support the Police Service of Northern Ireland (which had historically been much more favourable to the Unionist Protestant communities), the Democratic Unionist Party (DUP) agreed to enter a power-sharing arrangement in the Assembly. This was re-established in
May 2007, with small changes to the devolution settlement included in the Northern Ireland (St Andrews Agreement) Act 2006, which focused on processes rather than new areas of competence. The St Andrews Agreement itself had included provision for policing and justice to be devolved soon after the Assembly was restored; however this was delayed, once again, by tensions within the power-sharing executive. After a further threat of collapse and two weeks of negotiations, the Hillsborough Castle Agreement between Sinn Féin and the DUP saw competences over policing and justice devolved.

In 2014, two further issues had resurfaced as problematic for Northern Irish devolution. First, the issue of identity, culture and flags reasserted itself, particularly in Belfast where the City Hall had made the decision to only fly the Union flag on 18 days a year (rather than permanently). Second, the UK government’s Welfare Reform Act 2012 made significant changes to the way that benefits were structured across the UK. Welfare is a devolved matter in Northern Ireland, but the “parity principle” historically meant that benefits mirrored those in the rest of the UK. If that parity was broken, and the Northern Irish Assembly paid more generous benefits, the UK government would reduce the block grant available, effectively making the Assembly itself pay for more generous benefits. Sinn Féin and the SDLP, part of the Northern Irish Executive were opposed not only to the act, but also to the knock-on effect on benefits in Northern Ireland. By late 2014, with the Assembly once again on the verge of collapse, the main actors once again came together for talks over issues surrounding flags, parades and the impact of welfare changes. The Stormont House Agreement, reached in December 2014, included a package of financial support from the UK government amounting to nearly £2bn (€2.84bn) between 2014 and 2020, devolution of Corporation Tax (to allow Northern Ireland to set more competitive rates relative to the Republic of Ireland) by 2017, a Commission on Flags, Identity, Culture and Tradition to be established by the Northern Irish Assembly and a requirement that the Assembly effect welfare changes and produce a balanced budget in January 2015. The balanced budget was passed by the Assembly, but the Welfare Reform Bill fell after Sinn Féin withdrew their support and the SDLP joined them in a petition of concern, denying the bill the required cross-community support and leaving the devolution of further competences in doubt.
And what of England, the largest component nation in the UK? The obvious solution to the “English Question”, to create a separate English Parliament with powers similar to the current devolved legislatures, has limited support in England. Instead, and immediately after the Scottish electorate registered a “No” vote in the independence referendum, the Prime Minister announced his intention to legislate for what he called “English Votes for English Laws” (EVEL). The plan reflected the need to deal with the growing resentment surrounding the perceived generous powers and financial settlements to the devolved nations—and, particularly, the planned expansion of powers available to the Scottish Parliament. The theory behind the EVEL proposals was straightforward: if a policy in a devolved area was to be legislated upon and the intended legislation would affect only England, then only English MPs in the House of Commons would be permitted to vote upon the bill. In principle, the proposed legislation was sound: English MPs would effectively become an English Parliament, taking on devolved functions without the need for an entirely separate institution. However, a number of issues arose in practice. First, the identification of English-only legislation is controversial, with much in the way of cross-border spillover effects evident (for example, in the field of healthcare). Second, there is concern about House of Commons processes. The argument has been made that non-English MPs would have a reduced role in the legislative process, as the SNP put it, becoming “second-class MPs”. Alongside this was the role of the Speaker and the potential for politicisation of the chair, whose role it would be to determine whether legislation qualified for EVEL. Third, there was the issue of finance. Changes to the block grant for the devolved nations are, as outlined above, dependent upon spending in comparable areas in England. The argument made by the SNP is that English-only legislation (in, for example, health spending) would have knock-on financial effects for the budgets of the devolved nations and, as such, the legislation should not be identified as “English-only”. The response to this particular concern would seem to suggest that, rather than denying England a form of quasi-devolution, reform of the Barnett Formula would be a more appropriate solution. Few disagree that something requires to be done to eliminate the constitutional imbalance that puts the English electorate at a disadvantage to their counterparts in the devolved nations. However, agreement on what that solution should be remains elusive.
The sovereignty of the UK Parliament was challenged with the creation of devolved legislatures in 1999. Piecemeal changes have been made to the constitutional picture in the years since, and devolution remains, as Ron Davies so eloquently put it, a process not an event. Recent internal developments have further strengthened the devolved institutions. The Scotland Act 2016 takes as its starting point the near-entrenchment of the Scottish Parliament, and provides tax and (for the first time) welfare powers to Holyrood. The original 2016 Wales Bill was rather weaker and heavily criticised by politicians and academics alike, which resulted in the government withdrawing the bill and starting again. Asymmetry remains the primary feature as nationalists in Scotland and devolutionists in Wales make arguments for further devolution while those in Northern Ireland try to find the best way of keeping their institution running. England remains the elephant in the room on the issue of devolution, and though the UK government finally has some proposals to deal with the *English Question*, their solution is not without controversy. External pressures—in particular the referendum which supported the UK leaving the EU—look likely to have a significant impact upon the internal constitutional question. The fact that the UK’s component nations voted differently—England and Wales voting to leave the EU, Scotland and Northern Ireland voting to remain—has created further constitutional tension. Significantly, the Scottish First Minister instantly asserted the Scottish government’s intention to fulfil the wishes of the Scottish electorate and attempt to remain in the EU—putting a second independence referendum on the table. Northern Ireland, which has a land border with the Republic of Ireland that would become a ‘hard EU border’ when the UK leaves, is also in a difficult constitutional position. Irish nationalists immediately called for a border poll to ascertain the wishes of the Northern Irish population on remaining in the UK or reuniting with the Republic of Ireland (and thus remaining in the EU). As a result of both internal and external pressures, the constitutional question in the UK is fluid, and likely to remain on the political agenda for some time.
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Island Autonomies—Constitutional and Political Developments

Maria Ackrén

I. Introduction

Federalism is a normative rule which favours a political system of multilevel governance combining elements of shared rule and territorial self-rule. Similarly, autonomism is a normative term that advocates the use of self-governance as a principle with which to envision autonomy as the ideal constitutional and political framework for accommodating diversity. Both concepts are somewhat related to each other, but at the same time there are distinctions between them (LLuch 2012: 135). With autonomism politicians seek to develop further self-government in various spheres within existing state structures. In this context, autonomy is related to the federalist principle of multilevel governance, but the feature of autonomy becomes more asymmetrical in relation to the central level (LLuch 2012: 135). A regional government or a territorial autonomy may exercise authority in its own jurisdiction or in the country as a whole. This is the distinction between self-rule and shared rule (Hooghe and Marks 2013: 185). Territorial autonomies constitute entities with both federal and non-federal elements. Some of the non-federal elements are that the formal distribution of power between legislative and executive authorities is not constitutionally entrenched; the shared rule element is usually weak and sometimes non-existent; influence over the policymaking institutions of the centre is weak or negligible; and self-rule is set up in an unequal way in relation to the core institutional apparatus of the central state (LLuch 2012: 139ff.). An ideal symmetrical model of federalism is composed of political units, which are “comprised by an equal territory and population, similar economic features, climatic conditions, cultural patterns, social groupings, and political institutions” (Tarlton 1965: 868). The political subunits in such a system would maintain the same relationship to the central authority. On the other hand, an asymmetrical model of federalism would be composed of political units corresponding to differences of interest, character and make-up that exist within the whole society (Tarlton 1965: 869).
Autonomy does not seek independence or sovereignty on a short or medium term base, but seeks to promote the self-government, self-administration and cultural identity of a territorial unit populated by a society with some national, overall characteristics. Various forms of autonomy can be described as subcategories of the general classification of “federal political systems” if we include the broad scope of confederations, federacies, associated states, condominiums, etc. (Lluch 2012: 136). Autonomy normally encompasses measures of self-rule, where the subunits are run by elected governments that have meaningful measures of authority over local or regional matters in decisions and their execution. As a movement, autonomy is one important means that groups use to improve their status within existing state borders as an alternative to secession (Agranoff 2004: 26f.). Central governments hold control over fiscal matters and are usually reluctant to transfer these issues to autonomous subnational governments. This can be in the form of tax policies or of having a distribution system, where the autonomous region operates underneath the central government and receives some block grants or other subsidies in order to cover its expenses (Agranoff 2004: 43).

Island autonomies in the world belong to a group of asymmetrical federal systems. Asymmetrical federalism can be described as a system in which smaller entities are in an association with a larger entity on the basis of internal autonomy or self-government. This association can take the form of a free association or of a federacy (Elazar 1987: 54f.). Free association means that the smaller entity can break away from the larger entity if the population expresses the will to do so. The relationship is usually in a loose form where the larger entity has the power over external relations, such as foreign policy, security, citizenship and the economy, while the smaller entity is totally internally self-ruling in all domestic affairs. Examples of free associated statehood can be illustrated by the Cook Islands and Niue in their relations towards New Zealand. Free association can often be seen as the best option of both worlds, both for the small islands and the overarching larger state (Henderson 2002: 77ff.). A federacy is a relationship of mutual agreement between the larger and the smaller entity. Any change is determined, and this must be done in agreement with both parties. Most of the federacies in the world are islands (Ackrén 2009: 35; Hepburn 2014: 468ff.).

The Nordic autonomies (Åland Islands, Faroe Islands and Greenland) and the Portuguese autonomies (the Azores and Madeira) all belong to the group of federacies as classified by Elazar (1987: 55f.). Sometimes these...
arrangements are called self-government systems, territorial autonomies, subnational jurisdictions or minority governance systems (see, e.g., Ackrén 2009; Dinstein 1981; Elazar 1987; Hannum 1996; Gál 2002). Rezvani (2014) has even gone further in coining the concept of partially independent territories (PITs). These concepts are often used interchangeably to define the same territories.

With the term subnational jurisdiction, as defined by Baldacchino (2010), we mean entities which are created with strategic constitutional ingenuity by a larger state. These entities may entail or develop some national identity or regional identity over time, which is subsumed to some extent with another, overarching state identity (Baldacchino 2010: 29). One of the most common explanatory factors behind small island autonomy and/or small state sovereignty is colonialism. Most small islands in the world are former colonies. The various forms of successful asymmetrical federal arrangements have “special” endowments: 1) they are non-sovereign states with a strong level of internal autonomy or self-government, whether it is de facto or de jure or a combination of both; 2) they are subnational, lying underneath the central government; 3) they may have a distinct society and culture and therefore are seen as nations within the state structure; 4) they are usually islands at a remote distance from the mainland and from their metropolitan states; 5) the citizenry is supported by politicians who exploit the best of all possible worlds, using their jurisdiction as a key economic and political tool; 6) they either escape regulation or try to customise the interests of the metropolitan centre in order to fit in (Baldacchino 2010: 99).

This chapter will elucidate the Nordic autonomous islands: the Åland Islands, Faroe Islands and Greenland in comparison with the Portuguese autonomous islands of Azores and Madeira. What kind of constitutional and political development have these island autonomies been encountering, and what are their characteristic features when it comes to the relationship with their respective metropolitan states?

II. Structure of the distribution of powers

Constitutions are often seen as the building blocks of a society. The constitution sets out the rules of the political game, but it is not only a set of rules, since it also gives the scope of values and the nature of the political community as a whole. The constitutional design becomes the process of
how to structure society with various institutions and in what ways political leaders promote and sustain certain values (Simeon 2009: 243). A constitution does not always start as a blank sheet of paper, since influences are taken from other countries and regions. Constitution-making often combines elements of what we might see as “high politics”—the politics of the central state apparatus—and “low politics”—the politics of subnational entities (Simeon 2009: 245.). Within federal systems some key issues are often addressed, such as the number and character of the constituent units, the division of powers, fiscal arrangements, intergovernmental relations, representation at the centre, and judicial competences (Simeon 2009: 246ff.). The same issues can be said to apply to asymmetric autonomous areas as well.

In a decentralised regime, such as a federacy, the central authority can always override the decisions of the subnational jurisdictions if they fail to deliver what the central authority intended when it authorised the subnational jurisdiction’s decision-making powers (Rubin and Feeley 2008: 172).

A. The Åland Islands

The Åland Islands, which are part of Finland, are the world’s oldest territorial autonomy established in 1921. The decision was made in the League of Nations and is seen as one of the most successful conflict solutions in the world. The Åland Islands are based on international agreements that were later entrenched in the Finnish constitution (for more details, see Ackrén 2011).

The Åland Islands are mentioned and regulated in § 120 and § 75 of the Finnish constitution. According to § 120, the Åland Islands are stated as a self-governing territory, which is further regulated in the Act on the Autonomy of Åland. § 75 further stipulates special legislation regarding the Åland Islands in relation to acquiring real estate, namely that Åland has initiative rights to pass its own legislation and that these regulations are all mentioned in the Act on the Autonomy of Åland and the Act on the Right to Acquire Real Estate in the Åland Islands (Suksi 2005: 10). The constitutional status of the Åland Islands can be seen as quite strong, but at the same time the Åland Islands are regulated by three different legal frameworks, which affect the population on these islands: the Finnish constitution, the Act on the Autonomy of Åland and the EU regulations, the latter
because the Åland Islands also belong to the EU (with some exceptions). These legal frameworks work parallel to each other and can also been seen as exclusive of each other at the same time, since they function at the same normative level (Suksi 2005: 2).

The areas of competences assigned to the authority of Åland are all enumerated in the Act on the Autonomy of Åland in § 18 and the areas of competence that still belong to the Finnish state are all listed in § 27 and § 29. The Åland Islands have exclusive legislative powers regarding their areas of competence and their execution is carried out by the government of Åland. Judicial power, though, remains with the Finnish court system (Suksi 2005: 2f.). There are some functioning state authorities in the Åland Islands, such as the court (lower level instance), customs, taxation bureau and coastguard. The Finnish government is represented by the governor of the Åland Islands. The Åland Islands are a neutralised and demilitarised territory. This situation is regulated in the convention regarding the Åland Islands’ non-fortification and neutralisation, which was signed by 10 states in 1921 (Silverström 2004: 7).

The Åland Islands have some powers when it comes to international relations. According to § 58 in the Act of Autonomy of Åland, the government has the chance to participate in international negotiations when Ålandic matters are on the table. The Åland Islands cannot enter into international agreements by themselves, but have the right to address issues and proposals to the central level (Finnish authority) if there is a need for negotiations with a foreign power. The government of Åland needs to be notified about international agreements whenever they fall within the competence of the Åland Islands (Silverström 2004: 7f.).

The parliament of the Åland Islands has full legislation powers in areas under section 18 of the Act on the Autonomy of Åland, while legislative competence in other matters is vested in the Parliament of Finland. At the same time, the provision lays down that the administration and executive power of the Åland Islands is vested in the government of the Åland Islands and the officials are subordinated to it (Suksi 2011: 166). The Act on the Autonomy of Åland creates a number of interfaces between the Åland Islands and the central government of Finland. In order to avoid disputes, there is a cooperative organ, called the Åland Delegation. The Åland Delegation is represented by the Governor of Åland as its chairperson and two representatives from the Council of State and the Ålandic Parliament and two deputy members for each member. The Åland Delegation should upon request give opinions to the Council of State, the ministries of the central
government, the government of Åland and to the courts. One of the main functions of the Åland Delegation is the budgetary process and the determination of whether the enactments of the Parliament of Åland are within its competence. This task is performed together with the Supreme Court of Finland (Suksi 2011: 170f.).

Even though the Åland Islands have full legislation powers, the President of Finland has vetoing rights. When the Ålandic piece of law arrives at the Ministry of Justice, the President has a period of four months at his/her disposal to react if there are any disputable matters. If the president does not react, the enactment is published by the government of Åland Islands in the Statutes of Åland, after which it enters into force on a day specified by the government of Åland (Suksi 2011: 307).

The parliament of the Åland Islands has 30 members elected according to proportional representation from one single constituency of the Åland Islands. Those Ålanders who have received domicile, i.e. were born or have been living on the islands for a permanent period of five years and have approved knowledge of the Swedish language, are eligible to vote. It is possible to apply for this regional citizenship. The right of domicile is based on Finnish citizenship. The right of domicile is also linked to the right to acquire real estate or to establish a business on the islands (for more details, see Spiliopoulou Åkermark 2007: 19ff.). Furthermore, it is worth mentioning that the Åland Islands have their own political parties and are therefore cut off from the Finnish party system. The Åland Islands only have one out of 200 representatives sitting in the Finnish parliament, so their influence within Finnish politics is very marginal or almost nonexistent (Hepburn 2014: 476).

B. The Faroe Islands

The Faroe Islands became an integral part of the Danish Realm with its very first constitution of 1849. This meant that the Faroese were represented in the Danish parliament and that the civic rights of the constitution were directly applicable in the islands, while all major decisions concerning the Faroe Islands were taken in Copenhagen (Ackrén 2006: 223). The Faroe Islands were under British occupation during the Second World War and it was unthinkable to return to the pre-war constitutional situation. Discussions took place at different levels, but no agreement on a new political setting could be reached (Ackrén 2006: 226).
In 1946 a referendum was held with the options of either keeping the status quo of 1940 or outright independence. The result was a narrow majority in favour of independence (48.7% for and 47.2% against). The Danish government panicked, dissolved the Faroese legislative assembly, and a new election was held. This time a clear majority voted against secession, and the new coalition began negotiations on the question of Faroese autonomy with the Danish government. These negotiations eventually resulted in the implementation of the Home Rule Act of 1948 (Ackrén 2006: 226).

The Act of 1948 listed those areas for which the Faroese Løgting would, upon request, assume entire legislative, fiscal and administrative responsibility. Another list within the act enumerated matters for which the Faroe Islands needed further negotiations with the Danish government in order to take over such matters. All matters which the Danish government would continue to have sole responsibility over were also mentioned in the act (Ackrén 2006: 226). This included foreign policy, defence, the courts, civil rights, civil and criminal law and general fiscal policy.

If a dispute occurs between the Faroe Islands and Denmark, the case should be addressed by politicians from both the Faroe Islands and Denmark first and they should meet with three judges from the Supreme Court in Denmark. If the matter reaches consensus between the politicians, the case is solved as such. If a disagreement occurs, it is up to the judges to decide the outcome of the impasse (á Rógvi 2015: 143ff.).

One of the major revisions of the Home Rule of the Faroes occurred in 2005. Two laws were implemented regarding policy areas and foreign affairs. These laws were both accepted by the Danish parliament and the Faroese Løgting (á Rógvi 2015: 155f.). There are still five areas which are solely under Danish jurisdiction: the constitution, citizenship, the Supreme Court, foreign, security and defence policy and monetary issues (á Rógvi 2015: 155f.).

In the preamble of the Home Rule Act of 1948, the Faroe Islands are recognised as another nation with special historical and geographical ties to Denmark (Hvidbog 1999: 37). The Faroe Islands are also a member of NAMMCO (The North Atlantic Marine Mammal Commission) and operate outside the European Union with bilateral treaties with the EU. The Faroe Islands also have bilateral treaties on fisheries and commerce with other countries as well as a border treaty with the UK.

There are two distinct views of the relationship between Denmark and the Faroe Islands regarding the power of competence. One view is that the
Home Rule Act of 1948 is considered a normal Danish law, where delegation of powers is transferred from Denmark to the Faroe Islands. Another view is that it is seen as a binding agreement between the Faroe Islands and Denmark, which organises the legal relationship between the two entities (Hvidbog 1999: 38). It has usually been interpreted as an agreement between the two entities, yet different views exist on this matter.

The Faroe Islands and Greenland are not mentioned in the Danish constitution as autonomous territories, but they are mentioned in § 28 regarding election to the Danish parliament, where it is stated that both have the right to elect two members each to the Danish parliament out of a maximum of 179 seats (Danmarks Riges Grundlov 1953). In § 42 (8) it is also mentioned that rules regarding referenda can be enforced by law in the Faroe Islands and Greenland (Danmarks Riges Grundlov 1953). In § 86 the Faroe Islands and Greenland are mentioned regarding the elections to municipalities, and these are further regulated by law in the Faroe Islands and Greenland (Danmarks Riges Grundlov 1953). Additionally, the Faroe Islands have their own political party system.

C. Greenland

Greenland was a Danish colony from 1721 to 1953. During World War II, the USA also expressed an interest in buying the island. The USA had purchased the Caribbean Islands of the Virgin Islands from Denmark in 1917, so during the Second World War its interest in the Arctic increased due to German occupation of countries in Europe and Russia’s enhanced interest in the Arctic (see, e.g., Hanson 1940).

During the colonial era, Greenland was considered a trading colony and the Royal Greenlandic Commerce Company (KGH) regulated all commerce to and from Greenland. This monopoly situation functioned until 1950 (Ackrén 2014: 52f.). The administration was also in the hands of the Royal Greenlandic Commerce Company until 1912. With the Danish constitutional change towards democracy in 1849, Greenland was included in the process. A commission was established in Greenland in 1851, and superintendents were implemented to take care of internal affairs (Ackrén 2014: 53f.). The superintendents were Greenlandic representatives, but all the major decisions were taken in Copenhagen during this time. On 5th June 1953, Greenland became integrated into the Danish Realm as a country. This situation remained in place until the end of the 1970s. In the
1970s, political parties were established and voices for more extensive autonomy were on the agenda. This resulted in negotiations between Denmark and Greenland, and in 1979 Greenland received its Home Rule Act (Ackrén 2014: 54f.).

One of the issues which triggered the development of Home Rule was Greenland being forced to become an EEC member together with Denmark back in 1973. Referenda were held in both Denmark and Greenland with different results. The Danes voted clearly in favour, while the Greenlanders voted against membership. A new referendum was held after the introduction of Home Rule in 1982, and in 1985 Greenland left the EEC and opted for a status of “overseas country or territory”, which is its status within the EU today (Ackrén and Lindström 2012: 502f.; Gad 2014: 99ff.).

In the Home Rule Act of 1979, Greenland was recognised as a separate community within the Danish Realm. Like the Faroe Islands, Greenland was considered another nation with special historical, cultural and geographical ties to Denmark (Lov nr. 577 af 29. November 1978 om Grønlands hjemmestyre). The same system in the Faroe Islands also applies to Greenland regarding the lists of competence and the areas that Greenland could take over immediately, while other areas needed further negotiations.

During 1999 to 2000 a new commission for self-government was established to investigate and evaluate the first 20 years of Home Rule. The result of this work was a new agreement with Denmark. The commission realised that Greenland needed extended autonomy or self-rule in various areas. The political parties were also eager to develop the country in the direction of more autonomy. In November 2008, a referendum regarding the new Self-Government Act took place and a clear majority of the Greenlandic people voted for this development. The new Self-Government Act was implemented on 21st June 2009 (Ackrén 2015: 95f.).

In the preamble to the new Self-Government Act of 2009, the Greenlandic people are defined as a people according to international law with the right to self-determination. This means that the Greenlanders can secede from the Danish Realm in the future if the population so desires. In the preamble it is further stated that equality and mutual respect should be held between Denmark and Greenland in their relationship. Furthermore, it is an agreement between the government of Greenland and the Danish government as equal partners (Lov om Grønlands Selvstyre).
In § 1 Greenlandic self-government is outlined as including legislative, executive and jurisdictional powers in the areas of Greenlandic competence. In the appendix to the Self-Government Act, there are two lists: List 1 contains areas where the Greenlandic government can transfer matters directly after a decision it has made; List 2 includes areas where further negotiations between Denmark and Greenland should take place (Lov om Grønlands Selvstyre).

The largest change between the Home Rule Act of 1979 and the Self-Government Act of 2009 is related to economics and natural resources. The block grant is now fixed at DKK 3.4 billion (about €442 million) according to 2009 prices. A yearly check is conducted in relation to inflation. Natural resources are now in the hands of Greenland. Greenland has also received some more room for manoeuvre in international relations (Lov om Grønlands Selvstyre; Ackrén and Jakobsen 2015).

In case of a dispute between Denmark and Greenland, the Danish government or the Greenlandic government can initiate the question of dispute to a committee constituting of two members appointed by the Danish government, two members appointed by the Greenlandic government and three judges from the Danish Supreme Court (Lov om Grønlands Selvstyre). This is the same system used by the Faroe Islands.

According to the Danish constitution, the same rules and regulations as mentioned in the section on the Faroe Islands apply here. However, in the Greenlandic case, § 31 (5) states that special legislation is possible regarding Greenlandic representation in the Danish parliament (Danmarks Riges Grundlov 1953). Greenland, like the Faroe Islands, has two representatives in the Danish parliament. The political parties that these politicians represent do not have any counterpart in Danish politics.

D. The Portuguese Islands of the Azores and Madeira

The Portuguese islands of the Azores and Madeira will be outlined here in one section, since the two islands have much in common. The Portuguese constitution identifies the two islands as autonomous areas with their own legislative competences. However, this legislative power is to some extent circumscribed by the legislative power of the national parliament (Suksi 2013: 37ff.).

Several sections of the Portuguese constitution are related to the autonomous islands of the Azores and Madeira. Article 5 outlines that Portu-
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gal’s territory is made up of the European mainland, which is historically defined as Portuguese, and the Azores and Madeira. Article 214 stipulates that the Azores and Madeira Autonomous Regions shall control sections of the Audit Court with full responsibility for matters in their respective areas. Title VII from Article 225 to 234 is completely devoted to the regions. Furthermore, Article 236 outlines that the Azores and Madeira should comprise parishes and municipalities.

Both autonomous regions have full legislative, executive and jurisdictional powers, and both are members of the EU. They also have their own assets and finances and collect their own taxes. The financial system, however, is very closely linked to the Portuguese national system, with the central authorities empowered to control the taxation schemes of the two regions. With Portugal’s accession to the EU, the industrial free trade zones and the international business centres of both islands were subject to several revisions. These zones and business centres have been fully integrated and regulated under EU and Portuguese law (Correia 2012: 24).

Both the Azores and Madeira were first discovered by the Portuguese between 1335 and 1342 and became inhabited during the reign of Henry in the 15th century (Benedikter 2009: 140). Already politically connected to Portugal since the 14th century, the Azores raised demands for autonomy in the 1820s when liberals rebelled against the central authorities, which in those days resided on the island of Terceira. Autonomy was finally granted in 1895 but was revoked again in the 1930s due to lack of interest from Portuguese legislators and a lack of resources in exercising competences. After the fall of the dictatorship followed by the revolution in 1974, the Portuguese Constituent Assembly was willing to support autonomy for both the Azores and Madeira. In the constitution of 1976 both the Azores and Madeira were recognised as autonomous regions (Ackrén and Olausson 2008: 238ff.).

Besides the Portuguese constitution, which is rather detailed, the two autonomous regions have their own statutes. The regions’ legal framework is based on these basic laws (apart from the constitution), one for each region, governing the exercise of self-government by the region as well as its rights, powers and duties. The statutes can be further elaborated and improved by the regional assemblies (Benedikter 2009: 141).

The regional assemblies are empowered to legislate on matters of special interest to the region in question, to exercise executive authority over regional legislation, to draw up regional economic plans and to participate
in national development plans. Furthermore, the regional assemblies have the power to levy taxes and tariffs (Benedikter 2009: 141).

The executive authority in the two regions is delegated by the Portuguese president and a five-member advisory committee to the minister of the Republic. The regional governments are each headed by a president who is elected by and from the regional assembly and officially nominated by the minister of the Republic. The regional president in turn appoints the ministers of the regional government. The government remains responsible for the regional assembly and may be compelled to resign by a motion of no-confidence (Benedikter 2009).

The Azores are divided into three districts, each sending its representative to the Chamber at Lisbon (three deputies in all). Madeira and Porto Santo are officially designated as the District of Funchal, which sends two deputies to the national parliament. The judicial system of the autonomous regions is under the auspices of the Portuguese system with District Courts and a Court of Appeal. The final appeal is to the Portuguese Supreme Court (Benedikter 2009).

In disputes, it seems that the Audit Court is the first authority, with the right to issue opinions on the accounts of the Azores and Madeira. Furthermore, the Portuguese state has representatives in each region, which are appointed by the president of the Republic. The representatives are responsible for signing regional legislative decrees and having them published.

Both regions have the right to participate in the negotiations of international treaties and agreements that directly concern them. They also have the right to cooperate with foreign regional bodies and to participate in organisations with the purpose of fostering inter-regional dialogue and cooperation. They may on their own initiative or at the request of bodies that exercise sovereign power, give their opinion on issues that fall under the latter’s responsibility and concern the autonomous regions, and in matters that relate to specific interests in relations, for instance in their relationship with the EU.

III. The procedure of amendments regarding autonomous status

The procedures of amendments regarding a change in status for the island autonomies are different in the various contexts. For the Åland Islands changing the status or the Act on the Autonomy of Åland is a long and
difficult procedure. Section 69 of the Act on the Autonomy of Åland outlines the issue of amendment. It may only be amended or repealed, or exceptions to it may be made, by consistent decisions of the parliament of Finland and the Legislative Assembly on the Åland Islands with at least a two-thirds majority of votes cast. An Act of Åland follows the same procedure with a two-thirds majority, but in this case in the Ålandic parliament (Act on the Autonomy of Åland 1993). At the moment negotiations are taking place between the Åland Islands and Finland regarding some changes to the Act on the Autonomy of Åland. A committee is working on this issue with representatives from both Finland and Åland. This process has been continuing since 2013, and it is uncertain whether any changes will be made. However, the committee has a positive view, since Finland is celebrating its 100 year anniversary this year (2017), and Åland will soon have its own 100 year anniversary. Usually, it takes decades before an amendment is in place. The Act on the Autonomy of Åland has been changed only twice, in 1951 and in 1993. The Act on the Autonomy of Åland provides for a federal-like system based on an agreement which stipulates that several powers should fall within the authority of Åland, while others should remain under the authority of Finland (Hepburn 2014).

For the Faroe Islands and Greenland, a different approach is needed. Negotiations between Denmark and the two island autonomies are usually a first step towards changing the acts of autonomy. Then a referendum is usually the medium for the citizens to express their opinion. In the new Self-Government Act of Greenland, chapter 8, § 21 outlines the possibility of Greenland becoming independent. It is clearly stated that it is the Greenlandic people who should decide on their destiny. This would be done through a referendum, and if the referendum results in a vote for independence, it is followed by negotiations between the Danish government and the Greenlandic government. The agreement should be accepted by both the Danish and Greenlandic parliaments (Lov om Grønlands Selvstyre). The relationship between the Faroe Islands and Greenland in relation to Denmark is based on a mutual understanding between the parties. It is usually acknowledged as a binding agreement, but in legal terms it is possible for Denmark to withdraw the autonomous status if the Danish state desires to do so. This is, of course, most unlikely but is theoretically possible.

The Portuguese islands of the Azores and Madeira, which are deeply entrenched in the Portuguese constitution, follow the same procedure as
with constitutional amendments. According to title II, article 284 in the Portuguese constitution, the Assembly of the Republic may revise the constitution five years after the date of publication of the last ordinary revision. The acceptance of a revision requires a four-fifths majority in the Assembly. Alterations to the constitution can be made by a two-thirds majority, according to Article 286. The alterations need to be collected together into a single revision law. However, constitutional revision laws should respect the political and administrative autonomy of the Azores and Madeira (Article 288). The statutes of the Azores and Madeira are seen as ordinary laws, and therefore the amendments can be made by the Legislative Assemblies of the regions, but these revisions should be sent to the Assembly of the Republic for discussion for approval or rejection (Article 226).

IV. Exercising powers—the islands’ relationships with the EU

The island autonomies have different approaches when it comes to their relationship with the EU. The Åland Islands are part of the EU, but with some exceptions. From the viewpoint of the Åland Islands, while they were entering the EU, general opinion was in favour of keeping the regional form of domicile. Through the so-called Åland protocol, article 1, the limitations on owning land, having real estate and establishing a business were approved. According to article 2 in the Åland protocol, Åland is considered a “third country” in relation to the EU council’s directive 77/388/EEC and the EU council’s directive of 92/12/EEC. These directives mean that Åland is outside the tax union. The Åland protocol’s preamble also mentions Åland’s special status according to international law. However, this statement has been interpreted in various ways (Silverström 2004: 8f.).

The Åland protocol can be seen as part of the EU’s primary law; thus, changes in parts which fall within the competence of the Åland Islands can only be approved by the Ålandic parliament. The tax exemption falls under the EU Commission’s competence and can therefore be changed by the EU. The Åland Islands should implement those directives that fall under the competence of the Ålandic parliament. The Åland Islands take part in the elections of the European Parliament, but have no separate seat. Within the regional committee, Åland has its own representative in the Finnish delegation (Silverström 2004: 10).
In relation to the membership agreements with the EU, the Act on the Autonomy of Åland was extended with interstate relationships, through which the Åland Islands became a part of the Finnish management and preparations of EU issues. The Åland Islands have the right to participate in Finnish preparations pertaining to EU legislation, such as directives or decrees (Silverström 2004: 8).

The Faroe Islands had been a member of EFTA since 1967. In the negotiations regarding Danish membership to the then EEC, the Faroe Islands were a candidate for a special status in the Community, but since there were many uncertainties about the fishery policy within the EEC at the time, the Faroe Islands were kept waiting for three years. Thereafter, it was up to the Faroe Islands to decide whether they wanted to enter the EEC. In January 1974 the legislative assembly of the Faroe Islands rejected EEC membership. The Ministerial Council accepted the Faroe Islands’ exclusion, and instead some favourable agreements regarding the import of fisheries and fishing products to the EEC were established (Silverström 2004: 22).

In 1977, Denmark and the Faroe Islands, on the one hand, and the EEC, on the other hand, signed a fishing agreement. The agreement entered into force in 1981, and according to this agreement it is renewed every six years until one of the parties rejects its renewal (Silverström 2004).

Denmark and the Faroe Islands, on the one hand, and the Faroe Islands and the EU, on the other hand, have free trading agreements. The Faroe Islands have accepted the right of free movement of goods, with some exceptions regarding some very narrow areas. The EU has given free access right to the Faroe Islands’ industrial as well as fishery products (Silverström 2004: 23). The Faroe Islands are considered a third country in the context of the EU. There are two bilateral agreements in operation between the Faroes and the EU: a Free Trade Agreement and a Bilateral Fisheries Agreement (Government of the Faroe Islands). There have been some disputes between the Faroe Islands and the EU regarding herring and mackerel fishery, but these disputes have been resolved.

Greenland was integrated as a part of Denmark, and in 1973 when Denmark entered the EEC Greenland was forced to become a member as well. There had been referenda in both Greenland and Denmark respectively with different results. Denmark was in favour of membership, while Greenland rejected it. This event triggered voices for more autonomy in Greenland and later, after achieving Home Rule back in 1979, Greenland opted out of the EEC in 1985 (Gad 2013: 217). Greenland was one of the...
first territories to ever leave the EU. Greenland is now an Overseas Country and Territory within the EU and has favourable agreements with the EU regarding several matters, such as fisheries, education and research.

During the 1990s, a special dispute about “paper fish” occurred between Greenland and the EU, with the result that the EU granted Greenland export and tax-free access to the EU market provided by the OCT arrangement regarding the fishery sector. The cod fisheries had collapsed due to shifts in sea temperature, and the EU continued to buy the right to catch cod. The EU also paid for a stock of redfish (Gad 2013: 221).

In 2006, a more sustainable agreement between Greenland and the EU came into being. A joint declaration was established as an umbrella covering the fisheries agreement, and a new special partnership agreement was concluded regarding cooperation in a number of areas of interest to the EU, such as minerals, transportation and climate research. The first programming period was 2007–2012, with a focus on education and the development of human resources (Gad 2013). Since 1992 a Greenlandic representative has been working in the Danish diplomatic mission in Brussels. Today, four persons are employed full-time in Brussels for Greenland, two of whom have Danish diplomatic passports (Gad 2013: 223).

In 2009, the EU prepared a ban on importing sealskin due to Canadian Inuit hunters killing baby seals. This kind of hunting, though, is completely unfamiliar in Greenland. Thus, Greenlandic and Danish officials got together in order to ensure that the ban on importing sealskin should exempt skins harvested by traditional hunters (Gad 2013: 228). This ban has been of major concern for Greenland, since seal hunting is one of its traditional, cultural trademarks. After recent negotiations between the EU chairmanship and the European Parliament, the ban on imports has been lifted and now an exemption exists for skins harvested by traditional hunters. This is a triumph for Greenlandic hunters and Denmark since Greenland can now export seal skins to the European market (Sermitsiaq).

The autonomous regions of the Azores and Madeira have the right to participate in decision-making processes in the international affairs of the Portuguese Republic, and they also have the right to conduct an international policy of their own (Lanceiro 2010). This means that the regions have the right to participate and to be heard in matters that concern them. The regions participate within the delegation, the diplomatic mission or representation of the Portuguese state in the negotiations and international conferences which draw upon a given international convention or agreement. The regions are integrated into the Portuguese delegation (Lanceiro
The Azores have the right to possess full information regarding international relations according to their Political and Administrative Statute of 2009, as stated in Article 121 (3) b) (Lanceiro 2010).

The Azores and Madeira are regarded as geographical and economic specificities of the outermost regions within the EU. They are remote, insular, of small size, with a difficult topography, a different climate and economically dependent on a small number of products. Both islands are full members of the EU with some exemptions. They are currently taking advantage of several EU programmes (EU matters).

According to Article 227 (1) (v) of the Portuguese constitution, the autonomous regions should “give their opinion […] in matters that concern their specific interests on the definition of the Portuguese State's position within the ambit of the processes of constructing the European Union”. This means that the regions should be invited to nominate their representatives to the delegations of the Portuguese state, either in technical negotiations within working groups or within the EU Commission, or in political negotiations in the Council of Ministers of the EU when “matters concern them” (Lanceiro 2010; Constitution of the Portuguese Republic). The Committee of the Regions consists of two representatives from the Portuguese autonomous regions (one from each region). The Azores and Madeira may establish cooperative international relations with regional bodies from other member states within the EU.

V. Conclusions

The autonomous regions outlined in this chapter are clearly examples of asymmetrical federacies. They both have an asymmetrical relationship with their central states and within international relations, especially in their relationship to the EU. The Åland Islands, the Azores and Madeira are entrenched in the Finnish and Portuguese constitutions respectively. The Faroe Islands and Greenland follow a delegation model, where negotiations take place with Denmark. This also means that Denmark can withdraw the regions’ right to self-government if it wishes to do so. All autonomous islands have their own statutes or self-government acts, which regulate the powers of the islands. This is usually in the form of enumeration. This bilateral nature of intergovernmental relations reflects the asymmetry between the islands and their metropolitan state. There are no equivalent federacy/autonomy arrangements for other regions within the EU.
states they take part in. In Denmark and Portugal we have two such cases, while the Åland Islands are the only regional unit in Finland that exercise this system. This special situation of a substate territory possessing constitutionally protected autonomy, but without a guarantee of shared rule at the centre has led to the notion of federacy.

The amendments to the status and revisions of the self-government acts or statutes are a complex procedure when it comes to the Åland Islands, the Azores and Madeira. It is more flexible for the Faroe Islands and Greenland to change and revise their self-government acts and their status as such. This conveys the notion that these regions are actually two types of special entities. On the one hand, we have the Åland Islands, the Azores and Madeira as part of the definition of a federacy, but on the other hand the Faroe Islands and Greenland might be seen as other types of autonomies. However, the usual interpretation is that the Faroe Islands and Greenland are leaning towards more autonomy and even independence in the future, which would make these territories strong as autonomous regions and cut off from Danish politics. They act as states within a state (Kingdom of Denmark). The Faroe Islands and Greenland can then be seen as clear examples of partially independent territories (PITs).

Political parties are often seen as forces of nationalistic interest and even of separation from a state. The Åland Islands, the Faroe Islands and Greenland have their own regional parties, which are not part of the national party system of the state they are part of. In the Portuguese islands of the Azores and Madeira, the situation is a bit different since national parties operate together with regional parties and compete on both levels. A conclusion that can be drawn from this is that within a state with a two-party system, fragmentation within politics is more likely.

The autonomous islands’ relationship with the EU is different. The Åland Islands, the Azores and Madeira are full members of the EU with some exemptions. Greenland belongs to the Overseas Country and Territory regime within the EU with bilateral agreements and the Faroe Islands have achieved bilateral agreements with the EU. While the Åland Islands, the Azores and Madeira participate in Finnish and Portuguese delegations respectively with direct links to EU bodies, the Faroe Islands and Greenland have their own representation in Brussels, but with more limited access to the real negotiation tables. This has consequences for their policies directed towards the EU.
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Political and Territorial Autonomy of Vojvodina in Serbia

Srdjan Djordjević

I. Introductory notes

The territorial dimension of a constitutional system is one of the pillars of the development and sustainability of a state in both an abstract and in a practical sense. The formula of territorial compactness, which ensures a state’s existence, is one of the elements that forms the national constitutional order. Without doubt, territory greatly influences the structure of a national state both at the very beginning of the appearance of its modern form, as well as during the periods of its development and stabilization.

In our current time of globalised organisational forms of society, a question may be raised about the relativisation of the significance of territoriality, particularly bearing in mind the integrative tendencies of interstate linkages through new subnational forms. Nonetheless, we believe that understanding the state in a territorial sense is certainly still based on respecting its territorial integrity, one of the three foundational pillars of its creation and existence. Despite the obvious processes of so-called ‘desovereignisation’ of a contemporary state through globalisation, it must be acknowledged that the territorial element is actually the most common basis for redefining the political and legal position of individual national states. The more recent history of states from the end of the 20th and the beginning of this century once again proves the significance of territory in understanding the concept of the state. There are numerous examples on the European continent which show that the territorial aspect is a major challenge as well as the basis for the definition, foundation, change and very existence of certain states. In this context, it is sufficient to mention the examples of Yugoslavia, the Soviet Union and Czechoslovakia. In all of these examples, territory always appears to have a political motive and incentive for the creation of a new state framework, which additionally justifies the importance of territory. Thus, the understanding of political and territorial autonomy is strongly connected to the elementary understanding of the state, which M. Hauriou defines, above all, as a spacial
phenomenon, since territory is the basis for centralisation and for defining the limits of public power (Prelot 2002: 19–20).

It is easy to conclude that the territorial organisation of power in Serbia forms the basis upon which the entire social system is built. Apart from the fact that it represents an autonomous problem of social theory and practice, the internal territorial system can, at the same time, be an indicator of understanding the democratic capacities of a social community. Comparative experience warns us that the concept of non-democratic rule cannot coexist with democratic territorial decentralisation. Indeed, such political models cannot operate under conditions of decentralised distribution of political power. The pattern of non-democratic authority unavoidably includes centralisation as a constituent element of such political construction, which places the political establishment at the centre without the need to accept the articulation of interests by non-central parts of the social structure.

The problems mentioned before are particularly felt in the multinational context of national states, which is why the autonomy of Vojvodina in the Republic of Serbia deserves particular attention. Besides being a constitutional and legal problem, the issue of citizens’ right to provincial autonomy belongs to a set of questions of particular importance in Serbia, which can be confirmed by historical developments as well as by discussions held on this topic during the actual development of the country’s constitutional and legal system. These disputes are, of course, of a political and professional nature. The competing opinions of political subjects are the result of the intensity and dynamics of Serbian social life inside the political arena. Thus, the right of citizens to provincial autonomy appears as a “convenient” tool for attracting the attention of voters with the ultimate goal of winning their support once the elections come into the focus of public opinion. In this context, it is not rare that even academic and professional opinions can reflect motives which reproduce partisan scenarios. This is not surprising given the fact that scientists and professionals operate within a political context that has the power to influence the expression of academic and professional positions, particularly in the field of constitutional and public law.

The issues that need to be researched in order to ensure an objective analysis of such an important issue are complex, since they are part of a multidimensional problem. In this context, we need to speak about historical development, the complexities of political culture and current events, while we also need to be aware that the current system operates in such a
way that deep down in its essence lie historic traditions and cultural systems. Although the law plays an important role, the status of Vojvodina in the Republic of Serbia is not an exclusive format of legal solutions because such an approach would leave us at the level of dogmatic analysis. This is why it is necessary to take into account a set of relevant political elements which influence the legal shaping of final solutions.

In this framework, the legal regulations of the political and territorial autonomy of Vojvodina are not preconditioned by an exclusive two-way relationship between central and provincial governments, but they are influenced by the perceived results of territorial organisation in the entire area of the Republic of Serbia. Here, it is necessary to take into account the politically interesting territorial issue of Kosovo from the point of view of Serbia’s legal and political system. Serbia does not recognise the Republic of Kosovo, which has been recognised by most of the European Union countries. From the official point of view of the Serbian government, it remains the Autonomous Province of Kosovo and Metohija. This has created an atypical and specific collision in the sphere of legal validity with a unique example of how organised political communities work (Cukalovic and Djordjevic 2016: 481). Although the “Kosovo problem” is not our central topic, I believe it is important to point out that the attitude of the central government towards the autonomy of Vojvodina may, to a certain extent, be the reflection of the experience Serbia has had with political and territorial autonomy within its territory, bearing in mind all the differences between these two autonomous provinces. The case of Kosovo may exemplify the results of inadequate solutions in the field of autonomy, which degrades the concept of territorial compactness and stability of the state. Considering this issue in the context of the central problem, the author underlines that this does not interfere with axiological observation of the concrete “Kosovo example”, but rather points to possible reasons for the current solution of Vojvodina’s autonomy.

II. The previous constitution of Serbia

In a brief review of the development of the political and territorial system, I primarily pay attention to the period since 1990 when a new social order based on formal democratic principles began being built. Namely, in 1990 Serbia adopted its first constitution, which for the first time after the Second World War introduced legal and political solutions belonging to a
The Constitution of 1990 is usually described as the “Milošević Constitution” in professional and academic literature, in order to emphasise the instrumentalisation of this constitution for the political purpose of individual and personal power. From the political science point of view, it is important to take into account both the historical moment in which this constitution was adopted as well as the results of its application. The historical context in which it was passed includes the following elements: 1) The Yugoslav federal state was at the end of its constitutional and political existence, which generated political preparation for the forthcoming armed conflicts inside Yugoslav territory, finally resulting in the disintegration of the Socialist Federal Republic of Yugoslavia and the formation of new states; 2) Serbia directed its political energy towards fighting separatist and decentralist tendencies in its two autonomous provinces (Kosovo with Metohija and Vojvodina); and 3) Slobodan Milošević clearly demonstrated his intention to establish firm, autocratic power. In such an atmosphere, without an honest position that it was vital to abandon a communist one-party system, the constitution of the Republic of Serbia formally inaugurated a completely new social order, which raised questions surrounding the democratic capacities of these new constitutional solutions. The fact that reservations about these new solutions were in place proves that the Constitution of 1990 was the subject of serious criticism by academic and professional audiences from the moment it was adopted. Yet it survived the test of time for 17 years until it was replaced by the existing constitution.

III. The political environment during the adoption of the new Serbian constitution

During the contemporary constitutional and political history of Serbia, around the time of the adoption of the constitution in 2006, the territorial element of states came into focus again as a significant motive for encouraging constitutional campaigns which had an unavoidable impact on the level of the established political and territorial autonomy of Vojvodina within the legal and state system of Serbia. In order to draw objective conclusions, it is necessary to remind the reader of some unbiased facts which marked the period in which the current Serbian constitution was adopted.
Serbia was facing a complex political mosaic consisting of several relevant political circumstances. In 2006, the government of the Republic of Serbia was a coalition, mostly consisting of a number of political parties that, having derived from the political groups formed after the revolutionary overthrow of the Milošević regime in 2000, represented themselves as the pro democratic front. The prime minister was V. Koštunica, the leader of the Democratic party of Serbia, while the president of the state was B. Tadić, the leader of the Democratic Party. At the same time, 2006 marked the final year of the “trial period” of a specific formation—the State Union of Serbia and Montenegro, which had been established in 2003. With the expiration of this three-year trial period, formal preconditions were met for Montenegro to submit an official request to leave the union with Serbia. A referendum for the independence of Montenegro was organised in May 2006. Montenegro’s direction did not please the ruling political establishment in Belgrade, and using subtle methods, the Serbian government invested a lot of political energy into attempting to prevent the Montenegrin referendum having a positive outcome (Djordjevic 2010: 14). The final outcome of this independence referendum represented a defeat for the Serbian government’s political agenda and, at the same time, opened up questions about Serbia’s new constitution, which gained its state independence by having Montenegro leave their common state union. This was an epochal event in Serbian history, since it was the first time after 1918 that Serbia regained its full independence in a very specific way.

In addition to these events, it is important to point out that one of the pro-European political parties (G 17+) publicly stated that they would leave the government coalition on 1st October 2006 due to Serbia lagging behind in the process of European integration, which was supposed to be just one day after the parliament’s adoption of the new constitution. The fear of a premature parliamentary election made the political establishment resort to the instrumentalising the adoption of the new constitution so that ruling parties could increase their rating among voters. There was a justified suspicion and assumption that the accelerated adoption of the new constitution was a politically cunning manoeuvre for the survival of V. Koštunica’s government. This also included the exploitation of the Kosovo issue, with them using emotive arguments to remain in power. The third important factor in describing the political situation in this period is related to the Kosovo problem. After 1999, the United Nations established an international administration on Kosovo territory with the aim of
intensifying the process of gradually transferring certain powers to the Kosovo administration.

In such a conglomerate of circumstances, both the need and the expectations for a new constitution grew since the old constitution of 1990 was due to be replaced both formally and content-wise. The Serbian government prepared a platform for a constitutional campaign which was based on the necessity that the new constitution should preserve the state’s territorial integrity and wholeness, which again highlighted the Kosovo problem through an attempt to solve it through formal constitutional and legal norms.

IV. Modern constitutional problems of Vojvodina’s autonomy

The explanations laid out above are necessary in order to understand the period in which our constitutional solutions saw the light of the day and the foundations for the political and territorial autonomy of Vojvodina were established within the Republic of Serbia.

The rights of citizens to provincial autonomy and local self-government were regulated through a constitutional formula, a newly established concept of Vojvodina’s autonomy which significantly reduced its autonomy to the level of a local self-government. For the purpose of this paper, it is necessary to underline the justified criticism directed at the constitutional text and its lack of coherence. The author shares the opinion of the Venice Commission that extensively formulated norms on principal issues of Vojvodina’s autonomy lack essence (Commission 2007). It is obvious that the authors of the constitution intended to degrade the quality of regulations related to the provincial autonomy and democratic decentralisation capacities by using inconsistent normative linguistic expressions. The way in which the constitution makers were allowed to closely regulate the issues of the distribution of competences and jurisdiction is proof of insufficient constitutional protection of the citizens’ right to provincial autonomy.

The citizens’ right to provincial autonomy represents a specific right which regulates different spheres of social life. The citizens’ right to provincial autonomy is essentially structured within the framework of the competitive constitutional norm. This norm establishes rules on the relationship between the central government and decentralised authorities of the autonomous province, and were thus at the core of the decentralisation
principle. If we restrict our narrative exclusively to the level of understanding of the citizens’ rights to provincial autonomy, it can be said that it represents a tool for the realisation of the relationship between central and decentralised governments.

The provision of Article 176 of the Republic of Serbia’s constitution shows how the creators of the constitution understand the concept of provincial autonomy and local self-government, which is expressed through a formulation of citizens’ rights.¹ That is, they used a joint normative expression that makes it impossible to find a difference between two separate and distinct citizens’ rights—the right to provincial autonomy and the right to local self-government, which can be exercised directly or through their freely elected representatives. Looking at the fact that provincial autonomy and local self-government are considered equal at the level of the constitutional provision that mainly defines this concept, we can argue that the makers of this provision lacked the intention to establish a clear difference between these two citizens' rights—the right to provincial autonomy and the right to local self-government. An adequate solution would have been to identify and emphasise the differences between these two rights in order to extract a separate concept—the citizens’s right to provincial autonomy. However, when analysing the constitutional provisions, an interesting tendency can be noted in the constitutional text, that is, to conceptually equalise the right to provincial autonomy and the right to local self-government. This, of course, cannot do damage to local self-government but only to provincial autonomy: “The Constitutional Court interpreted the constitutional norms in a way that greatly restricts the right of citizens to provincial autonomy” (Korhec 2013: 440). On the other hand, the essence of decentralisation is reflected, among other things, in the jurisdiction available to local self-governments; thus the approach of the constitution makers can be understood to a certain extent. It is not the author’s intention to assess the quality of constitutional solutions to these issues, but to point out that the democratisation of relations inside a society is reflected in a formula for local self-government. Thus, further in the constitution’s text we can note a specific constitutional construction of the triangular relations between “the republic–autonomous provinces–local self-government”, from which it can be asserted that the makers of the constitution intended to support higher levels of autonomy in local self-

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¹ Službeni glasnik Republike Srbije, br. 98/06, Ustav Republike Srbije.
government units in relation to autonomous provinces, particularly when
the hierarchal unity among the legal acts of these three social and constit-
tutional entities needed to be protected.

Scanning through the constitution’s text, one gets the impression that
the provisions related to the right of citizens to provincial autonomy and
local self-government represent a complex solution, both from a linguistic
and coherence point of view. As already pointed out, linguistically the ex-
istence of two separate rights (the right to provincial autonomy and the
right to local self-government) is not clearly distinguished, so it may seem
that the creators of this provision did not plan to conceptualise the difference at all. When this problem is viewed from a nonomothetical perspective,
one can note the unified treatment of one complex citizens’ right which, in
the systematisation that follows, is regulated by two separate rights. Hav-
ing completed the analysis of the contents of the right to provincial auton-
omy and the right to local self-government, we can see that there are no
decisive distinctions between them, which supports the claim about the
degradation of Vojvodina’s autonomy. It is further supported by the practi-
cal application of relevant constitutional norms that regulate the issues of
the constitutional position of autonomous provinces in the Republic of
Serbia. This is also exemplified in the way that constitutional court judges
interpret these provisions when deciding on the constitutionality of the law
on establishing the Autonomous Province of Vojvodina’s areas of competence.

The application of constitutional and legal solutions to provincial au-
tonomy has raised a particularly important question for understanding the
theoretical essence of citizens’ rights to provincial autonomy. Can this
right be located within the corpus of human rights and liberties? Or should
it be treated as a separate competitive constitutional norm which defines
the distribution of powers between the central and provincial governments
and, in this way, establishes the line of (de)centralisation? That this
question appeared to be disputable is shown by the fact that the legislative
and judiciary branches of power stand in direct opposition. For the pur-
pose of clarification, it should be pointed out that the adoption of the law
on the establishment of the powers of the Autonomous Province of Vojvo-
dina meant that legislators assumed that the citizens’ right to provincial
autonomy included general legal protection, which exists for all human
rights individually. Namely, the relevant legal provisions prescribe that in
legal proceedings it would be taken into account to what extent the right to
provincial autonomy has been exercised (Law on establishing the powers
of the Autonomous Province of Vojvodina, Article 2.2.). With this norm, the legislator established a specific type of protective clause, which is identical to the European formula for the protection of human rights and which is a constituent part of the attitude of the Republic of Serbia’s constitution towards human rights (The Constitution of the Republic of Serbia, Article 20.2.). The constitutional formula on the achievement of human or minority rights represents a normative standard and the value of European understanding of the essence and methodology of preventing national legislators from trying to restrict the levels of human or minority rights in the future. However, when the Constitutional Court in Belgrade interpreted the relevant constitutional norms, it decided that the protection of the level of human rights achieved thus far could not be applied to the citizens’ right to provincial autonomy. Such an interpretation of the constitutional judiciary assumes a theoretical understanding according to which the right of citizens to provincial autonomy is not given the same status as standard human rights, which therefore rules out the possibility of it offering this type of normative protection, which exists for human rights, to this particular right. Such an approach is legitimate given the authority of the constitutional judiciary’s decisions, but under the condition that elementary logical principles, which form the basis of the legal system, are to be respected. When explaining the court’s deliberations, the justices were expected to at least follow this principle. In this concrete case, we can identify the lack of such consistency, even within the same decision. On the one hand, the Constitutional Court decided that claims for provincial autonomy were unacceptable, thereby ignoring international human rights standards. On the other, in the same decision the Constitutional Court avoided another provision which identified Vojvodina as a region that has traditionally cherished European values, explaining that such wording violated the principle of equality, which is indeed the basic principle associated with human rights. Therefore, in the first case we have an argument that the protection principle related to human rights cannot be applied to the right to provincial autonomy and, in the second case, another protection principle from the corpus of human rights that can be applied to the right of citizens to provincial autonomy. On the basis of this obvious in-

2 Službeni glasnik Republike Srbije, br. 99/09, Zakon o utvrđivanju nadležnosti Autonomne pokrajine Vojvodina.
3 Službeni glasnik Republike Srbije, br. 67/12, Odluka Ustavnog suda, br. Uuz-353/2009.
consistency from the constitutional judiciary in explaining their deliberations and rendering a number of legal provisions unconstitutional, we can conclude that the Constitutional Court of the Republic of Serbia was primarily guided by political principles. Here, it should also be noted that a disputed law was passed by one legislative body (2009) which, politically speaking, was quite different from the legislative body that was in power during the adoption of the decision by the Constitutional Court (2013).

This example reflects the absence of a constitutional solution on provincial autonomy, which could be detected right after the adoption of the current Serbian constitution, not only by an academic and professional audience, but also by the Venice Commission.

Public attention was particularly drawn in by the decision of the Constitutional Court to render the following legal provision unconstitutional: that, among other things, Vojvodina is a region that has traditionally cherished European principles and values, that it may become a member of European and world associations and that within its areas of competence it may establish offices in European regions and Brussels according to existing laws and its statute. Despite several attempts to understand the logic of the constitutional judiciary’s position, the author of this paper cannot offer an explanation.

It is absolutely beyond comprehension that such a legal formulation can be found unconstitutional, particularly bearing in mind that the constitution itself states that the Republic of Serbia is based on the rule of law and social justice, principles of civil democracy, human and minority rights and freedoms, and a commitment to European principles and values (The Constitution of the Republic of Serbia, Article 1). The author believes that constitutionally, legally and politically, it is impossible to explain why it is considered unconstitutional to emphasise and link oneself to the values which also represent and define the Republic of Serbia’s principal aspirations. It was already pointed out that the arguments of the constitutional judiciary—that such a provision violates the principle of equality—are unconvincing. It is not clear at all in what way this provision discriminates against other territorial parts of the Republic of Serbia if a specific law that regulates one autonomous province emphasises perfectly acceptable values. Here, it should be added that it is an indisputable fact that the Autonomous Province of Vojvodina is not only geographically, but traditionally, historically and politically based on European principles and values. The author believes that the reaction of the Constitutional Court of Serbia in this legal matter cannot be defended from the point of view of elemen-
tary constitutional logic and that it rather reflects the political views of this constitutional bench and judicial branch of power. In the author’s opinion, it was expected that the Constitutional Court would adopt quite the opposite position and protect the fundamental values upon which, at least according to the constitution’s text, Serbia is based. Instead of following their principles and underlining the arguments in favour of emphasising the traditional European values in the context of Vojvodina’s autonomy, which would also reaffirm Serbia’s constitutional essence, the justices of the Constitutional Court chose to pursue the opposite direction.

**IV. Conclusion**

In order to objectively understand the provincial autonomy of Vojvodina in the constitutional and legal system of the Republic of Serbia, it is necessary to bear in mind a few important factors. Besides a complex political culture (which is still characterised by patriarchal traditions), the political events which marked the period before the adoption of the current Serbian constitution should also be taken into account. In this context, the author believes that it is feasible to prove that the government of the Republic of Serbia, which was the most efficient initiator of the issue of constitutional changes, did not have sufficient political legitimacy to do so. This claim can be defended by indisputable facts about the non-democratic takeover of a few parliamentary mandates regardless of the clear constitutional and judicial position that these mandates do not belong to political parties, but to the individual members of parliament. If we add to this the fact that the Serbian government invested its political energy in an unsuccessful attempt to stop the Montenegrin independence referendum in 2006, then it is clear that 2006 was the year of political helplessness for the Serbian government.

In such a situation, the creators of Serbian political engineering devised a plan to activate the “constitution issue”, intensifying the process of adoption of a new constitution in a way which was, to put it mildly, suspicious. The basis of this suspicion can be found in the following facts: there was no public debate on the quality of planned constitutional solutions, the members of the parliament received the constitution text on the day it was adopted, a “weekend referendum” was organised, the list of voters was incomplete (this eliminated risks, since the success of the referendum on the constitution was measured in relation to the total number of voters regis-
tered in the election lists) and the problem with Kosovo was exploited again as a major constitutional issue for the promotion of the referendum.

The events that followed confirmed the aforementioned assumptions as the Serbian government, insisting that the constitution be accepted urgently, exercised psychological pressure on the public by asserting that the survival of the state depended on the adoption of the new constitution. Not long after its adoption, a paradoxical situation arose in which the neglect of the new constitutional solutions became obvious. In other words, at the beginning of its implementation, problems occurred in apparently technical details related to the date of its implementation. Thus, the application of the constitutional provisions was blocked by the will of the same authorities who had insisted on its urgent adoption. The new parliament was formed, while for another half a year political power was concentrated in the hands of a government appointed according to the old constitution. The constitutional judiciary was not functioning either, allowing the “illegitimate government” to exist as a “technical” government, while focus was not placed on vital constitutional issues, such as how to implement the new constitution. Serbia entered a period of deep institutional crisis (2006–2007) characterised by an uncontrolled executive branch of power which conducted a number of profitable businesses by selling and privatising parts of public wealth. At the same, the public was “entertained” by numerous affairs and mass arrests without relevant legal grounds and evidence, and consequently nobody took the time to question the uncontrolled spending of public money, the inadequate managing of internal and external state affairs or the irresponsible attitudes towards the interests of local territorial units.

By exposing the actual state of affairs, we are trying to contribute to the understanding of circumstances in which the constitutional provisions on the provincial autonomy of Vojvodina were created. The constitutional text that regulates these questions was evidently burdened with deliberate complications in order to make it inconsistent and of poor quality. Almost all political representatives (out of 250 members of parliament, 242 voted for the adoption of the proposed draft of the new constitution) reached an agreement, as the majority and the opposition joined forces.

Finally, at the end of presenting this problem, a question is raised about the sustainability of the existing constitutional solution. The first observations pointed to the fact that when the constitutional norms were applied in practice, there was a different understanding of the legislative branch of power about citizens’ right to provincial autonomy. This difference stems
from different political views on the same problem, which, once again, proves that, as far as consistency goes, the optimal normative methodology is the one that identifies the key territorial questions through constitutional provisions. However, we already stated that one of the deficiencies of Serbia’s constitutional provisions is the lack of coherence in the constitutional rule which authorised the legislator to regulate competitive issues between central and provincial governments. When the current political majority in the parliament adopted the law which regulates the issue of Vojvodina’s autonomy better, the constitutional judiciary reacted. However, this reaction had its final epilogue after a new parliamentary majority came to power, which had different political views on the problems of political and territorial autonomy.

It is evident that the scope and quality of a political and territorial autonomy within a state depends on the existence of the conditions for its creation. In turn, the significance of these conditions depends on the actual relationship between political forces inside a social community. In that context, the final decision on establishing the right of a part of the citizens within one state, and thus living in a part of its territory, to enjoy the right to political and territorial autonomy cannot be taken exclusively by that part of the population, but by the entire social community, i.e. the relevant population majority. Since the issue of territory is the basis of the existing nation state, the focus of political and territorial autonomy is no longer an instance of classical human rights since it belongs to the set of issues related to the organisation of state territory. That is, the right of citizens to provincial autonomy is not essentially characterised by individualism, but by the quality of political strength of the population living in a certain part of the state’s territory to obtain the political power that will allow them to create the autonomy of their own political life. This right is acquired by raising their political awareness, which exceeds the notion of satisfying one’s own needs at the level of local self-government, along with a latent tendency towards political organisation at the “substate” level, which may exceed even the level of political and territorial autonomy.

Summing up this analysis of constitutional, legal and political problems related to the autonomy of Vojvodina inside the Serbian social system, we need to point out that it still possesses transitional characteristics. The gradual progress of Serbia in the area of European integration will open new/old constitutional questions which are open to relevant reviews in the future. One of these questions is undoubtedly the territorial dimension of the republic’s legal system with a focus on decentralisation, which will be
the testing ground for the sustainability of existing solutions related to the political and territorial autonomy of Vojvodina.

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Federal Power-Sharing in the European Union

Simona Piattoni

I. Introduction

The European Union (EU) is a union of states, but whether it is or should ever be a federal union is one of the most contentious questions since its inception. For some (Kelemen 2004), the EU already displays the main features of federation. For others (Moravcsik 2001), it is and it should remain an international organisation, although a particularly densely institutionalised one. For most, federalism is one of several theoretical frameworks that may help discuss the present and imagine the future state of the Union without necessarily pre-judging its final shape. Many variations on the root-term “federal” have been coined to capture the *sui generis* and ever-changing nature of the Union, and other terms are as frequently used to try and come to grips with this novel institutional construct. What is certain is that in the political – as opposed to the academic – debate, the word federalism excites heated passions, either pro or against.

In this contribution, while necessarily hinting at the academic debate, I will concentrate on “the state of the Union” and see which elements of its current institutional architecture and mode of functioning point in the direction of a federal structure of sorts. I will also examine other concepts that, because of their descriptive neutrality, have gained increased currency in EU studies, first and foremost multi-level governance. I will, moreover, concentrate on the institutional provisions and the policies that sustain a federal or multi-level vision of Europe, and will assess the extent to which both allow for the inclusive and effective participation of institutional and societal actors at all jurisdictional levels in EU policy-making. I will conclude by pointing to what appears to be the most pressing issue for the Union: to articulate a normative justification that can underpin its legitimacy both among European citizens and in the wider international community.
II. Visions of federal polities

The idea that European states should create a federal union is very old. Some date it back to Kant’s idea of a perpetual peace (Neyer 2011), others to federalist thinkers such as Althusius (Burgess and Gagnon 2010; Nicolaides 2011), others still to the advocacy of intellectuals like Victor Hugo, Count Richard Coudenhove-Kalergi, and John Pinder and of politicians like Altiero Spinelli, Jean Monnet and Joschka Fischer (Burgess 2000; Rosamond 2000; Eilstrup-Sangiovanni 2006) – and the list could go on. European countries, although culturally diversified and historically antagonistic, also clearly share much in common. To begin with, they share the same geographical space – that appendage of the Asian continent called Europe – which in turn determines, roughly speaking, also their common geopolitical position in the world (similar resource endowments, comparable historical reliance on agriculture and fishing, shared trade routes, same neighbours, etc.). Moreover, they are characterised by fairly compatible political systems: they are liberal representative democracies upholding fundamental human rights and the rule of law. Furthermore, their economies are exceptionally intertwined: trade with other European countries represents by far the largest proportion of each country’s trade balance. And although divided by language and cultural traditions, the general outlook of their citizens on politics, economy and society is largely compatible. What is most important, Europeans have been interacting (communicating, travelling, marrying and so on) for centuries. To sum up, European countries have enough commonalities to warrant the coordinated and joint pursuit of their interests within a single polity.

And in fact this is what they have been striving to do. Since the Treaties of Paris and Rome, a growing number of European countries have decided to create a common market and regulate the production of many goods and services jointly. Does this amount to a de facto federalisation of Europe? Is the only “missing step” an explicit recognition of the federal nature of the European Union? The failed ratification of the Constitutional Treaty in 2007 gave a negative answer to this question, and it is even unclear whether the creeping constitutionalisation of the Treaties will ever lead to an equivalent result. What stands in the way, in addition to the explicit will of many European citizens, are significant differences in administrative traditions, political economies, and political cultures – the “stuff” of states as opposed to societies. Never has this been clearer than in recent times, during which the members of the euro-zone are dealing with their respec-
tive financial and economic problems in strikingly different manners. To what extent European member states can regulate their most sensitive policies – fiscal, welfare, and labour policies – jointly is open to question. The political-economic nexus appears to be the most divisive area in today’s Europe.

Given these structural circumstances – both those pointing to the many features that European societies share and to those that divide European states – what type of polity should the European Union be or, more to the point, what kind of polity has the European Union so far become? To give a full answer to this question would lead us too far, as it would amount to reviewing the whole debate on “the nature of the (EU) beast”. What I will rather do is reconstruct the debate on why it might be plausible to think of the EU as a federal entity of sorts. Terminology matters. One of the main problems for those who study the EU is to disentangle the notion of federalism both from the discrete models embodied in existing federations – particularly relevant for the EU are the US and Germany, but also Switzerland and Canada – and from the heated terminological debates that have characterised the development of this concept. Much of the current debate, then, is still about what precisely must be understood under the term federalism.

For Burgess (2006), federalism is a research agenda into the possible constitutional formats that could simultaneously secure unity and diversity, shared-rule and self-rule. Beyond this, not much is settled. One of the most pressing questions is whether the adjective “federal” must necessarily be associated with the noun “state” or it can also be predicated of other political entities. Nicolaidis (2011), for example, prefers to talk of the EU as a “federal union” precisely to avoid being drawn into the discussion of whether or not the EU should be considered a state. She argues that federalism is one of the oldest arrangements invented by human beings to create political associations. Foedus is a Roman institution that was, however, also practiced earlier to hold clans, tribes, cities or other collective entities together, thus by far pre-dating the “invention” of state. Up until the seventeenth century, it was still possible for federalism to indicate the voluntary association of various types of communities, much as in the Althusian tradition of voluntary functional associations (cf. Smismans 2004). However, according to Nicolaidis, after the philosophical and conceptual disputes of the 17th century, the Bodinian notion of state became hegemonic and the term federalism became indissolubly associated with that of state.
“If a political entity is no more than the sum of its parts, it is really just a con-federation or league, with each member having a veto over ‘sovereign’ acts of the centre, and acting autonomously on the world stage. If the federation is more than the sum of its parts, then a majority of the whole may prevail in sovereignty over the will of any of the other parts, which makes federalism often seem like central government with administrative decentralisation. In this case the federation is a federal state: in the end, simply another state.” (Nicolaidis and Howse 2001: 2)

Sergio Fabbrini (2015) would emphatically agree. He argues that the EU is a union of states, and only potentially a federal union, but it is not organised as such because it lacks a proper constitution that could order how the political system functions, not only by apportioning competences between levels but also by attributing and regulating powers among different institutions. Currently the EU is governed by a dual constitution that was introduced in Maastricht when the Treaty on the European Union regulated the Single Market through a supranational constitution and the Common Foreign and Security Policy (CFSP) and Justice and Home Affairs (JHA) through an intergovernmental constitution. The EMU is split between a supranational regime (monetary and, increasingly, financial policy) and an intergovernmental regime (budgetary and fiscal policy). The coexistence of these two constitutional regimes is a problematic feature of the EU. The EU, consequently does not have a proper constitution, but only a “material constitution”, given by the constitutionalisation of the Treaties. Fabbrini’s main, but certainly not only, argument is that the euro crisis has induced heads of state and government to further entrench the intergovernmental union and to institutionalise a decision-making strategy that has given a new spin to the intergovernmental union perspective, basically recalling most decision-making powers to the newly institutionalised European Council (which should properly be conceived as an executive and not as a legislative body)—while leaving to the Council only the decisions that pertain to the Common Market—and marginalizing the European Parliament and the European Court of Justice. This apparently expedient decision, contrary to expectations, has proven both ineffective and illegitimate: ineffective because coordination is more easily pledged than practiced, and illegitimate because it has blurred the necessary distinction between executive and legislative powers. The intergovernmental union, therefore, suffers from a legitimacy deficit. Fabbrini’s suggestion is to restore the rightful distinction between executive (European Council and Commission) and legislative (Council and European Parliament) institutions so as to allow them to check each other—the essence of a compound democra-
cy. This should however happen only within the limited circle of the euro-
area member states, as these alone are supposedly interested in creating a
union of states and in operating as a compound democracy.

Another contentious issue is whether “federalisation” indicates a trend
towards increased centralisation and concentration of powers at the federal
centre (as in the US) or it indicates a trend towards decentralisation and
the dispersion of powers to the federated units (as in Europe). Obviously
both elements—the federal centre and the federated units—are necessary
for a federation to exist and both levels are sovereign. Consequently, both
centripetal and centrifugal forces are simultaneously at work. Yet,
concepts carry political baggage: their meaning differs depending on the
context in which they are used, and this is all the more true of federalism.
While in itself the term federalism is neutral and contains both levels and
both forces, it is easily understandable why it carries different meanings
and different implications on the two sides of the Atlantic. As Burgess
(2006) has convincingly argued, in the US the term “federal” was appro-
priated by those political activists that, in Philadelphia, wanted to equip
the American union with sovereign powers; they did so by labeling their
opponents, who wanted to preserve a much greater autonomy for the indi-
vidual states, as “confederalists”. In Europe, where the centralised state
tradition is much stronger, federalism acquires a decentralist and devolu-
tionist ring. Not even the authoritative words of Daniel Elazar (1995), who
clearly sought to detach the concept of federalism from that of state, could
settle the question once and for all. “In the late twentieth century, we were
in the midst of a paradigmatic shift from a world of states, modeled after
the ideal of the nation-state developed at the beginning of the modern
epoch in the seventeenth century, to a world of diminished state sovereign-
ity and increased interstate linkages of a constitutionalised federal charac-
ter” (Elazar 1995: 5).

Burgess’ suggestion is, thus, to use “federalism” to denote the field of
study, to use “the federal principle” or “the federal idea” to denote the fund-
damental intuition behind federalism—“a framework that formally ac-
knowledges, protects and promotes human dignity, difference and diversi-
ty” (Burgess 2006: 3)—and to reserve the term “federation” for the politi-
cal construct that translates this idea into practice. Two fundamental prin-
ciples—autonomy and participation—are inherent in the notion of federal-
ism: “In other words, the autonomy of a community is not considered as
impaired by participation in a wider community if the sphere of authority
of the wider community is instituted, maintained and altered only with ef-
fective participation of the component community” (Burgess 2006: 285). “Union” and “autonomy” are the two fundamental elements of this theoretical construct. This is why the debate can never settle once and for all whether union or autonomy, the federal centre or the federated units are to be considered preeminent. It cannot do so theoretically, because both elements are equally foundational. It cannot do so practically, because their reciprocal relationship, although anchored in a constitutional charter, gets continuously redefined by external and internal political contingencies. It is the inherent “flexibility and adaptability” of federalism to a great many political constructs and circumstances that ultimately muddles its theoretical clarity.

The issue is hardly settled by looking at the attribution of competences between the EU supranational institutions and the member states: many of the competences that in normal federations would lie with the federal centre are in this case attributed to the member states (for example, culture), while some of the competences that in normal federations would be attributed to the federated units lie exclusively or primarily with the Union (for example, regional policy). The Treaty of Lisbon clarified the division of competences between the EU and EU countries, which are divided into three main categories: 1) exclusive competences; 2) shared competences; and 3) supporting competences. The EU has exclusive competence in those areas which are essential to the functioning of the Common Market: customs union, competition, trade and monetary policy (for euro-area countries, even though it is to be doubted that monetary policy is “essential” for the functioning of the Common Market) (Article 3 Treaty on the Functioning of the European Union/TFEU). It has shared competences together with the member states, that is, EU member states exercise their own competence where the EU does not exercise its own competence, in the following areas: internal market; (some aspects of) labour policy; economic, social and territorial cohesion; agriculture and fisheries; the environment; consumer protection; transport; trans-European networks; energy; the area of freedom, security and justice; research, technological development, space; development cooperation and humanitarian aid (Article 4 TFEU).

Lastly, where it enjoys supporting competence the EU can only intervene to support, coordinate or complement the action of EU countries, such as in the following areas: protection and improvement of human health; industry; culture; tourism; education; vocational training, youth and sport; civil protection; administrative cooperation (Article 6 of the TFEU). Further, the EU can take measures to ensure that EU member
states coordinate their economic, social and employment policies at EU level, and these are considered *special competences*. The EU’s common foreign and security policy is characterised by specific institutional features, such as the limited participation of the European Commission and the European Parliament in the decision-making procedure and the exclusion of any legislation activity. This policy is defined and implemented by the European Council (consisting of the Heads of States or Governments of the EU countries) and by the Council (consisting of a representative of each EU country at ministerial level). The President of the European Council and the High Representative of the Union for Foreign and Security Policy represent the EU in matters of common foreign and security policy. In the discharge of its competences, the EU is subject to two fundamental principles: proportionality, meaning that “the content and scope of EU action may not go beyond what is necessary to achieve the objectives of the Treaties”, and subsidiarity, which means that, “in the area of its non-exclusive competences, the EU may act only if — and in so far as — the objective of a proposed action cannot be sufficiently achieved by the EU countries, but could be better achieved at EU level” (Art 5 Treaty on European Union/TEU). Neither principle, in my view, settles the question of where best to lodge governmental competence once and for all, but rather opens a political space for debate about the features of this very peculiar federation which the EU can be considered to be.

Preserving the tensions inherent in federalism even at the cost of theoretical ambiguity is all the more imperative when the term enters the debate about the current and future nature of the European Union. Paradoxically, this is what makes the notion of federalism both indispensable and impractical at the same time. Those who want to resolve its inherent tension one way or the other will promote this or that empirical embodiment of the federal idea and will inevitably tilt its interpretation towards greater empowerment of the federal centre or of the federated units depending on their particular preferences, thus alienating the opposed camp. Those who want to keep the tension inherent in the federal idea alive will propose a “federal vision” that will alienate all the others for its indeterminacy. “A federal union of states differs from a federal state precisely in as much as it allows for the persistence of the sovereignty principle of the constituent units” (Nicolaidis 2011: 13, emphasis added). “Federal union”, “Union of democracies”, “Union of states and peoples”, “Compound republic” are all equally plausible terms that denote the simultaneous preservation of unity
and diversity, of federal and confederal traits, of supranational and transnational traits.

The conceptual apparatus of federalism, then, is both theoretically necessary and politically slippery. What characterises the EU, also from a policymaking point of view, is “The pervasiveness of concurrent or overlapping competences, the coexistence of elements of centralisation and decentralisation in the same policy area, and the dependence of successful policy outcomes on the ability of different levels of government to interact effectively” (Howse and Nicolaidis 2001: 3). Every attempt to put a label onto these complex vertical and horizontal governance arrangements ultimately fails because ultimately “there are no ‘benchmarks’ for optimal solutions for distributing sovereignty” (ibid.). This situation leads Joseph Weiler (2001) to speak of the presence, in the EU, of a mixture of federal and confederal principles in the EU and to invoke “constitutional tolerance” in order to square the federal circle.

III. Visions of multi-level policies

If the level of analysis gets shifted from polity to policy, the European Union is very often described as a multi-level system of governance. This term is broad enough to encompass fairly different policy regimes in its denotation, spanning from policies that fundamentally mobilise only two levels, the member states and the EU (such as defence and security, money and exchange rate, energy and trade), to policies that mobilise three or four levels of government as well as social partners and civil society organisations (such as cohesion, agriculture, the environment, development aid, migration, etc.). While more widely acceptable, and hence a bridge across several theoretical approaches (from intergovernmentalism to neofunctionalism, Schmitter 2004), MLG may be perceived as blurring some of the salient features of federalism: firstly, because it does not ostensibly add anything to the fairly complex conceptual apparatus already encapsulated by federalism; secondly, because it may appear to subtract something from federalism, namely the idea of trans-level cooperation.

The second criticism is easily rebutted: an accurate conceptual analysis of MLG reveals that this term indicates both vertical and horizontal relationships among levels of government as well as the relationships that exist between governmental and non-governmental actors at all levels and across levels (Piattoni 2010). It is, rather, federalism that must mobilise
the notion of inter-governmental relations (IGR) in order to analyse same-
level jurisdictional relations (Ongaro et al. 2010a, 2010b). The first criti-
cism, however, has potentially greater bite. One way of sorting out the conceptu
al relationship between federalism and multi-level governance might be to simply think of them as belonging to the same conceptual lad-
der (Sartori 1970, 1984), with MLG standing on a higher level of abstrac-
tion than federalism. Federalism would then be a species of the MLG gen
us, in which there are just two relevant governmental levels, the state and the national, while in MLG there could also be three and more levels. If so, which would be the attributes that we should add to MLG’s connota-
tion in order to narrow down its denotation to that of federalism? Is it only
the number of governmental levels involved in MLG or also the nature of
the levels?

Some MLG scholars (e.g., Conzelmann and Smith 2008) take “level” to indicate any sphere of authority, be it territorial or functional, governmen
tal or societal. According to this interpretation, while multi-level govern
ance can indeed accommodate both types of spheres of authority, federalism would include only territorially defined governmental levels. Hooghe’s and Marks’ distinction between Type I and Type II MLG (Hooghe and Marks 2003) would seem to point in this direction, as Type I MLG admits only a limited number of nested territorial jurisdictions, while Type II MLG encompasses a potentially unlimited number of overlapping functional jurisdictions. It suffices to read some of the recent liter
ature (Smismans 2004, Burgess 2006), however, to realise that also federalism allows for both types of jurisdictions, territorial and functional. In
deed, we learn that in the Althusian tradition federalism was the result of
the aggregation of spontaneously organised functional associations, while in the Bodinian tradition federalism was the outcome of the aggregation of territorial states that decided to pool their sovereignties. In reality, neither an exclusively territorial nor a purely functional organisation of human ac
tivities is really feasible, and this is why Type I and Type II MLG, as well as Althusian and Bodinian federalism, are ideal-types. Real-life organisation of human activities is always a mix: the haphazard coexistence of terr
itorial and functional jurisdictions, of vertical and horizontal intergovern-
mental relations is a characteristic trait of all current democracies.

But the difference between MLG and federalism runs deeper than that. Federations are normally based on constitutional charters that cannot be changed without the explicit consent of all the component parts. While the exact terms of this pact can be de facto shifted through day-to-day policy-
making, constituent units retain the power to force the relationship to be rebalanced. MLG is the name we give to a series of governance arrangements that involve more than two levels of government as well as civil society representatives, but which are not fixed in any constitutional charter. The role of subnational levels of government or of civil society organisations may change according to the policy at hand or to the specific administrative and institutional tradition of the member states without the need to go through a constitutional reform. The type of behaviour that is induced by these different institutional settings is quite telling. Subnational authorities that enjoy constitutionally enshrined rights to decide on certain policies at home (e.g., German Länder) also try to achieve the same type of institutional empowerment at EU level (without perhaps completely succeeding). Subnational authorities that do not enjoy these rights (e.g., English Regional Governmental Offices), pursue policy empowerment at EU level, that is, they try to establish themselves as crucial policymaking partners by providing on-the-ground expertise and collaboration. Federalism and MLG, then, address much of the same empirical phenomena but through radically different theoretical lenses: those of constitutionally enshrined powers, federalism, and those of policy established arrangements, MLG.

Finally, both terms, federalism and MLG, are ultimately polysemic concepts in the sense that they denote different empirical referents depending on the specific institutional context in which they are inserted. No simple upward or downward movement on the ladder of abstraction, therefore, will ever suffice to identify all the existing variants of federalism or MLG, as these are powerfully shaped by other contextual variables such as the specific electoral system in which they are inserted (more relevant for federalism, see Braun 2010) and the specific type of policy decision that they are designed to manage (more relevant for MLG, see Heinelt and Knodt 2010). While the literature on federalism admits fairly established subtypes, such as competitive v. cooperative federalism or dual v. nested federalism that try to specify the interrelations among institutional levels within the general federal framework better, such classificatory exercises ultimately fail to encapsulate the great variety of federal arrangements. Federations are powerfully shaped by the inter-governmental relations that develop across institutional jurisdictions and these are in turn powerfully shaped by contingent factors such as the current electoral equilibrium. Also, MLG can assume a great variety of actual configurations, with subnational governments or other non-governmental organisations taking the
lead in representing interests at levels of aggregation lower than that of the state, but it is the policy features, and not the institutional charters, which determine the interrelations among levels and actors (Piattoni 2010: Chs. 5–7).

We must conclude, then that the research agendas of federalism and multi-level governance to a large extent overlap, but while federalism focuses on the institutional structure that sustains inter-jurisdictional policy relationships, MLG studies how inter-jurisdictional policy relationships activate and incrementally form or transform the institutional structure. Federalism analyses the creation and organisation of a polity “from the top down”; MLG investigates the organisation and functioning of a polity “from the bottom up”. Federalism starts from the blueprint and deduces how the system works; MLG looks at how the system works and infers the blueprint that generated it. If anything, MLG is more explicitly open to investigating the interactions between state and society, institutional and non-institutional actors than federalism is. And, much more than federalism, it brings into focus the role of subnational authorities and their vital connection to subnational societies. In this sense, federalism has a harder time loosening the link with the notion of state than MLG does, as it explicitly challenges the historical uniqueness of the state.

This is the reason why the literature on MLG is so tightly connected with that on regionalism. Sub-state nations, historical regions and, more generally, regional societies have mobilised throughout Europe at least since the late sixties (P. Anderson 1994; Keating 1988, 1996, 1998; Rokkan and Urwin 1982, 1983). Subnational authorities have been increasingly involved in policymaking at both national and EU level at least since the eighties (Hooghe 1995, 1996; Hooghe and Marks 1996; Jeffery 1997a, 1997b; Jones and Keating 1995; Keating and Jones 1985; Keating and Loughlin 1997; Loughlin 1996; Marks 1992, 1993; Marks et al. 1996). These two developments became intertwined leading some to nurture misplaced hopes for a forthcoming “Europe of the Regions” (Anderson 1991; Rhodes 1974; Elias 2008), as if regions might replace states as the building blocks of European integration. This utopia created an unwelcome distraction in an otherwise very stimulating debate about the contingencies that led some states to succeed and others to fail in that long period of European history that marked the transition from an unraveling Empire to a system of states (1200–1800, according to Tilly 1975) and about the meaningfulness of the resurgence of minority nationalism and substate...
mobilisation. The debate rather focused on the supposedly “optimal” scale of social, economic and political organisation in postwar Europe.

The debate on federalism and MLG is sometimes presented as a theorisation of how political activities are “best” organised on different territorial scales. Let us remember that almost any solution can be supported by efficiency arguments borrowed from other social sciences. Ultimately, efficiency arguments are inconclusive insofar as they do not touch upon the only argument that is really decisive for political science: that of the legitimacy of the jurisdictions thus created. Also the “Europe of the Regions” debate runs the risk of being another reiteration of trite efficiency arguments. Because territory is much more than simply the scale at which functions are “most efficiently” performed, and rather tends to create commonalities of interests and of destiny bred by the many interdependencies and positive and negative externalities that occur across activities in a given space, territories are much more than the basis for claiming responsibility over the provision of one or two services and rather act as loci of self-governing communities. The literature on federalism (e.g. Elazar 1987; Burgess 2006) discusses precisely the many ways in which territories constitute themselves as self-governing communities and what relations they should have with one another and with the super-ordinate territorial entity of the state.

Just as the historical record suggests that the state was not the only solution to the problem of efficient territorial control, and that it was only human agency that bestowed significance upon state thresholds, neither can the region be “the efficient” solution for territorial control today. Even more radically, it was not obvious that the specific set of states that currently occupy the European continent should emerge as the significant units of reference for cultural, social, economic, and political activities (Spruyt 1994). Just as the current claims for sub-state and supra-state territorial relevance call into question the assumption of the centrality of the nation-state in economic, social, cultural, and political terms, so regions cannot replace the state as the central territorial level for the Europe of the future. The state is being challenged, not because new problems are emerging which cannot be adequately handled at state level—whatever that level is, given the wide differences in geographical extension and population size among equally “sovereign” states!—but because new (individual and collective, public and private) actors are pursuing strategies that imply the redefinition of the scale at which problems should be handled and are promoting the involvement of the level at which they are ac-
tive and the subjects which they represent in new decision-making arrangements.

This is what MLG is all about: describing and theorizing the novel mobilisation of institutional and non-institutional actors at jurisdictional levels and in forms that do not coincide with the conventional national boundaries. Whether this mobilisation will also lead to a transformation of the constitutional form of each state is an open question. In some countries, such mobilisation might indeed lead to constitutional reforms, in others just to new institutional arrangements, in others still simply to the experimentation with new modes of governance. The end result will not simply be determined by the different degree of resistance that each state will have shown to an equally powerful demand for change originating from regional mobilisation. Such a picture is indeed what some commentators suggested when they claimed that regional mobilisation across Europe was constrained by the institutional configuration of the different states—German Länder and Spanish Comunidades being supposedly more capable than French regions or British local authorities to obtain greater recognition of powers at EU level because they are institutionally stronger (Hooghe and Keating 1994). Institutional capacities are not all that matters: even within the same country, subnational authorities have been capable of being more or less policy empowered depending on the vision and entrepreneurship that local authorities and societies managed to express (Bukowski et al. 2003). Some regions or local authorities may be happy to obtain greater policy empowerment and greater involvement in policymaking; others want to cash in their mobilisation and their greater involvement in terms of greater institutional or constitutional empowerment. Regions are cradles of political visions and not just dispensers of policy outputs.

Finally, MLG is not just about where and by whom decisions are made, but also about how they are made and implemented. Under MLG not one, but several differentiated governance arrangements are encompassed, depending on the issue at hand, the types of actors that can best mobilise around each issue and the policy solutions that are envisioned. This is why structural policy MLG is different from environmental policy MLG which is, in turn, again different from higher education MLG (Piattoni 2010: Chs. 5–7). All embody to some extent the conviction that it is indeed necessary and opportune to involve subnational authorities and societal groups in the formulation and implementation of policies, yet all differ from one another in the way in which these goals are achieved.
IV. The division of competences between EU institutions and member states

The division of competences between EU institutions and member states is currently regulated by the Treaty on the Functioning of the European Union (TFEU) which was signed in Lisbon in December 2007 and came into force on January 1, 2009. It is not easy to determine whether this division of competences delineates a federal or a confederal system (Hix 2008; Jachtenfuchs 2009). According to standard federal theory, defence, security, immigration, money, exchange rate, justice, culture, international trade, competition and often also banking, labour and welfare are regulated by the federal centre, while agriculture, industry, tourism, education, youth, police and the environment are normally entrusted to the federated states. This division of competences may obviously change from federation to federation, according to the history of the particular state formation and transformation. The European Union is different, as many of the tasks typically entrusted to the federal centre (particularly defence, security, immigration, but also justice, labour and welfare) remain in the purview of the federated states while some of the tasks that are normally regulated by the federated states (agriculture, industry, culture, the environment) are governed at the federal level. This leads some commentators to speak about a “reversed federal system” (Jørgensen and Laatikainen 2013: 49).

The institutional structure of the Union secures both direct (citizen) political representation, through the European Parliament, and indirect (state) political representation, through the Council and the European Council. So, on the surface, the EU appears to be endowed with institutions representing both states and citizens, like any other federal system. Unlike European federations, however, the EU executive branch—also divided between the European Commission (which in theory acts on behalf of all EU citizens) and the national executives (which act on behalf of the national constituencies)—does not depend on the representative-legislative assembly for its political legitimation at either EU level (the Council’s and European Council’s compositions are not determined by EU-level electoral results) or at the national level (governmental representatives in the Council and European Council are obviously determined by national elections, but they enter a system of negotiation in which the interests of the national community may be trumped by those of other governmental representatives and therefore not of the representative assembly from which they derive their power). So, while the institutional structure of the EU re-
sembles that of a federal system, it can be considered neither a fully fledged parliamentary federation nor a genuine separation-of-powers system (which normally entails a directly elected president) and therefore it suffers from a legitimacy deficit. Other concepts and terms—such as compound democracy (Fabbrini 2007) or democracy (Nicolaidis 2004)—should probably rather be employed to describe it, but neither of them yet commands wide acceptance amongst EU citizens. The lack of European familiarity with these types of systems and the reversed division of competences that obtains between the EU and the member state levels affects the legitimacy of the EU’s institutional structure and of the decisions produced by it.

Moreover, like in all “really existing federal system”, the division of competences is never completely fixed. Conflicts over policy decisions often translate into conflicts over allocation of competences and generate prolonged periods of stalemated negotiations. These “joint decision traps” (Scharpf 2010) may lead to the reallocation of competences or to the rebalancing of powers between the federal and the state levels. In the European Union, such a rebalancing formally happens through treaty-signing, but may in practice also happen in different policy areas when greater or lesser policy-making or implementation powers are granted to this or that central institution or to subnational levels of government or again to some EU-level agency. Also for this reason—that is because the Union is a system of multi-level governance systems—its functioning is particularly difficult for the average citizen to grasp and the legitimacy of its decisions appears to be extremely frail.

V. The normative justification of the Union

Since the Treaty of Maastricht, the European Union is considered by many to be affected by a democratic or legitimacy deficit. For some (Moravcsik 2001, 2002), the Union is as democratic as it should be. As in any other international organisation, EU decisions are made by democratically elected national governmental representatives. Even when the Council decides by qualified majority voting, and some governmental representatives may happen to be outvoted on a particular decision, they can nevertheless use “emergency breaks” and other possibilities for limiting damages in particularly sensitive (“vital”) national areas. We must also remember that national governmental representatives have approved such decision-making
mechanisms and, therefore, must have decided that the overall advantages of expediting crucial decisions outweighed the occasional adverse decision. Finally, national representatives could always claim back their veto powers, if they so wished, given that they are the “masters of the treaties”.

For others (Majone 1998; 1999; 2000), the EU does not have any greater democratic deficit than any other European national democracy. Many policy decisions are taken, in the EU as in national democracies, by non-elected, non-majoritarian expert bodies endowed with extensive legislative and executive (and sometimes also judicial) powers. These expert bodies, however, are theoretically accountable to democratically elected governments, or to institutions in which democratically elected governmental representatives sit, who can use a plethora of administrative tools to control the way in which sensitive decisions are made. Moreover, the policy decisions which are entrusted to these bodies are normally Pareto-optimal and, as such, they should be rather uncontroversial. These two rather optimistic accounts of EU democracy have been extensively criticised (Føllesdal and Hix 2005). The democratic deficit of the EU, then, is a real problem, perhaps the most pressing problem that the Union faces at the present moment.

One of the clearest analyses of the Union’s defective democracy is linked to the notion of “joint decision trap”, a concept originally elaborated by Fritz Scharpf (1988) to describe the working of the German federal system. Scharpf later assimilated the EU political system to German cooperative federalism and argued that, just like German federalism, the EU is structurally bound to run into “joint decision traps”. Grossly simplifying, Scharpf’s argument is that, in theory, federalism is the ideal system for combining community and autonomy or effectiveness and legitimacy: that is, for simultaneously securing the best level of government and the closest translation of local policy preferences into policy decisions. In reality, these two goals may be inherently contradictory and the more tightly the one is secured, the more easily the other escapes.

Joint decision traps occur when two fundamental conditions apply: first, when federated units have veto power over most legislation through their governmental representatives in a senatorial chamber and, second, when policy objectives cannot be achieved unilaterally by central government through its own administration, or central government cannot bargain bilaterally with individual federated units differentiated policy solutions. Under these circumstances, any truly “political” decision that also implies some degree of cross-territorial redistribution will be extremely difficult to
attain and will probably be based on a rather complex distributional mechanism which is difficult to change. When socio-economic circumstances change, it becomes even more difficult or even nigh impossible to renegotiate past policy decisions, as even a single veto can stop any reform. Policy decisions are, therefore, not only cumbersome to begin with, but become increasingly so as time goes by and as circumstances expose the limitations of the original decision.

In the revised formulation of the joint decision trap, Scharpf (2006; 2010) acknowledges that at EU level there are several escape routes out of deadlock. To begin with, decisions in the Council are increasingly taken by qualified majority voting, thus depriving national governmental representatives of their veto power. Even though they can still oppose a veto when “vital national interests” are at stake, they normally do so sparingly and only under truly exceptional circumstances.\textsuperscript{1} This constellation makes “negative integration” decisions that remove barriers to the free circulation of workers, capitals, goods and services much simpler to make than “positive integration” decisions aiming at creating a European single market by reregulating products and processes. For the first type of decisions, challenges brought by beleaguered individuals or firms to the European Court of Justice may suffice. For the second type of decision, one needs the active consent of a sufficient number of national governmental representatives. According to Scharpf, then, the process of European integration has an inherent neo-liberal bias that tends to dismantle national welfare provisions (which may act as barriers to trade) without allowing for the creation of compensatory common European welfare provisions on which national representatives would hardly agree.

In sum, the European federal-like system creates an inherent opposition between effectiveness and legitimacy, economic freedom and social concern and, ultimately, between law and politics. Deadlock can be escaped only to the extent that the consent of democratically elected representatives on truly political decisions is forfeited. For truly political decisions that may impose redistribution across national constituencies to be made, a supranational demos would need to exist, Scharpf (2009) argues, but this unfortunately is not yet the case. This amounts to a de facto negation of the promise of federalism to reconcile shared rule and self-rule, communi-

\textsuperscript{1} This is the essence of “Luxembourg compromise” (1966) now enshrined in the Treaty of Lisbon (2009) as “emergency break”.

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Das Erstellen und Weitergeben von Kopien dieses PDFs ist nicht zulässig.
ty and autonomy, and effectiveness and legitimacy. Extending the powers of national parliaments to suspend and force reconsideration of EU legislation thanks to the principle of subsidiarity, as the Treaty of Lisbon has done, or allowing national governmental representatives to stop negotiations and obtain permission from their national parliaments whenever a truly political decision is being discussed, if taken seriously, will only run the risk of multiplying joint-decision traps. How can this dismal conclusion be avoided?

Two escapes routes have been proposed. The first banks on the idea that political identities do not develop in a void but only through the process of articulating political positions. This position, most strongly propounded by Simon Hix (2008), inverts the relationship between the existence of a demos and the possibility of parliamentary democracy. Instead of parliamentary democracy being premised on the existence of a demos, it is the demos which results from entrusting full sovereignty in a majoritarian representative assembly. It suggests that it is only by breaking up territorial representation along national lines and reassembling it along partisan lines that a demos can be developed and that this can be achieved through discussion and deliberation in a fully sovereign representative assembly. Although risky in the short term, as sizeable minorities may refuse to abide by decisions taken by simple majorities and may decide to break away from the Union, this solution draws our attention to a crucial aspect of the joint decision trap. Joint-decision traps are the result of national governmental representatives’ fear of being voted out of office by their own national constituencies should they fail to protect their constituency’s interests. While this appears to be the essence of democracy, in reality it leads national governmental representatives to always put the interests of their office ahead of community interests.

In a supranational community, however, the interests of the parts must also be duly weighed against the interest of the whole. The second escape route from joint decision traps and a way of achieving this difficult balance is always to consider the interests of all those affected by the negative externalities of the policy decision too, that is, of the other national constituencies. This is one of the distinctive traits of the notion of “democracy” (Besson 2006; Müller 2011; Nicolaïdis 2004). Another solution is to replace democracy with other legitimating principles such as “justification” (Neyer 2010, 2011), which however brings politics dangerously close to law and induces political debate to be replaced with reason giving. While this may be a much more civilised exercise and a way to avoid
joint-decision traps, it also runs the risk of depriving EU politics of those “gutsy” elements that have allowed people to identify themselves with their national representatives and to condemn it forever to cold aloofness. And that the Union is still capable of eliciting rather “gutsy” reactions is certainly testified by the June 2016 referendum on Brexit which was followed by the formal triggering of Art 50 (TEU) in March 2017 by the British government. Most observers think that these momentous decisions were the consequence of a campaign rich in emotions and poor in information, which managed to portray an exit from the European Union as “gaining back control”. It is remarkable that a quasi-federal union like the UK granted no special vote to the territories of Wales, Scotland and Northern Ireland: for example, it could have foreseen that Brexit would need to be supported by an overall majority of the entire British population and by a majority of the populations of Wales, Scotland and Northern Ireland. The consequences of Brexit will be momentous not only for the relationship between the UK and the other twenty-seven member states, but also for the relationship between England and the devolved territories: the risk that both Unions may break down is real. The rhetoric of the sovereign unitary state is evidently still alive and well, although increasingly less convincing.

References


Part 3: 
Synopsis and Conclusions
Political systems are undergoing a thorough process of change: Decision-making is getting more complex; the number of actors involved is increasing at both the vertical and the horizontal level (cf. Palermo 2015: 499); claims for broader involvement and new forms of participation are rising (Bertelsmann 2014; Decker et al. 2013; Reuchamps and Suiter 2016); and not least, there are now more veto players than in the past (Fukuyama 2014). With the background of divergent interests and claims emanating from actors with different legitimation, the question arises of how decision-making procedures can be organised in more effective and transparent ways.

The different variants of federalism, which today no longer represent an institutional configuration of different government levels but are also expected to provide an inclusive, democratic and more transparent governance tool, are also faced with these challenges (Palermo and Alber 2015). Federalism is therefore primarily seen as a multidimensional political structure covering different and specific policy fields (Lépine 2015: 37).

Given this assessment, the question arises of how pluralism, as the “core” of federalism and effective and efficient governance (cf. Piattoni 2010), can be combined (Palermo 2015: 504). Under these considerations, federalism and federal derivatives such as regionalism and devolution represent not just an organisational principle of statehood but more a political reality, resulting from a permanent process of change and adaptation (Benz and Broschek 2013).

Federalism as a structure and a process (cf. Sturm 2015: 8) is strongly determined by pluralism and dynamics—these are the two dimensions along which the systems of power-sharing in Europe can be analysed and compared. Pluralism, conceptually understood as multifacetedness, is considered a fundamental feature of any democratic system focusing on free societal and political coexistence based on liberal values (Fraenkel 1991).
In sociology, pluralism refers to societies characterised by socially differentiated conflict structures and disparities in lifestyles shaping the struggle for social influence. From a political science perspective, pluralism refers to diversely organised forms of decision-making and political orders. In this connection, those in power are controlled through law and institutional checks and balances (Schmidt 2006: 227f.). Thus, pluralism rests on the structural variation of state and society, an insight that also applies to the concept of federalism—simply because diversity is a precondition of any federal layer (Sturm 2006).

As far as political decision-making is concerned, the extent to which pluralism, in comparison to a merely institutional approach, prevails can be gathered from the fact that (majoritarian) decisions at different levels are, as a rule, taken in compliance with the principles of power distribution and power-sharing. Federalism and its derivatives represent a specific form of institutional pluralism which should not only be analysed under institutional premises of power-sharing, but rather increasingly by considering political processes. Therefore, division of power and the issue of improving the efficacy of decisions cannot be reduced simply to a more or less clear division of responsibilities but, rather, require more and more coordination and cooperation between institutional levels and decision makers.

By and large, the various federal systems are the result of path-dependent historical developments and continue to persist or adapt to a changing political environment. Federal systems are on the move everywhere and are exposed to internal and/or external impacts, displaying continuity and change, and at the same time weakening or gathering strength. Federal and related systems are dynamic insofar as they substantially derive from different political cleavages, be they political, economic, social or otherwise. In connection with this permanent process of adaptation and transformation in which federal systems find themselves, the question arises of why and how they change and adapt. Furthermore, it is relevant whether reform happens from the top down or from the bottom up, and whether certain federal systems are more resistant to reform than others. Finally, it is important whether reform negotiations take place at a formal or an informal level. As experience shows, federal systems never change completely; more frequently, incremental steps are taken, mostly indicating institutional adaptation or revisions in selected policy areas (Benz and Broschek 2013: 8).
In what follows, some of the issues addressed above are subject to comparative analysis, particularly with regard to the division of powers in connection with pluralism and federal dynamics. Hereby, drawing on insights as provided, e.g., by Burgess (2006: 135ff.), the following aspects are discussed: - federal and regional structure; - social entrenchment; - the role of political parties; - cooperation and coordination within the federal structure; - developments and trends in federal and regional systems.

II. Federal structures

Federal and regional: All the countries covered in this book have a system of division of competences that places them in the category of either a federal or a regional state. Austria, Germany, Switzerland, Belgium and Bosnia-Herzegovina belong to the group of federal states, while Spain, Italy and the United Kingdom are regional states. In some other countries, special regulations for certain autonomous regions apply: Serbia with the province Vojvodina, Finland with the Åland Islands, Denmark with the Faeroese and Greenland, and Portugal with the Azores and Madeira.

Developed federations: Austria, Switzerland and Germany are considered “developed federal systems”. Despite a number of differences, all three display the key properties of a federal system and are therefore classified as genuine federations.

Belgium as a federal state as well as Spain, Italy and UK as regional states belong to the category of “developing federations”, although in Spain recently some weakening of the legal and political status of the autonomous communities has been noticeable. Bosnia-Herzegovina is an uncertain case insofar as the federal system was introduced in order to contain ethnic tensions; the same, albeit less dramatically, applies to Vojvodina.¹ What is characteristic of the Island Autonomies is the fact that they are located far from their respective central authorities and due to this fact have some special independence.

Competence distribution: Depending on typological properties, the structure of competence distribution varies from country to country (cf. Watts 2008). As a rule, national areas of competence are specified in detail in the constitution, while residual areas of competence are assigned to the

¹ For typological aspects, see Watts (2015).
substate level (in this respect, Belgium, Spain and the island autonomies are exceptions). However, this alone does not mean that the regions’ tasks are well defined and binding, but rather indicates a trend towards limiting and eroding regional competence. This can take place in different ways, such as changing interpretations, the rulings of constitutional courts, issues of “national interest”, economic and tax measures, or the like. Aside from residual areas of competence, regions can be assigned additional tasks or be mandated to implement national law. Executive federalism, as is typical of Switzerland, Germany and Austria, requires enhanced cooperation and coordination between central and territorial authorities. It implies shared legislation, which may be understood as a division of labour with the federation providing the framework law, while the regions are responsible for implementing and enforcing the law. With varying intensity, shared legislation of this kind is practiced in Italy, Spain, Austria, Switzerland and Bosnia-Herzegovina. Germany abandoned framework legislation in the course of the federal reform of 2006. By and large, competitive legislation is on the decline (Palermo and Nicolini 2016: 569), but may still result in the duplication of areas of competence, as is the case in the UK. All things considered, it can be stated that in most federal/regional systems central–state legislative power prevails, while—with the exceptions of Belgium, Bosnia-Herzegovina and (more moderately) the island autonomies—the substate level is confined to implementation and administration.

Symmetry and asymmetry: All federal systems are a product of historical developments. Primarily territorial, historical or regional differences derive from cultural, ethnic, linguistic, religious and national differences. Social, ethnic and religious cleavages were most determining for the emergence of different structures and federalist initiatives (Watts 2015: 19). In Austria and in Germany, territorial aspects played some role in the development of the federal system, yet in toto both are homogeneous nations. Although cultural regional variations are identifiable (for Austria, see Bußjäger et al. 2010), it was first and foremost common geography and history that served as the foundations for both federations. In contrast, Belgium and Bosnia-Herzegovina but also Spain, Switzerland and Vojvodina are determined by a variety of cleavages. The first federation of this type was Switzerland, which in 1848, the year of its foundation, displayed strong religious and linguistic tensions (Curch and Head 2013). In Italy, decentralisation had its roots in historical–territorial differences, along which the regions with regular statutes were established, while the cre-
ation of regions with special statutes (aside from exceptions) followed a differentiation with regard to ethnic distinctions. The same applies to the island autonomies, which derived their special status from territorial, historical and ethnic–linguistic cross–cleavages.

The historical development in the respective federal/regional systems has had a decisive impact on whether their constitutional architecture emphasises symmetry or asymmetry (Tarlton 1965: 861). The developed federations (i.e. Austria, Germany and Switzerland) are symmetrical systems, albeit with qualifications here and there, while all the others are substantially asymmetric. Whilst in the past symmetry was regarded one of the most important features of federal systems, for quite some time there has been a growing trend towards asymmetric solutions in order to mitigate tensions in the multilayered systems (Palermo et al. 2009). In general, asymmetry is attributed to structural features: One explanation refers to a group of communities with a special geographic location, e.g., an island position. Another explanation focuses on a group whose areas have sociopolitical peculiarities, whereby these are usually connected to a third group that demands differentiation in terms of ethnicity, language, religion, nation and other criteria.

The first group comprises the island autonomies, but same way British devolution, Spain’s Estado autonómico, the Italian regions and Vojvodina in Serbia—some of them in part closely overlapping with the second and particularly the third group. Belgium and Bosnia-Herzegovina fall into the category of multinational federations (Seymour and Gagnon 2012), i.e. the latter group. Remarkably, asymmetric areas of competence tend to be a feature of derivative federations, and the same holds true for regional states emanating from unitary states, while in genuine federations the principle of symmetry prevails. Now and again, conflicts result in shifts towards asymmetrical solutions.

III. Social basis

Social configuration and the nature of domestic distinctions are considered critical points of origin for the formation of a federal/regional system, dimensions that are also of importance when it comes to establishing differentiated organisational structures (Watts 2015: 19). Regional variations indicate territorial and historical developments and cleavages by analogy to the distinction between symmetry and asymmetry determined by various
conflict lines (Amoretti and Bermeo 2004). Notwithstanding this, there is no linear correlation between social entrenchment and a respective federal type. Austria and Germany, as genuine federations, are primarily mononational, albeit with some cultural diversity at the regional level. However, cultural and social diversity has not led to the formation of pressure groups or political movements which pursue a radical shift towards encompassing federalism. By contrast, the Swiss federation comprises four official linguistic groups, a fact that makes it a multinational entity (Vatter 2014).

As in Switzerland, social fragmentation can be noticed, albeit with varying intensity, in all the other federal countries, too. In some cases, autochthonous language groups live in homogeneously settled regions, as is the case in Belgium (with the exception of Brussels), in Bosnia-Herzegovina, the island autonomies, and—to a lesser extent—in Spain and in the Italian periphery, too. Clearly, it is not only language that represents a strong and distinctive cultural feature but also religion, which, like in Switzerland, is frequently closely connected with the language region.

As far as the allocation of areas of competence is concerned, the social dimension is quite relevant, since it implies strategical behaviour when it comes to (re-)designing the federal architecture. First of all, it is a question of defining the territory at stake in connection with state–substate relations in the federal system. In order to anticipate ethnic, linguistic or religious claims by societal groups, and to avoid centrifugal tendencies in the direction of secession, the areas in which certain groups prevail frequently privileged status is granted. A similar approach was applied in Italy with regard to most of the regions with special statutes, as it was in Spain’s autonomous communities and Serbia’s Vojvodina (all of them regionalised states). As for the island autonomies, they have a different relationship with their mother countries, since autonomy there rests both on territorial and linguistic distinctions. By contrast, in Belgium and Bosnia-Herzegovina whole regions are differentiated in ethnic and linguistic terms, which has inevitably led to dual federalism. Finally, the UK, representing a special case, has taken into account national specifics and economic demands by means of devolution.

Constitutionally entrenched with (relatively) autonomous status, quite different European regions enjoy protection and security for the diversity they represent. In some cases, such as Greenland, the Åland Islands and Bosnia-Herzegovina as well, the central state has transferred power to the substate level even in central policy fields (Elazar 1987: 12).
IV. The role of political parties

Processes of decentralisation, i.e. changes in the scope of autonomy and territorial self-government in federal and regional states, are closely connected to the ability of political actors to adopt demands for change and to make them an issue in public discourse. In this respect, political parties are decisive protagonists in federal dynamics (Swenden and Toubeau 2013: 229).

Frequently, political parties have taken advantage of overall regional developments as windows of opportunity to reinforce demands for strengthening decentralised structures. In this connection, the demands for change may refer either to cardinal principles or to immediate factors. In other words, a given logic of action may be questioned or adapted at a critical juncture (Capoccia and Kelemen 2007: 341), understood as a pervasive political rupture (may it have exogenous or endogenous causes) distinct from small accidental events (Edelmann 2016: 55). With reference to critical junctures, for example, the process of federalisation in Italy after the breakdown of the party system in 1993/94 or, reversely, the (failed) referendum of 2016, which had aimed at more centralism as a response to the debt and financial crisis, can be analysed. The devastating war and the subsequent shaky peace process were severe for Bosnia-Herzegovina, while Great Britain is having to cope with the consequences of Brexit fuelling secessionism in Scotland and in parts of Northern Ireland, too.

Unlike in the asymmetric states, in symmetric federations changes take place incrementally rather than abruptly, from the gradual adoption of institutions through to changes in informal rules. In particular, in the genuine federal states this pattern clearly prevails over radical changes.

As a matter of fact, the processes of federalisation, decentralisation and regionalisation that have been noticed in recent decades have been fostered by ongoing European integration as well as by the need to modernise society, strengthen governance, improve problem-solving capacities, promote the economy and extend political participation (Keating 2000; Sturm 2003: 113; Kröcher 2007; Swenden 2006). As for the European Union, there is anything but consensus about whether it will ever become a federation or not. Still, as pointed out by Piattoni in this volume, the very fact

2 With regard to sources and mechanisms of change, see Benz and Broschek (2013: 8ff.).
that the EU displays features of a federation, such as the allocation of areas of competences in a multilevel system, makes the European polity a subject of federal research.

Along with the revival of regionalism, the political actors at regional level have gathered steam, too, with demands for more autonomy and self-government being articulated emphatically. Also “old” (ethno-) regional parties, such as the Scottish National Party, Plaid Cymru (Wales), the Union Valdotain (Italy), and the Volksunie and its successors (Belgium), have gained momentum. These and a few other regional parties had already been active before or immediately after World War II. A huge number of (ethno-) regional parties though, were founded in the 1970s and 1980s and, hand in hand with the spatial turn (Crang and Thrift 2000), firmly called for regional adjustment of their respective states.

In genuine federations, regional parties are mostly a temporary phenomenon or play a marginal role. Two outstanding exceptions, both of which are present in the regional and the national parliament, are the populist Lega Ticinese in the Swiss canton of Ticino and in Bavaria the conservative Christlich-Soziale Union (CSU), the latter, as of 2017, being part of the German federal government and holding an absolute majority of seats in the Bavarian Landtag. In Austria, by contrast, regionalist parties very rarely, and if so, not for long, make it into regional, let alone national, parliaments (De Winter and Huri 1998).

In Belgium, starting in the 1960s, Flemish as well as Wallonian regionalist parties gained attention with increasing voter support. In Spain, after its shift towards democracy, regional parties began to undertake important tasks at the substate level and, as coalition partners in national governments, alternately with one of the big parties (cf. Guinjoan and Rodon 2014). In Italy, it is all above the Lega Nord that has played a strong role in the process of transforming the state from a unitary to a more federal state since the 1980s. Greenland and the Faeroese have party systems of their own, and in Bosnia-Herzegovina not only is the federation organised along ethnic lines, but so are (with some insignificant exceptions) the political parties (Tronconi 2009: 29ff.; Elias and Tronconi 2011; Mazzoleni and Mueller 2016).

Frequently, processes of federalising or decentralising the state and redefining competences in favour of substate entities are the result of political pressure by political parties of this type. And in many cases, constitutional politics has considered not only functional aspects, but also how to preserve national integrity. Sometimes, the devolution of competences to
regions was an unavoidable act to anticipate demands for secession. Italy (Padania), Spain (Catalonia) and the UK (Scotland) can serve as examples of that argument (Eppler and Jeffery 2017; Requejo and Nagel 2015).

Notwithstanding this, it is evident that successful realisation of decentralisation and the enhancement of regions aside from regional parties also depends on the cooperation of the mainstream parties which have been and will remain gatekeepers in the system, able to support or to counteract a certain measure at stake (Swenden and Toubeau 2013: 268).

Unlike parties with a regional focus, those with a national presence are kind of integrative agents and, along with interest groups, influential actors in the multilayered system (v. Beyme 2010: 373). With good reason, they adapt themselves to the federal structures in that they create territorially integrated organisational units, which at all levels represent the party’s goals (Benz 2003: 34f.). Likewise, party careers follow national and regional lines, thereby fostering the parties’ vertical integration (Watts 2015: 23). Outstanding examples of countries with parties functioning as integrative agents are Austria, Germany and Switzerland (the latter, though, with strong accentuation of cantonal autonomy).

As far as federal affairs are concerned, the question arises of how mainstream parties react to demands which come from the regions. Swenden and Toubeau (2013: 253–255) suggest three key steps that need to be taken into account when it comes to coping with regional pressure: 1. Strong strategic incentives prompting mainstream parties to adopt regionalist demands in order to secure political influence and electoral success in the periphery. 2. Ideological and organisational openness to regionalist issues that challenge a party’s ability to bring its territorial strategy in line with constraints due to ideological and programmatic positions. 3. Government cohesion, understood as the ability of mainstream parties to decentralise political power and thereby, in view of political veto players, anticipate potential obstruction.

Quite often, national parties and their regional subunits have to cope with double loyalty inasmuch as regional actors tend to focus on centrifugal interests as opposed to the centripetal orientation of the party as a whole, particularly when it is about competence distribution. In the recent past, tensions between the centre and periphery of party organisations have occurred repeatedly, such as between the British Labour Party and its Scottish unit, and between the centre and regions within the Spanish PSOE.
A weakening of the integrative power of a national party takes place primarily when, due to fluid internal structures and the increasing volatility of the electorate, the party’s organisational centre lacks sufficient authority over its territorial subdivisions, as is the case, e.g., with several nationwide parties in Italy (Edelmann and Kaiser 2016). To give some more examples, in Belgium and Bosnia-Herzegovina, the party systems have doubled along language cleavages, the Nordic Island Autonomies have party systems completely different from those of the motherlands, while in the Portuguese islands, regional and national parties coexist side by side.

V. Coordination and cooperation

Provisions for competence distribution between states and substates rest upon an understanding of democracy in which the separation of power has a central function in the prevention of power concentration at the horizontal level. Thus, federalism ensures power diffusion between the different territorial levels, thus ensuring checks and balances both vertically and horizontally. As a consequence thereof, L’esprit des Lois is accompanied by L’esprit de Féderalisme or, as Burgess (2012) put it, by a Federal Spirit.

Depending on consensus and compromise as preconditions for carrying out political tasks, federalism essentially follows a cooperative pattern of interaction with shared rule given priority in the relations between national and subnational levels of government.

Since the relations between the different levels demand regulation beyond the division of areas of competence, in all federal systems the participation of substates in national affairs is laid down in the constitution. Notwithstanding this, informal relations between the actors, as mirrored in cooperation between executives, are of growing importance (Opeskin 2001). Austria, with its uncoded and at the same time quite powerful Conference of State Governors (Landeshauptleutekonferenz), is a prime example of informal intergovernmental relations. The same applies to the Conference of Prime Ministers (Ministerpräsidentenkonferenz) in Germany and the Conference of Cantonal Governments (Konferenz der Kantonsregierungen) in Switzerland; in the latter, this is reinforced by the “principle of loyal cooperation”, as entrenched in the federal constitution.

To some extent, the regional states are undergoing a process of fostering intergovernmental relations, too. In Italy, like in Switzerland, the con-
stitution stipulates “loyal cooperation”, a rule that finds its expression in a number of state–region conferences, with, however, the regions occasionally coming into conflict with each other. In the UK, a (consultative) interdepartmental committee for policy coordination between the different levels has been established—such as that between London and Scotland—, which, just like the so-called Sewel Convention, operates avowedly informally. In Spain, agreements are fixed in sectoral ministerial conferences or intergovernmental bodies as a rule, however, with party negotiations in advance.

Reforms in Belgium aim, among other things, to improve the cooperation between substate units, also on a voluntary basis, as is demanded by the constitutional court in certain cases; furthermore, for substates a principle of loyalty applies. In Bosnia-Herzegovina, the Dayton constitution provides for several mechanisms of cooperation and coordination that even allow for a transfer of authority to the national level through negotiations and consensus-seeking without formalised decision-making. Similarly, in the Island Autonomies intergovernmental bodies and also rules provide for cooperation and coordination: The Finnish central state and the Åland Islands established the so-called Åland Delegation as an informal forum for conflict resolution. In the same way, informal talks between the Faeroese and Denmark take place in order to find a solution before a conflict becomes a formal, confrontational issue; the same procedure applies to Greenland’s relationship to Denmark.

Formal and informal fora for coordination and cooperation serve the purpose of anticipating or solving conflicts, and additionally of identifying and mitigating discrepancies in the allocation of powers in a consensual way. Notwithstanding this, more or less obligatory compliance with consensual rules may also result in a reverse effect, such as in the form of a joint decision trap (Scharpf et al. 1976), i.e. when different actors make use of their vetoing power and obstruct a reform effort rather than contributing in a constructive way, as has been the case in Bosnia-Herzegovina, for instance.

VI. Developments and trends: federal and regional systems under pressure to reform themselves

Acceleration of reform processes: In the 1990s and after, the revival of regions and regionalism in the course of a general process of modernisation
in an “ever-growing” European Union had fuelled efforts towards strengthening the region’s role in that multilevel system. Most notably, Belgium passed a constitutional reform that transformed the country from a unitary state into a federal state (1993). Further examples are Bosnia-Herzegovina’s constitution which was passed in 1995, some single transfers of powers in Spain between 1995 and 1997 (followed by revisions of regional statutes in the mid-2000s). In the UK, the Devolution Act was passed in 1998, in Switzerland the federal constitution was completely redrafted in 1999/2000, Italy took a step towards federalism after a referendum in 2001, and likewise in Denmark constitutional amendments favouring the Faeroese (2005) and Greenland (2008/2009) were passed. In Serbia, with the constitutional reform of 2006, the autonomous province of Vojvodina was established. The German federal constitution was revised in a two-step process (2006 and 2009), while in Austria, aside from some minor items, the draft constitution elaborated by the so-called Austria Convention was rejected by the Conference of State Governors.

In recent years, most of the federal and regional states have again been undergoing a wave of reform—with quite different backgrounds: in Italy, for instance, due to critical junctures, and in Switzerland as a response to demands for gradual change. Reform processes, it seems, are initiated more frequently and in shorter intervals. Belgium witnessed its sixth state reform by which dual federalism was consolidated (2012 and 2014/2015), and in Switzerland the constitution was again revised in 2008 and is now the subject of a parliamentary initiative started in 2015. In Italy, in 2016 a referendum was held which aimed to achieve a substantial reduction in federal provisions, yet it failed. In Wales, initiatives for constitutional reform are being started in short intervals; the most recent one was a Wales Bill initiated in 2015. As for Scotland, the Scotland Act strengthening the power of the Scottish Parliament came into effect in 2016. Finally, in Bosnia-Herzegovina the federal constitution has been and will remain a permanent matter of dispute.

Trends towards centralisation: Aside from the UK (in particular, with regard to Scotland in the wake of “Brexit”) and the Island Autonomies, most countries are undergoing a process of centralisation for several reasons. One of the causes is the constant growth of welfare state functions (Schmid 2010), which strengthens central control over subnational units. Another reason is that new policy areas, such as ecological modernisation and sustainable development, are reserved for central government and legislation. Primarily, though, in all federal and regional countries rapidly
changing economic conditions and increasing state expenditure (Wagschal 2013) have become crucial for areas of competence shifting towards the central level.

In Germany, to give an example, in connection with political bargains between the federation and Länder, the latter as a rule receive funding from the former but in return have to concede increased control over their area of competence. In doing so, the state extends its sphere of influence, well supported through almost unlimited authority in tax legislation.

In the same way, Switzerland—notwithstanding the solidity of its federal architecture—is witnessing a process of “creeping” centralisation. Following the international trend, the country is continuously being modernised and urbanised, with the result that state intervention is increasing. For instance, cantonal autonomy in social insurance and social policy matters is being increasingly superimposed by federal competence. Despite the far-reaching constitutional reform of 2008, through which the cantons have clearly been favoured with regard to competence and finance, the demand for unitary federal solutions is increasing, particularly when complex and costly projects are at stake (Mueller 2015).

Austria, unlike Switzerland, is a federation with a high degree of centralisation, both in legislation and in finance. Thus, not without reason, any thorough federal reform has to cope with the challenge of adapting the fiscal equalisation scheme. Various developments and changes to the political system indicate an erosion of the country’s real federalism, which is heading towards even more centralisation.

In Spain, the relations between centralists and decentralists are filled with tension. Mostly, public finance dominates the controversies, since the communities enjoy a high degree of autonomy with regard to expenditure, which, however, stands in sharp contrast to their strongly limited tax authority. The European Fiscal Compact, which was concluded in 2012 and stipulates structural adjustments and budgetary reforms for regions, has made the communities more dependent on the central government. Indirectly, the restrictions imposed on the regions have had an impact on competence and intergovernmental relations, too.

In Italy, with the constitutional reform of 2001, the regions with regular statutes have been strengthened, which means they henceforth had more competences, including financial coverage. Some fifteen years later, though, disillusion prevails. Financial adjustment negotiations between the central state and regions notoriously tend to become controversial, particularly due to (alleged) corruption and bribery, and an increase in reckless
expenditure and debts. Furthermore, like in Spain, the Fiscal Compact has caused budget restrictions that affect local and regional authorities, too.

As far as finance is concerned, Belgium is a remarkable case. Despite strong decentralisation, regional tax autonomy is distinctly limited, leaving little scope for regions and communities. With regard to the distribution of expenditure between the different levels of government, Belgium’s dual federalism appears to be markedly less decentralised than supposed (Palermo et al. 2011).

VII. Summary

In conclusion, considering the range of federal and regional states in Europe, we arrive at the following findings:

1. Political parties: Along with the revival of regions, numerous (ethno-)regional parties have emerged or, if already in existence, have gathered steam. Frequently, the restructuring of federal/decentralised systems and, going hand in hand with this, the recalibration of competence profiles has been strongly influenced by (ethno-)regional parties. Notwithstanding this, any transformation process deserves the involvement of mainstream parties, which are still gatekeepers in the federal system, able to either support or oppose challenges to the status quo.

2. Creeping centralisation: Most of the federal/regional countries are undergoing a process of gradual power shift towards the central level, as is expressed in particular in the growing functions of the state. With, among other things, the expansion of the welfare state and the costs attached to that, (central) governments are faced with additional tasks and expenditure. Logically, national and transnational policy areas, such as environmental policy, are matters to be dealt with by central authorities.

3. Primacy of the economy: The shifting of areas of competence from lower levels towards the national level frequently has an economic background: The economic and financial crisis of recent years has forced states to undertake structural reforms and take measures that put a strain on their substates, too. As a result, substate entities are increasingly dependent on national policymakers. Indirectly, financial restrictions also have an impact on the “culture” of intergovernmental relations, with centralist structural reforms reinforcing the trend.
4. **Consensus and cooperation**: As a matter of fact, federalism inherently relies on cooperation as the dominant mode of interaction. Aside from formal modes and rules, informal communication channels have gained importance, simply in order to prevent conflicts in connection with questions of competence. However, commitment to a cooperative pattern of interaction may just as well produce counter-effects when veto players make use of their power by obstructing negotiation processes.

5. **Ongoing reform**: Since federalism is a dynamic matter (cf. Benz and Broschek 2013), federal and regional systems are again and again confronted with requests for reform; moreover, externalities of different kinds are increasingly fostering the pressure to adapt to a changing environment. The way a process of adjustment is carried out is closely connected to the type of federalism a country exhibits. In regional and asymmetrical federal countries, it deserves, in general, a critical juncture should thorough change take place. In symmetrical federations, by contrast, changes occur in the forms of incremental adaptation of institutions as well as informal rules.

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List of Authors

Maria Ackrén, PhD, Institut for Samfund, Økonomi og Journalistik, Ilisimatusarfik University of Greenland (Denmark)

Marco Brunazzo, Prof., Dipartimento di Sociologia e Ricerca Sociale, Università degli Studi di Trento (Italy)

César Colino, Prof., Departamento de Ciencia Política y de la Administración, Universidad Nacional de Educación a Distancia Madrid (Spain)

Srdjan Djordjević, Prof., Pravni Fakultet, Univerzitet u Kragujevcu (Serbia)

Malcolm Harvey, PhD, The School of Social Science, University of Aberdeen (United Kingdom)

Angustias Hombrado, Prof., Departamento de Ciencia Política y de la Administración, Universidad Nacional de Educación a Distancia Madrid (Spain)

Ferdinand Karlhofer, Prof., Institute of Political Science, University of Innsbruck (Austria)

Soeren Keil, PhD, School of Psychology, Politics and Sociology, Canterbury Christ Church University (United Kingdom)

Manfred Kohler, PhD, Department of Migration and Globalization, Danube University Krems (Austria)

Sean Mueller, PhD, Institute of Political Science, University of Bern (Switzerland)

Günther Pallaver, Prof., Institute of Political Science, University of Innsbruck (Austria)

Bettina Petersohn, PhD, Department of Political and Cultural Studies, Swansea University (United Kingdom)

Simona Piattoni, Prof., Dipartimento di Sociologia e Ricerca Sociale, Università degli Studi di Trento (Italy)
List of Authors

Roland Sturm, Prof., Department of Political Science, Friedrich-Alexander-University Erlangen-Nürnberg (Germany)

Adrian Vatter, Prof., Institute of Political Science, University of Bern (Switzerland)

Jens Woelk, Prof., Facoltà di Giurisprudenza, Università degli Studi di Trento (Italy)