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Jurisdiction and Pluralisms: Judicial Functions and Organisation in Federal Systems

by

Jens Woelk*

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The thematic focus of this issue of *Perspectives on Federalism* shall analyse phenomena of pluralism in the judiciary of federal systems: 'Jurisdiction and Pluralisms: Judicial Functions and Organisation in Federal Systems'.[1]

It will focus on the degree to which legal and judicial pluralism is possible within the general legal system of the State. Particular attention will be paid to autonomous judicial powers and the organisation of the judiciary. An important question regards the interrelation with the principle of uniformity of the jurisdiction and the general legal system of the State.

According to the main hypothesis to be tested in the case studies, the underlying rationale of the respective federal systems will determine the concrete ways in which the judiciary is organised. Geographically, the case studies cover six federal systems from all around the world, in North and South America, Europe and Africa. And they show that it actually makes a considerable difference, whether the federal system is of dual or integrated nature in the organisation of federal and State functions, whether it has to cope with a huge geographic extension, or whether the challenge for the federal system is linguistic or ethnic diversity in a multinational or multiethnic federation. Of course, these essential features of the federal system in question also determine the room which exists at sub-national level for differences in judicial organisation and functions.

Thus, the authors have been asked to briefly introduce the respective federal system at the beginning of their contributions with a brief overview of the characteristic systemic features, in particular the organization and competencies of the federal and sub-national levels. This shall provide some basic information about the underlying rationale, before focusing on the functions of the judiciary and on the impact, the federal structure has on those functions. The main interest is, of course, whether and which judicial functions can be exercised autonomously by sub-national entities, and, in case that such powers do exist, which are the constitutional and legislative limits to the autonomous exercise of those functions.

An important issue regards the organisation of the judiciary in the sub-national sphere. Do particular guarantees for its independence from political actors exist, how is its autonomy protected and which limits do exist for the exercise of that autonomy? Is there any specialisation of judicial services and organisation or a differentiation in functions? And

who is responsible for selection and appointments of judges and other judicial official holders at the sub-national level? Do specific guarantees for the independence and impartiality of judges at sub-national level exist? Are there specific institutions guaranteeing the (administrative) self-management of the judiciary at sub-national and at federal level?

The analysis of the single cases includes an examination of the relations between the judicial institutions at sub-national and at federal levels. In some cases, there is a parallel organisation of the judicial functions, based upon the separation of the two levels which follows the general model of dual federalism. In other cases, the opposite is the case with the integration of sub-national judicial institutions, which are responsible for the lower instances, into a comprehensive judicial system with supreme judicial authorities at the top. In both cases, dual or integrated judiciary, manifold questions of coordination arise, the nature and scope of regulations for the judiciary needs to be examined as well as the existence of effective guarantees.

Another interesting question is to which extent sub-national entities are represented in the federal judiciary. This may be relevant for the coordination within a composite system as well as for the representation of diversity.

In the constitutional sphere, the guarantee of federal constitutional values and fundamental rights as well as instruments of judicial review need to be examined. How is conformity with the Constitution guaranteed at sub-national and at federal level?

Finally, in a number of federal systems, differentiated language regulations exist in judicial proceedings at federal and/or sub-national levels. These specific language regimes have consequences for the parties' right to information, as well as for the obligations regarding transparency and publicity. If a trial is conducted at sub-national level where such a differentiated regime exists, does this also determine or influence the language in case of appeal or in front of a Supreme Court?

The six case studies in this volume will provide answers to these and other questions.

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[1] This publication is part of the results of the PRIN project (2010-2011) on 'Jurisdiction and Pluralisms' (JPs), coordinated by prof. Roberto Toniatti, University of Trento. A summary of the research project is available at the project website:((http://www.jupls.eu/). Special thanks are due to Dr Vincenzo Tudisco, currently Postdoctoral Researcher in Comparative Constitutional Law at the University of Trento.

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The declinations of regulatory pluralism in the form of the multilevel State and their impact on jurisdiction: judicial federalism in the United States.

An (unfinished?) model for a pluralist defence of rights

by

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Abstract

Judicial federalism has generally been neglected by scholars in comparative federalism. However, this topic is quite relevant for a proper understanding of the distribution of competences in a federal order and of the techniques for the protection of fundamental rights. This article focuses on the model of judicial federalism that has developed in the United States. How does this particular configuration of the relationship between federal judicial power and state judicial power influence the defence of fundamental rights? Can the organisation of judicial federalism in the United States be seen as neutral in relation to this issue?

Key-words

United States, federalism, New Judicial Federalism, fundamental rights protection

1. Introduction

It has almost become a cliché – albeit one based on truth – that comparative studies on federalism focus exclusively on the division between Federal State and federal departments of legislative and executive power, while neglecting to examine the legal system.[I] The reason for this phenomenon is sometimes traced back to the relative rarity, at least in Europe, of federal systems that also include two or more legal systems with a division of legislative jurisdiction: only Germany and Switzerland have federal-style judiciary systems, while the jurisdictional function is strictly reserved for the central government in Belgium and Austria, as it is in States with accentuated regionalism, such as Italy and Spain, and in States subject to devolution, like the United Kingdom. The notion that this dissociation between legislative/executive federalism and jurisdictional federalism is less widespread should not be surprising if we follow the approach laid out by C.J. Fredrich. *Judicial Federalism* allows the analysis of the phenomenon of aggregation and disaggregation of political communities equipped with constitutional agreements that follow the different lines of evolution represented by the three powers so that it is absolutely natural for the federalisation process to proceed at different speeds – or even in different directions – depending on whether legislative power or judiciary power is taken into consideration. This method provides an examination of the aggregative and disaggregative dynamics – the procedure of federalisation – while the qualification of the State as federal or regional, composite or whatever else you might like to call the phenomenon as a whole, is of no interest, because it is a static and imprecise label, lacking meaning.

From a different point of view, the lack of relevance of comparative studies on jurisdictional federalism has been attributed not only to the empirical data indicated above, but also to a cultural element, connected to the figure of the post-Jacobin judge (Lombardi 1986: 43-44): this is the official judge, under whose jurisdiction the tangible case must fall, without the possibility of division of sovereignty. To this arrangement, which is deeply rooted in the European juridical tradition, we can also add the system in which jurisdiction must be exercised unitarily, dating back to the Kelsenian doctrine, which states that the law shall not tolerate different applications by separate judiciary orders.[II] Moreover, and to some extent paradoxically, in the US constitutional tradition, there seems to be limited

analysis of jurisdictional federalism, other than for the fact that, at least in its first century, US constitutional doctrine underestimated the 'danger' of jurisdictional power, notoriously defined as the *least dangerous branch*.[III] Therefore, if federalism, considered as the separation of vertical powers, on a par with horizontal powers,[IV] is aimed at restricting public power through competition between bodies of powers superimposed in the two levels of governance (federal and state), then that juxtaposition is not as necessary for jurisdictional power, which does not pose a threat to the individual liberties of the people, whereas legislative and executive power do. In other words, according to this reconstruction, the Founding Fathers in Philadelphia did not worry about building a strong federal judiciary power in opposition to that of the member states, on the grounds that the general judicial power was not a threat to individual liberty and, therefore, did not require the creation of a juxtaposition between the federal and state judiciary. While it is obvious that at the moment no one denies the extreme relevance of deferral judiciary in the US system, perhaps the above analysis can help explain why the level of decentralisation of judicial power in the United States is still, at least apparently, stronger than that of legislative power, as shown in the following paragraphs. Moreover, the absence of comparative studies on judicial federalism also concerns US doctrine, which has carefully analysed its own *Judicial Federalism*, but has rarely used it as inspiration for assessing the dissemination of the model in other juridical orders.

In consideration of this consolidated lack of interest by comparative studies in judicial federalism, there is also the particular relevance that such studies could have in general, because 'the study of the division-allocation of judicial power in complex orders is important to understand the way the *form* of said order is and evolves' (Pizzetti 2003: 54), and in particular, in relation to the techniques for the defence of fundamental rights within each order. It is in this second sense that the model of *Judicial Federalism* in the United States is briefly outlined below. It is a matter of checking whether this particular configuration of the relationship between federal judicial power and state judicial power influences the defence of fundamental rights, or whether the organisation of judicial federalism in the United States can be considered neutral in relation to this issue.

Before tackling the matter, which involves certain unavoidable technicalities, we should remember that US constitutional evolution involves a constant interweaving of issues relating to federalism and the development of the defence of rights. We must limit

ourselves to citing the two turning points in the constitutional history of the United States: the Civil War, in which the abolition of slavery came about within the scope of a sharp contrast in how relations were considered within the Federal (or Confederal) State; and the *New Deal*, when the enforcement imposed by Roosevelt on the Supreme Court had to pass through a fairly broad interpretation of the *Commerce Clause*, to attract within federal legislative jurisdiction the economic issues that allowed Federal Congress to introduce certain social rights.[V]

2. The model of judicial federalism in the United States

Art. III of the US Constitution, the original version of which is still in force (with the exception of the addition of the 11th Amendment in 1798), establishes that federal jurisdictional power is assigned to the Supreme Court and to the federal judges who are appointed by Congress.

Consequently, Federal Judges with less power than Supreme Court Judges are not mandated by the Constitution, in that their appointment is decided by Congress, which began exercising this power immediately after the passing of the Judiciary Act of 1789. The Supreme Court has original jurisdiction in the cases pursuant to paragraph 3 of Art. III (ambassadors and consuls) and in the other cases defined by Congress, which has not, however, ever established them, with the consequence that the federal judiciary system is basically made up of three levels of judgement (District Courts, Appeals Courts and the Supreme Court), as the original jurisdiction of the Supreme Court is quite limited.

Obviously the Constitution does not deal with the judiciary power of the States – just as it does not deal with the legislative power of the States in Article I – because it existed before the Constitution. So it is not so much a question of two levels, as it is of two – or 51 – different judiciary systems: one federal and one for each of the individual States, each with its own complete organisational autonomy.[VI]

The division between state and federal jurisdiction is established by the Federal Constitution. Paragraph 2 of Art. III established the cases that fall within the jurisdiction of the Supreme Court: they are mostly cases in which it is necessary to apply the Constitution or a federal law, 'federal legislation jurisdiction', and cases in which the parties are citizens of different States, 'diversity jurisdiction'. Then there are other cases relating to

international treaties, litigation involving ambassadors or diplomatic representation, admiralty and maritime jurisdiction, etc.

The Supreme Court has established that the federal jurisdiction pursuant to Article III is not exclusive, but could be described as 'concurrent', without attributing to the term the meaning held in the field of legislative jurisdiction in the Italian and German constitutions. According to the Supreme Court,[VII] Congress can establish cases that are exclusively of federal jurisdiction and Congress has done just that in relation mainly to bankruptcy proceedings, the defence of intellectual property, federal criminal law, federal expropriations and confiscations (so all cases of *federal legislation jurisdiction).*

Therefore, with the exception of those listed above, all cases falling within the boundaries of Article III, paragraph 2, can be decided by the Federal Courts, and also by the State Courts.

Moreover, the Supreme Court[VIII] has established that federal jurisdiction can be waived by the parties, while state jurisdiction cannot. Consequently, the parties can always reach a settlement with regard to state jurisdiction, even when it is a matter of applying federal law or *diversity jurisdiction*, while the defect in federal jurisdiction can be raised by each party or by the court. It may be that the state courts pass judgment on the basis of federal laws, while it is much rarer that the federal courts will pass judgment on the basis of state laws or constitutions.

The elements for assessing the autonomy of a judiciary order within the Federal State are usually related to the methods used to select the judges and their status (in that they are employees of the federal state or the member state), jurisdiction over procedural law and, lastly, the presence of juridical instruments that allow federal judges to reform the sentences of state judges. With this in mind, the judiciary systems of the member states are definitely configured as autonomous with regard to the first two criteria, in that state judges are chosen with different procedures in each member state, ranging from appointment by the Executive to direct election and mechanisms that combine the two[IX], while civil and criminal procedural law are under the sole jurisdiction of the legislative power of the member states.

The examination of the cases in which the federal judge can reform the decisions of state judges is more delicate, however. There are two exceptional hypotheses:

(i) cases in which the Supreme Court can handle appeals against state sentences;

(ii) cases in which the federal judge can pronounce *habeas corpus*.

On the first matter, the Supreme Federal Court passed. a judgment in 1983,[X] establishing the rule by which the state sentence can be appealed against before the Supreme Court only when it is definite, also implicates the application of federal law and, above all, has not been pronounced on the basis of 'adequate and independent state juridical grounds', and has been explicitly indicted by the State Court. In other words, the intention of the Supreme Court was to leave it up to the State Courts to finalise their decision, or allow appeal before the Supreme Court: if the State Court issues a '*plain statement*' confirming that the decision has been made on the basis of '*adequate and independent State Grounds*', then the Supreme Court cannot intervene. According to the words of the Supreme Court in the case of Michigan v. Long:

'*If the state court decision indicates clearly and expressly that it is alternatively based on bona fide separate, adequate, and independent state grounds, this Court will not undertake to review the decision'*.

The desire of the Supreme Court to recognise and defend the definite nature of the decisions of the State Courts is clear, in order to '*provide state judges with a clearer opportunity to develop state jurisprudence unimpeded by federal interference and yet preserve integrity of federal law*'. More specifically, Judge O'Connor, author of the majority opinion in the case of Michigan v. Long, was always in favour of differentiation also on the subject of the defence of rights (O'Connor 1984). The idea behind this position is that the decisions on the matter of rights made by the State Courts on the basis of State Constitutions must be final, without federal judges being able to change them (allowing for the possibility of *Federal Habeas Corpus*) because the Member States are different communities from the federation, with their own values which have to be upheld. This is jurisdictional federalism which presupposes an axiological pluralism and is aimed at defending it, guaranteeing state judges extensive faculty to pass final sentences, on condition that they declare this intention in a *plain statement*.

What is surprising is that, following an empirical analysis of the application of *Michigan v. Long*, we see that the state courts have not taken advantage of the opportunity, in that they have rarely included the *plain statement* in their decisions (Williams 2009: 123-124). This is perhaps due to a lack of state constitutional culture on behalf of lawyers, or because judges often want to avoid involving the State Court in an interpretation of the state constitution, preferring to 'hide' behind a possible intervention by the federal judge.

On the second matter, we should remember that *habeas corpus* is a practice which allows the federal judge to order the release of anyone who is denied their freedom by order of a state judge, in breach of the Federal Constitution (Hertz and Liebman 2011). This is not an appeal, but a new sentence, limited to cases of breach of personal freedom. The main point lies in defining whether the federal judge can decide with regard to state law, particularly with reference to the methods of proof used; whether the judgment of the federal judge is based only on law, or whether it also recognises facts confirmed by the state judge, in accordance with state law, and whether it is possible to assess exceptions which, according to state law, have been considered as expired due to late presentation. In some ways, this issue is similar to the one handled in *Michigan v. Long* in favour of the final nature of the state decision, which, in this case was brought to a more controversial solution.

Initially[XI] the Supreme Court established that the federal judge cannot know the fact or the exceptions ascertained by the state judge, out of respect for the finality of the state judgement passed in application of state law. Subsequently, within the scope of the most liberal jurisprudence of the 1960s, the Court changed its mind,[XII] allowing the option of presenting exceptions before the federal judge which had expired before the state judge, on condition that failure to exercise could not be attributed to the precise will of the party. This position was then gradually worn down by subsequent decisions that greatly reduced the cases in which the re-proposition of the exception expired before the state judge was found admissible, to the point of reaching a jurisprudence in the 1990s which clearly favoured a restriction of the application of *habeas corpus*, considering it to be presented only to gain time, especially in disputes against state death sentences.[XIII]

So, in short, we can confirm that the federal judiciary system and the state judiciary systems are separate and independent and that the Supreme Federal Court does not impose a uniform interpretation of national legislation, not even in the law, because it can reform state sentences only in two exceptional cases: in appeal, but with the limitations of *Michigan v. Long*, and in the doctrine of *habeas corpus*.

3. *New Judicial federalism* and the defence of fundamental rights

The most frequent cases of intervention by federal judges in relation to state sentences regard the matter of fundamental rights. These are often matters linked to the guarantees

of criminal procedure, but also – as we will see – same-sex marriage, right to jury, equal protection clause and other similar cases.

The study of the relationship between jurisdictional federalism and the defence of fundamental rights gave origin to the doctrine of the so-called New Judicial Federalism (NJF), which dates back to the article published by Judge Brennan in the Harvard Law Review in 1977 (Brennan 1977). Brennan maintained that, as the Supreme Court had lost its propulsive function on the matter of defence of rights in the Warren period, the state courts had to proceed on the basis that, when the Supreme Court denies the existence of a right, it does so only in accordance with the Federal Constitution, while the State Court can still recognise that right on the grounds of the State Constitution. Obviously, Brennan could not deny the principle of incorporation of state rights through the 14th Amendment, which he had sustained during the Warren Court, so he confirmed that the Supreme Court could impose on Member States the defence of federal rights, while the Member States can raise this level but not reduce it.

NJF clearly has a liberal arrangement and also has the explicit aim of pursuing the work of the Warren Court at a state level, using an argument that had, until then, been sustained by conservatives, i.e. the independent and final nature of state decisions. At first glance, NJF has little to do with federalism, in that it is aimed at consolidating the expansive curve of fundamental rights begun by the Warren Court: the claim of autonomy by state judges is exclusively instrumental, due to the fact that, at that precise moment in history, state judges – or at least the judges of some States – could be considered more liberal than those of the Supreme Federal Court.

If we look closer, we can see that it also has significant implications in terms of federalism, because – perhaps unintentionally – it looks at the reason why each State can have its own concept of certain fundamental rights, as long as they are not below the federal standard. This discussion leads to the idea that American NJF tends to protect the combination of rights that best adapts to the specificity and traditions of each Member State and can, therefore, lead to a different conclusion, perhaps not envisaged by Brennan, that the autonomy of the judiciary state is instrumental in the protection of the specific values of each individual Member State, in opposition to the general defence of federal rights. In other words, born with the explicit purpose of expanding the defence of fundamental rights, NJF can also be interpreted in such a way as to bring out and enhance

state judiciaries, thereby recognising the existence of an axiological pluralism that state judges would be preordained to defend.

In reality, the potential of NJF seems not to have achieved its aim, due not so much to judicial difficulties or opposing doctrines, as to the inability or lack of desire by the state judicial class to make use of them.

According to Robert Williams, one of the main scholars of US state constitutionalism,[XIV] NJF, having survived severe criticism in the late 1990s, is now more easily accepted in theory by judges and lawyers, but is less developed than it could be, due to a difficulty primarily at a cultural level, which seems to be the same issue that blocks the use by the State Courts of the *plain statement* of *Michigan v. Long*. There seems to be a lack of awareness on behalf of judges and lawyers in making decisions on rights in a way different to those made by the Supreme Court (which is possibly now less controversial due to this reduction in its power).

The phenomenon is also present in the case of federal rights which are not considered binding on the States in that they are not incorporated in the 14th Amendment. For example, the right to a trial by jury, pursuant to the 7th Amendment of the Federal Constitution, was not considered by the Supreme Court to be applicable to the States, which are free to consider different ways, so much so that almost all the State Constitutions have provisions relating to the popular jury, which has a long tradition at the state level. A recent study (Hamilton 2013) showed that most of the Supreme State Courts abide by a decision made by the Supreme Federal Court over 50 years ago,[XV] which established certain principles regarding trial by jury, without even raising the issue of a possible different constitutional interpretation at the state level.

This attitude of 'renunciation' by the state courts is more understandable in cases in which the state constitutions contain provisions that are absolutely identical to those of the federal constitution.[XVI] But in these cases too (Williams 2009: 193 ff) it would seem that the decision not to move away from the federal interpretation is largely unintentional, given the need for speed and the absence of adequate reflection as well as doctrinal examinations. It is considered natural that – since the federal constitutional text and that of the state are identical – federal judges abide by the interpretation of the Supreme Court, while it could definitely be argued, also in view of *Michigan v. Long*, that state judges can draw a different interpretation from the same text (Williams 2009: see above).

Moreover, also in cases in which the State Courts employ New Judicial Federalism, it may be that the local legislative power – or the electoral body by referendum – will, once again, impose the federal standard. For example, one of the first and most famous cases of NJF is the sentence of the Supreme Court of California[XVII] which, in 1972, declared the death sentence to be unconstitutional on the grounds of the ban contained in the California Constitution, on *Cruel* ***or*** *unusual punishment*: while the US Constitution, 8th Amendment, speaks of *Cruel* ***and*** *unusual punishment*. But then, as we know, in the same year, a prepositive constitutional referendum changed the California Constitution, explicitly declaring that the death sentence is neither *cruel* nor *unusual*, not only overturning the result achieved by the Supreme State Court, but also excluding every other possible future interpretation in this sense. Similarly, in 2008, the Supreme Court of California judged the state ban on same-sex marriage to be unconstitutional and, a few months later, the Constitution was amended by public referendum, introducing a ban on same-sex marriage. In Alaska too, the sentence passed in February 1998 in favour of same-sex marriage prompted a referendum which led, a few months later, to the amendment of the Constitution, introducing an explicit ban on same-sex marriage.

These examples can provide a further explanation regarding the reluctance of state judges to apply Judicial Federalism: (i) the state constitutions are much easier to amend than the federal one, especially thanks to referendums, so an innovative stance could have the opposite effect to the desired outcome, causing a constitutional stiffening by amendment and (ii) state judges are often subject to re-election or recall (where pressure groups play an important role) and do not want to take stances that make them unpopular.

In the case of same-sex marriage, as mentioned above, it is possible to analyse the different behaviours of the state judges in a more varied context: not only in relationships between federal constitution and state, but also in the communication between state constitutional courts, and in the consideration that the state courts owe them (Devins 2011).

The first case is that of the Supreme Court of Hawaii which, in 1993, found the state ban on same-sex marriage to be unconstitutional, causing a political reaction which led, in 1998, to the approval of a constitutional amendment which banned same-sex marriage and also, in 1996, a federal law which banned the recognition of same-sex marriages celebrated in another State.

A different case is that of Vermont, where the State Supreme Court[XVIII] declared in 1999 that the state law against same-sex marriage was unconstitutional, but established that it could remain in force for the time necessary for the local legislator to adapt it to the Constitution, in order to allow alternative solutions, such as civil partnerships or similar, as did eventually happen.

The decision by the Court of Vermont was clearly influenced by the previous experiences in Hawaii and Alaska, and it influenced the Court of Massachusetts which, in 2003, declared the state law against same-sex marriage to be unconstitutional, giving the legislator 180 days to change the law.[XIX] In 2004, a law was approved allowing same-sex marriage, and subsequent attempts to ban it were destined to failure.

These are very different approaches to the application of New Judicial Federalism, from which it is possible to deduce the dual nature of this phenomenon: striving to exult state sovereignty on the matter of rights on the one hand, and an instrument of constitutional communication between member states and between these and the Federal State, on the other.

We are left with the feeling that the role attributed to the state courts for experimentation in the matter of fundamental rights in the name of a different perception of them by state communities, seems to correspond more to the more generous aspirations of certain scholars than to judiciary reality.

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I See for all, Pizzetti (2003: 19-22), which cites the few comparative studies on jurisdictional federalism published to that date, to which we can add, from a diachronic viewpoint, Luther 2005.

II According to the reconstruction of Pizzetti 2003: 25, in particular, note 63.

III In this sense see Pizzetti 2003: 27 *et seq*.

IV It has also been noted that, while the separation of powers at the federal level was desired by the constituents under the evident influence of the theories of Montesquieu, federalism was nothing more than the necessary recognition of the *de facto* relationships of strength existing between member States, even though the constitutional hagiography later assigned it the same function as the separation of powers, qualifying it as a separation of vertical powers. See Dahl 2001: 32-33.

V On this matter we can refer to Comba 1996.

VI For a description of the state judiciary systems, see Tarr 2005.

VII Claflin v. Houseman, 93 US 130 (1876).

VIII Jackson v. Ashton, 1834, 8 Pet. 148, 8, L. Ed. 989.

IX An up-to-date description of the mechanisms used for the selection of state judges can be found on the website of the *National Center for State Courts*, www.judicialselection.us.

X Michigan v. Long, 463 U.S. 1032 (1983). In the case decided, the Supreme Federal Court had actually reformed the decision of the Michigan Supreme Court, because it clashed with the Federal Constitution, but then pointed out that, if the Michigan Supreme Court had declared that its decision had been made on the grounds of '*bona fide separate, adequate, and independent state grounds',* then the Supreme Federal Court would have been unable to intervene.

[xi] Daniels v. Allen, 344 US 443 (1953).
[xii] Fay v. Noia, 372 U.S. 391 (1963).
[xiii] Teague v. Lane, 489 U.S. 288 (1989).
[xiv] Williams 2009: 130 – 131. See also the *Annual Issue on State Constitutional Law* published by Rutgers University Law Review, edited by R. Williams.
[xv] Beacon Theaters v. Westover, 359 U.S. 500, 503, 508-10 (1959).
[xvi] There are also those who have argued that the Supreme Federal Court should draw inspiration from the State Courts for interrupting constitutional clauses of the same type, also in consideration of the fact that, historically, the State Constitution inspired the Federal Constitution (Blocher 2011: 323).
[xvii] People v. Anderson, 493 P2d 880 (Cal. 1972).
[xviii] Baker v. State, 36.744 A.2d 864 (Vt. 1999).
[xix] 440 Mass. 309 (2003). For an in-depth analysis of the event, see Tarr 2005: 3-8.

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Jurisdiction and Pluralism: Judicial Functions and Organization in Federal Systems. The Case of Germany

by

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Abstract

This article analyses the model of judicial federalism that has developed in the Federal Republic of Germany. As the constitutional history of Germany reveals, federal regulation of the judiciary has often been associated with centralization and even authoritarian centralization. On the other side, a federal constitution based on the rule of law should guarantee its protection by the judiciary. The conflict between federalist organization and central guarantee of the rule of law determines the actual system

Key-words

Germany, federalism, rule of law, unity of the judiciary, judicial pluralism

1. Federal systems and the role of subnational entities in the judiciary.

While in the process of regionalization, devolution and decentralization the subnational entities are normally involved in administrative, perhaps in legislative, but not in judicial functions, the classical federalist States are based on pre-existing member States. Therefore, these entities or States have their own judiciary. The problem arises whether and how these are unified and integrated in a federal system, or to which degree they remain independent.

As far as Germany is concerned, all the member States – called, at least since 1919, *Länder* – had their own judicial system, and these systems were extremely different, as the differences of territory and population were enormous, in the time of unification 1867/71 with nearly two thirds belonging to Prussia and with very small principalities of about 50,000 inhabitants. Therefore, harmonizing the judicial systems, important for the economic development as well was one of the essential problems of the new Empire. Among the first legislative projects, there was the judicial organization (*Gerichtsverfassungsgesetz*) of January 27, 1877, and the laws on civil procedure of January 30, 1877 (*Zivilprozessordnung*) and on criminal procedure of February 1, 1877 (*Strafprozessordnung*). These laws, very often modified, but in principle valid until nowadays, provide for a central (federal) court, the *Reichsgericht*, since 1950 called *Bundesgerichtshof*, who decides in last instance on *Revision,* a remedy limited on the control of application of the law with exclusion of the control of the facts. The laws regulate the inferior instances and remedies as well. On administrative law, there was, in the beginning, no federal jurisdiction.

However, with the growing centralization, especially in the First World War and then in the Nazi time, federal power on the judiciary was extended. This leads to an ambiguity: On the one side, federal regulation could appear as an authoritarian, even totalitarian tendency; on the other side, the constitution of a Federal State based on the rule of law should guarantee its protection by the judiciary. It is this conflict between federalist organization and central guarantee of the rule of law that determines the actual system.

2. The functional unity of the judiciary

In this sense, article 19 IV of the Basic Law (BL) of the Federal Republic of Germany guarantees the access to the judiciary (*Rechtsweg*) against every violation of the rights – especially the fundamental rights – by all public powers, either of the Federation, the *Länder* or other authorities. One may conclude that this guarantees the power of the courts in civil law cases as well. Articles 92-104 BL regulate the judiciary and attribute it – exclusively – to the judges. Furthermore, they distribute it to the Federation and the *Länder*. Article 93/94 provide for the Federal Constitutional Court, article 95 for the supreme federal courts, article 96 for some other federal courts, while all the other courts are matter of the *Länder*. But their functions and position are regulated by the following articles of the Basic Law and, based on it, by the federal legislation. Therefore, the judiciary is considered as a functional unity, guaranteed and determined by the Federation. There seems to be no space for judicial pluralism.

However, there is an exception. As the *Länder* are considered to be States, they have their own and autonomously regulated constitutional system. Between the constitutional organs, there may be – and are established in all the *Länder* – constitutional courts. These are regulated exclusively by the constitutions and laws of the *Länder*, and there are, as a matter of fact, certain differences: different regulations of the conflicts between the constitutional organs of the *Länder*, of judicial review of the constitutionality of laws, only a part of the *Länder* has introduced a constitutional complaint etc. That may produce conflicts with federal regulation and is limited by this, especially for the judicial review of constitutionality of laws (art. 100 I BL, see below, nr. 7), and the Basic Law provides for a solution of differences of interpretation (art. 100 III).

With this exception, it has to be underlined that legislative power in the field of judicial organization, process law and the main areas of civil and criminal law belongs to the Federation (art. 74 I nr. 1 BL). This is important above all for the ordinary jurisdiction, but the power to regulate judicial organization and procedure concerns all the courts. Therefore, there are, besides the above mentioned laws for the ordinary jurisdiction, federal laws – very often modified – for the administrative courts (*Verwaltungsgerichtsordnung*, 1960), the financial courts (*Finanzgerichtsordnung*, 1965), the labour courts (*Arbeitsgerichtsgesetz*, 1953), the social security courts (*Sozialgerichtsgesetz*, 1953). For most of these fields, federal

legislation is prevailing. It is mainly in administrative law that many fields are regulated by the *Länder*, but nevertheless the judicial control is determined by the federal legislation.

3. Organization of the court system

a) In general: – According to this constitutional and legal framework, it has to be emphasized that only the courts mentioned in the Basic Law are federal, while all the other courts belong to the *Länder*. Therefore, there is the Federal Constitutional Court (art. 93/94 BL); there are the five supreme federal courts, for ordinary (civil and criminal law), administrative, finance, labour, social security cases (art. 95 I BL); and there are some special courts of the Federation for patents and for disciplinary matters of federal public servants, judges and soldiers (art. 96 I, III BL; the military criminal courts, art. 96 II BL, have not been established). But all the other, the inferior courts of first and often second instance, in the ordinary, administrative, finance, labour, social security jurisdiction, are courts of the *Länder*, although provided and regulated by federal laws.

b) Courts on the *Länder* level: – In detail, we meet, besides the constitutional courts in every *Land* according to its constitution and a law of the *Land* concretizing it, the following courts:

- Ordinary jurisdiction (civil and criminal law cases): For smaller cases, courts of first degree called *Amtsgericht*, for more important cases and as courts of appeal in smaller cases the *Landgericht*, furthermore as courts of appeal the *Oberlandesgericht*, normally one or two in every *Land*.

- Labour jurisdiction: As first degree the *Arbeitsgericht*, as court of appeal the *Landesarbeitsgericht*, normally one or two for every *Land*.

- Administrative jurisdiction: First degree *Verwaltungsgericht*, appeal to *Oberverwaltungsgericht,* or *Verwaltungsgerichtshof*, one for every *Land*.

- Social security jurisdiction: First degree *Sozialgericht*, appeal to *Landessozialgericht*, normally one for every *Land* or for two smaller *Länder*.

- Finance jurisdiction: One, in bigger *Länder* two courts, called *Finanzgericht*.

For the regulation of details, like the number, the place and the limits of the single courts, there are laws of the *Länder* concretizing the federal legislation and providing for the necessary structures.

c) Appointment of judges: – For the federal judges, article 94 BL for the Federal Constitutional Court prescribes the election of half of the judges by the federal Parliament (*Bundestag,* operating by a special committee for that purpose), the other half by the *Länder*-representation, the *Bundesrat*, in both cases with a two thirds majority. The judges of the supreme federal courts are appointed by the competent federal minister, according to German tradition, but now (article 95 II BL) on the proposal made by a committee composed of the competent ministers of the *Länder* and the same number of deputies of the federal Parliament. In that way, a unilateral choice by the federal minister is excluded, the selection between the qualified judges in the service of the *Länder* is guaranteed, but the decision is taken on the federal level.

The judges of the *Länder* are traditionally appointed by the competent minister of the *Land*, but according to article 98 IV BL the *Länder* may install committees for the election of judges participating in the proposal. This solution, which may improve the impartiality and the legitimation of judges, has been made in about half of the *Länder*, according to the *Land* constitution or a law, with different composition of the committees: deputies of the *Länder* Parliaments, other ministers, judges, lawyers. Details are controversial, but the fundamental situation is that the Basic Law itself allows the different solutions and therefore pluralism.

d) Guarantees of independence. – The principle and the essential regulations of independence of judges are declared by the Basic Law, article 97: Subordination of the judges only to the law, not to governmental or administrative decisions, protection against measures concerning the personal position of judges and reserve of decisions in these fields to the judiciary. But the details of these regulations have to be ruled, according to article 98 I, III BL, by laws. Therefore, there is a special federal law on judges, enacted in 1961, and containing some dispositions for the judges in the *Länder* as well. But their position has to be concretized and regulated in detail by a law of each *Land* which contains, among others, dispositions on the committee for the election of judges, disciplinary sanctions, procedure in case of modification of the court system etc. There is a large jurisprudence, above all on disciplinary measures concerning judges. In addition, the development of judicial organization has enforced the tendencies of self-government of the courts, with presidencies composed of the president and a number of judges elected by all the judges of the court. These presidencies have the power to organize the distribution of tasks in the

court on the singular deciding chambers and the judges. The respective rules have to be enacted with respect of the position of the single judges and are public, valid for a determined time, so that manipulations of competence are excluded and that the independence of the judiciary is improved. Therefore, the participation of committees, mainly with members of Parliament, in the appointment, the federal structure and the self-government of courts equalize the missing of an organ such as the *Consiglio Superiore della Magistratura* in the Italian system. Nevertheless, the promotion of judges is mainly in the hands of the judicial bureaucracy and of the ministers. This may intimidate judges and be considered as a weak point in the German system.

4. The way of judicial remedies

a) Initial competence of the *Länder* courts: – From the functional unity of the judiciary and the historical background follows that the judicial processes regularly begin before the courts on the *Länder* level. This is the case not only in the ordinary jurisdiction, but also in conflicts with public authorities. Even if a federal authority is involved and has issued an order, the question of violation of rights and of legality has to be submitted to the competent court of the *Land*. Furthermore, for the public servants appointed by the Federation as well, the first decision of judicial conflicts is in the hands of the *Länder* courts. The power to give judicial protection does not depend on the position of the deciding authority in the structure of the Federation or the *Land*. There are very few exceptions from this rule, e.g. in case of administrative conflicts between the Federation and a *Land*, dissolution of forbidden organizations ordered by the federal minister of the interior, conflicts on secret services; in such cases it is the federal administrative court who decides (see § 50 VwGO). In certain criminal cases regarding heavy violations of international law or the State security, the federal public prosecutor is empowered to defend the case before the *Land* court (art. 96 V BL). But the entire normal jurisdiction is, in the first instance, attributed to the *Länder* courts and allows a large space for judicial pluralism.

b) Remedies. – On the other hand, the functional unity of jurisdiction, ensured by the federal legislation, includes a system of remedies with a determinant position of the federal courts. The principle and normal system is the possibility of appeal against the original

decision, to decide by a higher court of the *Land*, who controls, in that way, the jurisprudence of the original court. Against the decision of the court of appeal, there is the possibility of the so called "*Revision*", a remedy which, without re-examining the facts, controls the interpretation and application of the law. The judgment on this remedy is entrusted to the supreme federal courts that have, in this way, a control over the jurisprudence. In case of difference of jurisprudence, there is a "common senate" of the supreme federal courts who decides the question. The control includes interpretation and application of federal law, in some cases of law of the *Länder* – e.g. the laws on administrative procedure (§ 137 I nr. 2 VwGO) – as well, while in other cases, interpretation and application of the *Länder* laws is left to the *Länder* courts, so that, so far, judicial pluralism is guaranteed by the federal legislation.

c) Limitation of remedies and acceptation of pluralism. – Nevertheless, in the practical concretization the mentioned model has been modified. There have been for a long time different solutions, e.g. for smaller civil law cases decided, in first instance, by the *Amtsgericht*, with the right of appeal to the *Landgericht*, but without the possibility of access to a supreme federal court, and for smaller criminal law cases decided by the *Amtsgericht* with the right of appeal to the *Landgericht* and the *Revision* to the *Oberlandesgericht*; however, in these cases differences of jurisprudence are to be submitted to the *Bundesgerichtshof*, so that the uniformity of jurisprudence is ensured. But for the smaller civil law cases, judicial pluralism has always been accepted. Therefore, in house renting e.g., judicial differences between the courts are tolerated.

Besides that, there are cases where the difficult or complicated clearing of facts recommends renouncing on a repetition and thus on the right of appeal. Therefore difficult criminal cases are entrusted to the *Landgericht*, in certain very important and politically relevant cases to the *Oberlandesgericht*, with the right of *Revision* to the *Bundesgerichtshof*. Similar solutions have augmented; so in administrative law, there are more categories of cases now conferred to the *Oberverwaltungsgericht*, so that only the *Revision* to the *Bundesverwaltungsgericht* is possible, and in the finance jurisdiction, there is only one degree on the *Land* level, so that appeals are not possible, but only the *Revision* to the *Bundesfinanzhof*. These and other simplifications – above all the possibility of *Revision* to the supreme federal court against the original decision, if both parties agree – are signs for the need of a shorter and faster judicial procedure.

It is the same need that has motivated the legislator to limit the judicial remedies. Therefore, especially in civil law conflicts the values of litigation necessary for remedies have increased, and in many cases, especially in administrative law, the appeal is possible only in important cases, defined by law (§ 124 II VwGO), and after admission either by the administrative court, or by the administrative court of appeal (§ 124a VwGO). So the parties first have to pass through this procedure which diminishes the number of remedies. For the procedure of the *Revision*, first for the processes of administrative law, then in civil law and a part of the other processes as well has been introduced a procedure of admission by the deciding court, with the possibility of a complaint for not admission to the *Revision* court.

It certainly has to be admitted that among the criteria for the admission of remedies is always the unity of jurisprudence – avoiding differences form the precedent jurisprudence of higher courts – and the fundamental importance of the case, however with different formulation of these criteria. But nevertheless it results from the mentioned development that the function of remedies to ensure the uniformity of jurisprudence is reduced; a final judgment may be not appealed and therefore legally binding, even if its conformity with the jurisprudence is doubtful or missing. Therefore, the limitation of remedies leads to an increase of judicial pluralism. In a complicated legal order with limited resources of jurisprudence the primordial function of the judiciary must be the legally binding decision of cases, and the uniformity of these decisions has to cede. It is this situation; more urgent in larger States and legal systems, that characterizes the recent development of legislation and practice.

5. Influence of the *Länder* on the federal judiciary

It follows from what has been said before that the federal judiciary is essentially linked with that of the *Länder* and determined by it. Notwithstanding the control of the supreme federal courts on the jurisprudence in the *Länder*, it is this jurisprudence which fixes the objects of federal jurisprudence. Furthermore, there is a personal entanglement, because the normal career of judges goes from a first appointment and possibly promotion in a *Land* to the appointment as federal judge, which is better paid (except some functions of president of big courts in a *Land*) and therefore the natural aim of judges, sometimes as

well of university professors, public servants of a *Land*, too. It is quite rare that federal public servants may be appointed as judges of a federal court.

To this situation contributes the cooperation of the ministers of justice of the *Länder* through the *Bundesrat*, the representation of the *Länder* on federal level. As said before (supra, 3c), either the *Bundesrat* (for the half of the Federal Constitutional Court judges), or a committee for the election of judges with membership of the *Land* ministers (for the judges of the superior federal courts) cooperate in these decisions. Therefore, besides the information on the quality of candidates who are judges in the *Land*, these authorities largely determine the composition of the federal judiciary. On the other hand, this does not permit an influence of a single *Land* as such and neither of the community of *Länder*, because the *Bundesrat* and the committee for the election of judges are federal authorities, in spite of the de facto-influence of the *Länder*.

6. Guarantee of federal constitutional values and fundamental rights

Notwithstanding the constitutional autonomy of the *Länder* (supra, 2), an additional unifying factor may be seen in the prevalence of the federal constitution and especially of the fundamental rights, article 1 III, 20 III BL. Therefore, every judge is bound to respect and to apply this prevalence. This is important for judicial review (below, 7), but the same for the interpretation and application of the laws as such. Every control of legality includes the control of interpretation and application of the Basic Law, and the system of judicial remedies contributes to this purpose.

Although this legal situation and the very large and developed judicial system, the legal concretisation of the Federal Constitutional Court has introduced, based on older and especially Bavarian traditions, an additional constitutional complaint (*Verfassungsbeschwerde*) to the Federal Constitutional Court in protection of fundamental rights. This decision, later laid down in articles 93 I nr. 4a, 4b, 94 II phr. 2 BL as well, has had an essential impact on the German constitutional system. The constitutional complaint permits to pretend for protection of fundamental rights against every action of public authorities by the Federal Constitutional Court. This means, besides the possibility of reviewing legislative action and, in urgent cases, acts of government or public administration, that after having exhausted

the judicial remedies every court case may be brought before the Federal Constitutional Court for a control of violation of fundamental rights.

In fact, the interpretation of fundamental rights by the court has been extremely generous. Through the protection of the human dignity (art. 1 I BL), the general freedom to develop the personality (art. 2 I BL), the principle of equality (art. 3 BL) and even the right to vote (art. 38 BL), the protection of rights may allow the control of constitutionality under aspects of competence, of the rule of law, of the principle of the social State (art. 20 I BL) etc. As a matter of fact, the number of constitutional complaints has been very high from the beginning and has even increased in the now over sixty years old history of the court.

This leads two a double problem. On the one hand, the enormous number of constitutional complaints can be decided only in procedures of simplified examination. Therefore, in a development by many degrees, the actual procedure of acceptation has been introduced (§§ 93a-93d BVerfGG). Every constitutional complaint needs acceptation and is accepted only in case of fundamental constitutional relevance or in case of specific importance for the protection of fundamental rights (§ 93a BVerfGG). This acceptation is decided by "chambers" of three judges of the constitutional court. If they refuse it, no motivation or further procedure takes place, and if the question has been decided before, the chamber may decide on the case, either in positive, or in negative sense. In this way only the really important questions are decided by a "senate" of the court, composed of eight judges, in normal procedure.

On the other hand, it is just the high number of cases that gives to the constitutional court, above the supreme federal courts whose decisions are the normal object of constitutional complaints, a role of a real supreme court, ensuring a unity of jurisprudence and determining it through the application of the fundamental rights. Certainly the constitutional relevance as condition of control focusses on the constitutional aspects, but thanks to the interpretation of fundamental rights, these determine all the legislation and the application of the laws. Therefore, the constitution in its application by the Federal Constitutional Court is an instrument unifying judicial protection.

Nevertheless, even this unity of jurisprudence is influenced by judicial pluralism. The Basic Law (art. 142) and the constitutional court recognize the power of the *Länder* to have their own constitutions and fundamental rights – however without limiting the guarantees

of the Basic Law –, and the jurisprudence of the constitutional court has amplified the importance of the *Länder*-constitutions. This is why half of the *Länder* have introduced constitutional complaints to their constitutional courts, and they have developed, even in spite of the federal regulation of process law, their jurisprudence in these fields. Necessarily this raises the problem of differences, of their solution and, to this purpose, of the cooperation of the constitutional courts. The problem is similar to the cooperation of courts in other multilevel systems, like between the national courts, the court of justice of the European Union and the European court of human rights. It illustrates the pluralism inherent in more complex systems.

7. Judicial review of laws

A similar problem of courts cooperation is raised by the regulation of judicial review. The problem has been very old in Germany, but under the monarchic form of State, it has been answered in a negative way, once the law was signed by the monarch and correctly promulgated. Only under the Weimar constitution, the court of the *Reich* claimed for a right to exercise the review, but the question was highly controversial. So the Basic Law (art. 100) approved the right of control of every judge whether the law which has to be applied is conform to the constitution, but it did not give the power to the ordinary courts not to apply an unconstitutional law, reserving that power to the constitutional courts. Therefore, the deciding court has to submit the question to the constitutional court, if he finds that the law in question is unconstitutional, and it is only the constitutional court which may declare the law unconstitutional and therefore not to be applied.

However, the contrast can exist either to the Basic Law, or – in case of laws of the *Länder* – to the constitution of the *Land*. In the first case, it is the Federal Constitutional Court that has to decide, in the second case the constitutional court of the *Land*. Already with this alternative we find a tendency to judicial pluralism. Even more, frequently there are fundamental rights involved that are regulated in the Basic Law and in the constitution of the *Land* as well; both are valid (art. 142 BL). In such cases the deciding court may choose whether it wants to submit the question to the federal or to the *Land* constitutional court, so that there is a further pluralistic alternative. To resolve conflicts of interpretation possibly resulting from these alternatives, there is the procedure regulated in article 100 III

Basic Law (see above, nr. 2) which reserves the final decision to the Federal Constitutional Court.

8. Language regulations

Different from federal States like Belgium or Switzerland, federalism in Germany is not linked to language pluralism. Linguistic minorities have been always of small importance in the German empire, and they have diminished after the world wars. Since 1877, the *Gerichtsverfassungsgesetz* (§ 184, see above, nr. 1) declares German as the courts' language. For not German speaking people there is the right to use interpreters, nowadays guaranteed by the European Convention on Human Rights (art. 6) as well, and of increasing importance due to the international migration, but that does not seem to relativize the unity of jurisdiction.

9. Conclusion

According to a first impression, the influence of judicial pluralism in the German system seems slight. The courts and judges of the *Länder* are integrated in a functionally uniform system based on the Basic Law and concretized by central legislation already in the 19th century for the ordinary jurisdiction, under the Basic Law for all jurisdictions. The guarantees of the judiciary, essentials for the rule of law, are anchored in the Basic Law and protected by the possibility of constitutional complaint to the Federal Constitutional Court. Even the exception for the independent regulation of constitutional courts of the *Länder*, which has augmented its importance through the constitutional complaint to them, is harmonized by limits and rules of the Basic Law.

Nevertheless, the influence of judicial pluralism has always conserved its importance in detail, and in the last decades, it even has increased. This may be seen already in the federal legislation that leaves influence to the *Länder* regarding the places, numbers, resources of their courts and regarding the details of the position of their judges. Namely the appointment of their judges may be regulated with different solutions and exercised by decisions on the *Land* level; for promotion of judges, the influence of the judicial bureaucracy in the *Länder* may even be criticized as reduction of the independence of

judges. Cooperating in the appointment of federal judges, the *Länder* influence the federal judiciary.

But especially the regulation of judicial remedies may reduce the unifying role of the federal supreme courts. That has always been the case for smaller conflicts, especially with a smaller value in dispute, but the tendencies of the last decades have limited the judicial remedies, as the appeals, the *Revision* as well. Finally, the legislative powers of the *Länder* often reserve the final judgment on the interpretation of these laws to the *Länder* courts, excluding a federal control. As a result, the cost of judicial protection necessitates economy and reduces, in this way, with the reduction of judicial remedies the ideal of unitary jurisdiction which, independent from that, has been relativized by the principles of federalism.

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Normative Pluralism in Argentina and its Repercussions on Jurisdiction

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Abstract

In Argentina the repercussions on the judicial system deriving from the territorial allocation of power are marked by peculiar features that make this experience not fully ascribable to what can be defined as 'classic models' of 'judicial federalism', namely the United States and Germany. This is related to the particularities of Latin American constitutionalism in general, and Argentine constitutionalism in particular. For this reason, it is more appropriate to discuss the main features of the federal model established in Argentina first, and then extend the analysis to profiles related to judicial power.

In so doing, this essay tries to identify the essential features of judicial federalism in Argentina: i) organization of the judiciary at the two levels; ii) competences of federated entities in defining the status of judges; iii) participation of federated entities in issues related to the 'self-government of judges'; iv) definition of a coherent system which allows jurisdictional disputes to be resolved. Point iv) is examined with reference to constitutional justice.

Key-words

Argentina, judicial federalism, Latin American federalism, distribution of powers, constitutional justice

1. Premise

In Argentina the repercussions on the judicial system deriving from the territorial allocation of power are marked by peculiar features that make this experience not fully ascribable to what can be defined as 'classic models' of 'judicial federalism', namely the United States and Germany.

This is related to the particularities of Latin American constitutionalism in general, and Argentine constitutionalism in particular. For this reason, it is more appropriate to discuss the main features of the federal model established in Argentina first, and then extend the analysis to profiles related to judicial power.

With regard to the latter, the approach defined in the research project on 'Jurisdiction and Pluralisms' will be used as a framework to identify the essential features of judicial federalism: i) organization of the judiciary at the two levels; ii) competences of federated entities in defining the status of judges; iii) participation of federated entities in issues related to the 'self-government of judges'; iv) definition of a coherent system which allows jurisdictional disputes to be resolved. Note that point iv) will be examined with reference to constitutional justice.[I]

2. Argentine federalism in the context of the study of Latin American systems

For comparative law scholars, the study of Latin American legal orders offers numerous elements of interest, especially in terms of classification and circulation of legal models. In fact, many scholars have already explored the issue of 'the existence of an Ibero-American legal system' by considering the peculiarities that distinguish the Latin American experience.[II] Any study on this topic should be developed on different levels: on the one hand, it implies the identification of common elements that allow us to identify a regional model regardless of the specific peculiarities that may characterize different countries in the area; on the other, it implies the identification of innovative aspects that may distinguish it with respect to the European legal tradition which it historically originated from.[III] Moreover, in more recent years, studies concerning on the rights of

indigenous peoples have added further levels of complexity, thus rendering it very difficult to put all the countries in Latin America in the same category developed by comparative law scholars.[IV]

A lot of the research that has been carried out on these issues has been within the field of private law therefore it is connected to the codification that started in 19th century with the European model in mind. Research in the field of public law has usually had the United States in mind given the influence of the latter on the form of government, the system of constitutional justice and the vertical allocation of power (which is what interests us in the context of this research).[V] Nonetheless, even in this case the peculiarities of Latin America's constitutional history should be considered because it was influenced, on the one hand, by the colonies in North America becoming independent, but on the other, it was also marked by the participation in the complex phase of 'liberal revolutions' which occurred in both civil law and common law countries in Europe and beyond at the end of the 18th century.[VI] Albeit limited, the involvement of South American MPs in the drafting of the 1812 Constitution of Cadiz was undoubtedly important, as was the participation of academics from the region in the debates on a series of important constitutional issues.[VII] Certainly, each country has its own institutional evolution, however it is possible to pinpoint certain elements of similarity which allow us to identify the particularities of Latin America in comparison to other regions of the world. In this regard, the Italian comparatist Lucio Pegoraro has stressed that: 'The originality of Latin American constitutionalism – which should induce European and US scholars to reflect on the assumed supremacy of their models – is of great importance not only for the institutional history of the continent, but also for the rest of the world' (see Pegoraro 2010: 571). Examples include the protection of fundamental rights and constitutional justice,[VIII] where both the hybridization of classical models and innovative solutions have emerged,[IX] as well as – more generally – Latin America's well known 'new constitutionalism.'[X]

With respect to the topic of this study, it should be noted that with the 1853 Constitution[XI] Argentina introduced a federal system which, although inspired by the United States, also includes some important innovations, connected to the country's history.[XII] In fact, the choices of the framers of the Constitution should be read within the complex process of decolonization and the formation of the new Argentine state. This all started in the territories of the Viceroyalty of Río de la Plata as of May 1810. In this long

phase, both centralist and federalist visions were debate and these were largely related to the difficult relations with the Province of Buenos Aires, which only became part of the Federation in 1860. On the one hand, the *unitarios* or *porteños* – referring to Buenos Aires' inhabitants – were in favour of creating a strong central power; on the other, the *federales* or *provincianos* – members of other Provinces – considered the federal system a way to preserve their distinguishing features and the autonomy obtained under Spanish rule.[XIII] The incorporation of the Province of Buenos Aires into the Federation only took place after its defeat in the *Batalla de Cepeda* of 1859 through an amendment to the Constitution approved in 1860. This amendment strengthened provincial autonomy and was supported by the Province of Buenos Aires itself, which in the meantime had evidently shifted its position on the issue.[XIV] However, the political and economic power of the Province of Buenos Aires produced greater centralization and in 1880 the Constitution was amended so as to provide the federal capital with a special status.

A reconstruction of the federal system cannot be separated from an analysis of the form of government, a presidential system, borrowed from the United States (see Hernández 2010: 10 ff). From the outset, however, the President was given a greater range of powers and this is a trend we find in most of the countries of South America.[XV] This inevitably led to a succession of authoritarian regimes especially in the 20th century, which were characterized by strong centralization of power, limitation of the autonomy of the Provinces and a weak system of check and balances. All of this occurred without these regimes needing to amend the Constitution.

With respect to the vertical allocation of powers, it should be noted that several authors have discussed the concept of 'unitary federalism' or a 'mixed system', – using the terms employed by Juan Bautista Alberdi[XVI] – aimed at reconciling different and opposing trends present in the country. While the federal option, inspired by the US model, was seen as a tool for preserving the peculiarities of the different Provinces, at the same time, however, the conditions for a strong centralization of power were established. In addition to the broad powers of the Federal President mentioned above, a wide set of competencies were allocated to the Federation – including the adoption of codes – and the substitutive powers in cases of inaction on the part of the Provinces.

Within this framework, the federal system that was adopted has proved to be incapable of ensuring a viable system of check and balances and that is why many scholars talk of a

'hegemonic hyper-presidency'.[XVII] Even the well-known constitutional amendment of 1994 did not manage to rebalance the form of government and strengthen the federal system.[XVIII] For example, tax reforms have all had a 'centripetal footprint'. Relevant to this study is the attempt to limit presidential powers through the establishment, at the federal level, of the *Consejo de la Magistratura*, which plays a role in the appointment of judges, with the exception of the justices of the Supreme Court.[XIX]

3. Repercussions on jurisdiction deriving from the allocation of power territorially

As mentioned above, the federal system established in Argentina does not resemble the North American prototype entirely, and this emerges quite clearly from its repercussions on judicial power. Indeed, again one can note the influence and hybridization with European models. This is the case not only from a historical perspective (with the role that the codification of law had at the federal level), but also in relation to the more recent evolution of the safeguards for independence of the judiciary, which resembles the European example of Councils for the Judiciary.[XX] In addition, the system of constitutional review also deserves greater attention, given that the US diffused/decentralized model that was adopted in Argentina has been integrated with other elements which we could define as 'autochthonous'. This has led several authors to observe that Argentina system of constitutional review is actually similar to the concentrated/centralized model, typically found in Europe.

3.1 Structure and organization of the judicial system

In analyzing the judicial system in Argentina, one must take into consideration the solutions adopted in the United States – already qualified as one of the classic models – so as to identify similarities and differences.[XXI]

The essential elements of Argentina's judicial system were established in the original 1853 Constitution, which contained many similarities with the US Constitution of 1787. These constitutional provisions have not been amended and will be cited below.

Argentina's judicial system is 'dualist' meaning that the Federal Constitution establishes and guarantees two levels of judicial power: at the federal level and at the provincial level.[XXII]

Art. 108, which opens the Third Division of the Constitution, is dedicated to the judicial power, and establishes that 'The Judicial Power of the Nation shall be vested in a Supreme Court and in such lower courts as Congress may constitute in the territory of the Nation.'[XXIII]

The similarity with the Art. III Section 1 of the US Constitution is striking: 'The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.'

The first part of the Constitution of Argentina, entitled 'Declarations, Rights, Guarantees,' defines the powers of the Provinces by including the judicial function. In this sense, Art. 5 specifies that: 'Each Province shall enact its own constitution under the republican, representative system, in accordance with the principles, declarations, and guarantees of the National Constitution, *ensuring its administration of justice*, municipal regime, and elementary education. Under these conditions, the Federal Government shall guarantee each Province the full exercise of its institutions' (italics added).[XXIV]

These constitutional provisions establish a judicial system organized at two levels, the federal and provincial ones, to which the unique status of the city of Buenos Aires is added. The latter benefits from prerogatives that make it similar to a Province.[XXV]

A more detailed analysis of the judicial system reveals that the same framework is substantially present at both the federal and provincial level and, alongside the two degrees of justice, it includes the Supreme Court (which at the provincial level has various names: *Corte Suprema de Justicia, Superior Tribunal* o *Tribunal Superior de Justicia*). The latter is a final degree judge which also acts as a single judge in relation to certain subject matters. The single Provinces have some distinguishing features with regard to the types of judicial bodies – for example, some of them have introduced justices of the peace – and the status of the judges, which can be different in relation to the appointments system, or the term of office.[XXVI]

As far as the structure established at the federal level is concerned,[XXVII] the judicial bodies of first instance are represented by Federal first instance courts, which were created by President Mitre with the *Ley sobre el Poder Judicial de la Nación* of 1862 n. 27, and are

located in the federal capital and principal cities of the Provinces. The Federal appellate courts were established only in 1902, and have jurisdiction over civil, criminal and commercial matters, but may also have jurisdiction over other fields indicated in specific laws. Finally, the Supreme Court of Justice of the Nation – regulated, as already indicated, by Art. 102 of the Constitution – is a court which decides in the final instance at federal level, and also has original jurisdiction and exclusive jurisdiction over certain subject matters.[XXVIII]

Bearing in mind that we will address this topic later, it should be noted there is also the possibility to reach the Supreme Court through the *recurso extraordinario federal*,[XXIX] *recurso de amparo*, *habeas corpus* and *habeas data*[XXX] – as well as through *acción declarativa de incostitucionalidad* prescribed by Art. 322 of the National Code of Civil and Commercial Procedure (Haro 2003: 247 ff).

As for the definition of competencies of federal courts, one should refer to Articles 116 and 117 of the Constitution. According to Art. 116:

> The Supreme Court and the lower courts of the Nation are empowered to hear and decide all cases arising under the Constitution and the laws of the Nation, *with the exception made in Section 75, subsection 12*, and under the treaties made with foreign nations; all cases concerning ambassadors, public ministers and foreign consuls; cases related to admiralty and maritime jurisdiction; matters in which the Nation shall be a party; actions arising between two or more Provinces, between one Province and the inhabitants of another Province, between the inhabitants of different Provinces, and between one Province or the inhabitants thereof against a foreign state or citizen (italics added).

In these cases, according to Art. 117

> the Supreme Court shall have appellate jurisdiction, with such regulations and exceptions as Congress may prescribe; but in all matters concerning foreign ambassadors, ministers and consuls, and in those in which a Province shall be a party, the Court shall have original and exclusive jurisdiction.

Considering these constitutional provisions, one can affirm –using the words of Antonio M. Hernández – that 'La justicia "federal" es limitada, de excepción y exclusive' (Hernández 2009: 93).

Additionally, the reference made in Art. 116 to Art. 75 (12) – which deals with the competences of the Congress – should not be neglected. It represents one of the peculiarities of Argentine federalism as it provides that codes should be adopted at federal level. It, in fact, establishes that Congress is empowered to

> *enact the Civil, Commercial, Criminal, Mining, Labor and Social Security Codes, in unified or separate bodies, provided that such codes do not alter local jurisdictions, and their enforcement shall correspond to the federal or provincial courts depending on the respective jurisdictions for persons or things*; and particularly to enact general laws of naturalization and nationality for the whole nation, based on the principle of nationality by birth or by option for the benefit of Argentina; as well as laws on bankruptcy, counterfeiting of currency and public documents of the State, and those laws that may be required to establish trial by jury (italics added).

There is thus a significant degree of difference with the US model where the legislation on substantial matters is largely established at state level. This difference is due to specific historical events and the influence of European codification (Lugones 1985). In this way, in terms of exercise of normative power, several subject matters are drawn towards the federal level. However, the codes (so-called *derecho común*), as indicated by the Art. 75, should not alter judicial power at provincial level and should also be applied by the provincial courts when they have jurisdiction. The rules of procedure, on the other hand, fall under the competence of the Provinces. This implies that an identical provision (contained in the federal code) will be applied in a different way due to the different rules of procedure of each Province. It should be noted, however, that the final decision on compliance with the Federal Constitution, including the application of codes, is vested in the Supreme Court of the Nation. As a consequence, this conditions application of the provisions at provincial level thus confirming the centripetal effect of the codes.[XXXI]

3.2 Competencies of Provinces in defining the status of judges

The Constitution of Argentina safeguards judicial independence at federal level, while the definition of the status of provincial judges falls within the scope of autonomy of the Provinces. Under the already invoked Art. 5 of the Constitution, Provinces should 'ensure the administration of justice' and are therefore free to choose the structure they deem appropriate (see Vergara 2008: 425 ff). In most cases, however, the federal and provincial levels are very similar from a substantive point of view. Moreover, provincial autonomy,

recognized under Art. 5, does not call into question the respect for fundamental principles of judicial independence, which is part of the tradition of democratic states.

With regard to judicial independence, we will examine the following issues: the appointment of judges; the term of office; the irremovability and responsibility; the guarantee of remuneration.

a) The appointment of judges. The solution originally adopted at federal level was inspired by the US model. The appointment of federal judges was vested in the President, with the approval of the Senate, namely the representative Chamber of the Provinces. Currently, this procedure is applied exclusively for the appointment of justices to the Supreme Court, while in the case of federal lower court judges the 1994 constitutional reform provided for the involvement of the *Consejo de la Magistratura*. More precisely, the latter proposes a closed list of three candidates to the President and then subsequently her/his appointee has to be approved by the Senate.[XXXII]

Up until the 1980s, the provision established by the Federal Constitution was applied, with one or two exceptions, at provincial level too. These exceptions included the Province of Chaco, which at the end of 50s set up a Council for the Judiciary with the competence to propose three candidates for appointment of judges to the Executive, and the Province of Neuquén which, during the same period, created an advisory body, the *Junta Calificadora*, with a mixed composition (see Vergara 2008: 435). As of 1986 – under what has been defined as the 'provincial constitutional cycle' – a progressive differentiation of the appointments procedure took place. A common element to almost all Provinces, however, was the introduction, at constitutional or legislative level, of Councils for the Judiciary with jurisdiction over the appointment procedures of lower court judges (thus excluding the Supreme Court). The aim was to avoid the politicization of these courts.[XXXIII] As already mentioned, the same body was established at federal level with the 1994 constitutional reform, thus realigning the systems with a circulation of models that initially started as an experiment at provincial level.[XXXIV]

Thus, both the federal and provincial level are marked by different appointments procedures in relation to judges of higher courts, which in the case of federal judges is an Executive responsibility, but also needs the approval of the representative Assembly – namely the Senate – while in the appointment of lower court judges the Council for the

Judiciary acts has primary jurisdiction.[XXXV] Let us now examine the Council for the Judiciary in more detail.[XXXVI]

A European observer would be struck by composition of the Council for the Judiciary at federal level (similar solutions could be also found at the provincial level) because the majority of the members are political appointees, thus clearly contradicting the objective of strengthening the independence of the judiciary with respect to other branches of government.[XXXVII] In actual fact, Art. 114 of the Constitution merely offers some indications of general character: it provides for a mixed composition of the body which is thus composed of professional judges and ungowned members. Still according to Art. 114, the ungowned members may be politicians or legal experts and requires that a balance must be assured between the two different components. The detailed discipline, on the other hand, is deferred to the ordinary legislation. As provided by Art. 2 of the Law on the Council for the Judiciary, the latter is currently composed of thirteen members, of which only three are judges elected by their colleagues; six are members of Parliament, respectively three senators and three deputies, chosen by Presidents of the two Chambers on recommendation of political groups (two of the three are indicated by the majority and one by the opposition). In addition to these members there are two representatives of the bar association, one representative of the executive and one representative of the university professors.[XXXVIII]

The creation of the *Consejo de la Magistratura* appears to have been inspired by the European model, which assigns a key role to the presence of bodies with a mixed composition vested with the power to appoint judges. These bodies are generally referred to as 'Councils for the Judiciary'. However, various documents adopted in this regard – both by magistrates' associations and by the Council of Europe – insist on a body composed mainly of magistrates, or at least a number of magistrates equal to that of other ungowned members.[XXXIX] The solution adopted in Argentina is problematic because the majority of members are political appointees and the number of professional judges is limited. If the objective was to reduce the powers of the Executive, and in particular of the President, the solution adopted in Argentina certainly does not draw the federal judges away from the 'political game'.[XL] Despite this, it should be noted that in 2013 President Fernández de Kirchner proposed an amendment to the composition of the Council aimed at further strengthening the political component. This amendment provided that the

academics (whose number was increased), judges and representatives of the bar association would all be elected directly by voters through a mechanism of competing lists. As has been rightly pointed out, in this way all components would have 'directly or indirectly a political extraction, in line with the presidential intention of realigning the judiciary to the political choices of the governing party.'[XLI] The provision was, however, declared unconstitutional by the Supreme Court in the decision *Rizzo, Jorge v. Estado Nacional* of 18 June 2013, which contains an interesting reconstruction of the constitutional principles involved in this case.[XLII]

(b) Term of office. Let us again start from the federal level where the 1853 Constitution echoed the US model of life tenure: 'los jueces de la Corte Suprema y de los tribunales inferiores de la Confederación conserván sus empleos mientre dure su buena conducta (…)' (Art. 92, Constitution of 1853). The 1994 constitutional reform introduced a retirement age of 75 (Art. 99). Once it has been reached, the judge may ask to remain in office, but in this case, the term is renewed for five years and needs prior approval of the Senate. The 1994 reform led to a lively debate, as it was supposed to apply to judges already in office, originally appointed for life.[XLIII] In particular, the new provisions were read as an *ad hoc* measure aimed at questioning the irremovability of a specific judge – Justice Fayt – who had clashed with President de Kirchner on several occasions.[XLIV] The reform was thus brought to the Supreme Court, which in its decision of 24 August 1999 declared that the new provisions were not applicable to the case of the Judge Fayt, thus affirming that it was null and void on the grounds that it has exceeded the limits established by the Constitution to the constitutional amendment procedure.[XLV]

The case opened an extensive debate on what in comparative constitutional law is known as the unconstitutional constitutional amendments doctrine,[XLVI] and involved more generally the relationships between branches of government.[XLVII] The provisions introduced in 1994 opens two distinct issues, even leaving aside the question of its applicability to judges already in office. On the one hand, the choice to introduce an age limit for judges appears legitimate, as this solution has been adopted in many other legal orders and can also be found in Argentina at provincial level. On the other, the renewal process appears more problematic as the powers attributed to the Assembly do not appear in line with the guarantees of judicial independence, which was ensured, on the contrary, by life tenure. In fact, the judge might be conditioned in her/his decisions by seeking the

necessary political support for confirmation in office. Nonetheless, it should be noted that with the subsequent decision of 28 March 2017, the Supreme Court has changed its previous orientation by recognizing the legitimacy of the 1994 constitutional reform.[XLVIII]

The provisions adopted at provincial level appear to be much more articulated. In fact, a diachronic analysis reveals the following: life tenure (e.g. Córdoba 1923; Entre Ríos 1933; Mendoza 1965); life tenure after a trial period (i.e. after the first renewal: after a 1 year La Rioja 1933; after 6 years San Juan 1927); renewable term of office (e.g. Jujuy 1935; Skip 1929; La Rioja 1986); non-renewable term of office (e.g. 10 years Tucumán 1907). In more recent years, several Provinces have amended the rules and opted for life tenure (e.g., La Rioja 1998; Tucumán 1991; San Juan 1996). However, in a large-scale study Andrea Castagnola points out that, regardless of these provisions, in most cases, judges do not remain in office for the full term and when re-election was admitted, it was a rare occurence, thus implying that 'estabilidad or inestabilidad de los jueces en el cargo non puede ser explicada por las reglas institucionales'.[XLIX]

c/d) The irremovability and responsibility. The irremovability represents the first guarantee of independence that historically judges have obtained. In Argentina, it is recognized both at the federal and provincial level. Following the United States model, Art. 110 of the Constitution establishes that judges shall remain in office as long as they maintain good behavior. Irremovability concerns both the office and the function, so as to allow judges to perform their functions with maximum independence 'sine spe ac metu.' However, the examples cited in the previous paragraph should not be forgotten. as changes to the term of office, or the introduction of an age limit, may affect the principle of irremovability of judges.

The US is also a source of inspiration for provisions on the responsibility of Supreme Court judges, as the decision is attributed to political bodies: in particular, at the federal level it is up to the Chamber of Deputies to take disciplinary action, while the Senate is involved in cases of 'mal desempeño o por delito en el ejercicio de sus funciones; o per crímenes communes' (Art. 53 of the Constitution). Similar solutions can be found in the majority of the Provinces, with the necessary adjustments when the form of government provides for a unicameral parliament.[L] For lower court judges, the constitutional reform of 1994 introduced the involvement of the *Jurado de Enjuciamento* regulated by the Art. 115 of the Constitution, at the request of the Council for the Judiciary. Again it is interesting to

note that the *Jurado de Enjuciamento* is a body that was first introduced at provincial level, in some cases with a power of oversight also over judges of the Supreme Court.[LI] At the federal level, the body is composed of two judges, four members of Parliament, and one lawyer, who are drawn by lot every six months.[LII] These provisions can be traced back to different models: the political decision of Congress is necessary for taking disciplinary mesure against the of the Supreme Court judges, whereas for other judges the participation of new bodies with a mixed composition is expected for initiating both the procedure and adopting the subsequent decision. In addition, Art. 114 of the Constitution empowers the Council for the Judiciary with the competence to 'Ejecer facultades disciplinairas sobre magistratos.'[LIII] These solutions are aimed at strengthening the independence of judges, although the predominance of the political appointees in the Council for the Judiciary raises several concerns about its effective independence from political power.

e) The guarantee of remuneration. It is common knowledge that adequate and stable remuneration is also an essential condition for affirming the dignity of the judicial function and ensuring that judges have serenity and independence in performing their duties. This guarantee is specified under Art. 110 of the Federal Constitution and it has been reproduced in the Constitutions of the Provinces, which in some cases have provided for a set of rules to determine the remuneration of judges by linking it to that of members of the Government. The most serious problem that emerged in Argentina was that of the effectiveness of the formally established prohibition to decrease the salary set by law. The serious inflation that hit the country, leading to the collapse of the currency, also had an impact on this guarantee. In this respect, the Supreme Court has recognized in *Bonorino Però v. Estado Nacional* of 1985 that the maintenance of the nominal value meant in that situation a substantial reduction in salary and has, therefore, declared 'la incostitucionalidad de las normas que fijan or mantienen los emolumentos desactualizados.'[LIV] The subsequent case law, however, in implementing the constitutional guarantee, took the principle of solidarity involving all citizens into consideration.[LV]

From this short overview of the discipline related to the status of judges, a widespread similarity between the provisions adopted at federal and provincial levels emerges, with a circulation of models that, in some cases, seems to render the Provinces a testing ground for reform (such as the introduction of Councils for the Judiciary) which were then accepted also at federal level. Furthermore, the hybridization of models also emerges in this

context: if the primary source of inspiration is undoubtedly the US system, more recent reforms seem to be inspired by provisions adopted in Europe. Reference to the European tradition, which has already been mentioned in connection to federal codification, brings with it a different vision also of the role of judges, leading to a more complex process of affirming their independence vis-a-vis other branches of government. This applies *a fortiori* in a context characterized by a form of hyper-presidentialism, which tends to pervade all the other branches of government. The establishment of Councils for the Judiciary at federal and provincial level is certainly an attempt to strengthen the independence of judges, although the results are not satisfactory due to the complexity of the context and the weakness of the provisions that have been adopted.[LVI]

3.3. Participation of Provinces in issues related to the 'self-government of the judiciary'

Following again the US model, the involvement of Provinces in issues related to the 'self-government of the judiciary' passes through the Senate as it has the competence to approve the appointments of federal judges decided by the President.

The Art. 99(4) of the Constitution vests the President with the power to appoint judges with the approval of the Senate. As already mentioned, following the 1994 constitutional reform, the appointments procedure has been differentiated. The justices of the Supreme Court are appointed by the President and approved by the Senate with a majority of 2/3 of the members present in the public session. In the case of federal lower court judges, the Council for the Judiciary proposes three candidates to the President; however, the President's power of appointment is subjected to the approval of the Senate which needs a simple majority of those present in a public session in which 'the suitability of the candidates will be examined'.

As far as the appointment of Supreme Court judges is concerned, the Constitution provides for a limited number of requirements: lawyer of the Nation with eight years of experience and eligible as a senator. This leaves the President with an ample margin of discretion which has led to very different observations. In some cases, the choice made by the President has led to the creation of pluralistic and independent bodies, as was the case under President Mitre when the first Court was appointed in 1863 or, more recently, under President Alfonsin in 1983. However, it has also been underlined that most of the judges

come from Buenos Aires and that, therefore, they are not very sensitive to the problems and peculiarities of the Provinces (see Hernández 2009: 93, note 2).

More precise criteria for the selection of judges is certainly needed, both in relation to the professional experience in the judicial sphere, and with respect to representing the complexity of the country.[LVII] The decree approved by President Nestor Kirchner in 2003 goes in this direction given that it was aimed at regulating the procedure for exercising presidential power in accordance to Art. 99(4).[LVIII] In addition to setting rules for publishing the names that the President intends to take into consideration (accompanied by a corresponding possibility for any interested person to express her/his evaluation) some parameters have also been established so as to guide the choice. On the one hand, with reference to the candidates' qualifications, in addition to moral integrity, emphasis is put on their technical expertise, and their commitment (trayectoria y compromiso) to the protection of human rights and democratic values; on the other, the new appointments should ensure diversity on the Court, with particular reference to 'las diversidades de género, especialidad y procedencia regional en el marco del ideal de representación de un país federal' (Art. 3). The decree thus takes into consideration the importance of involving the Provinces in the appointments to the Court, so as to take into account the federal structure of the country.

A final observation can be made on the role of the Senate in approving the appointments of the judges of the Supreme Court. The 1994 constitutional reform has increased the required majority to two thirds of members of Parliament. This change would appear to strengthen the overseeing powers of the Provinces, but one should be cautious and also take into account the overall context of the reform. Indeed, let us not forget that the very same reform has changed the number of senators, bringing it from two to three for each Province. They are elected directly by the voters, with the requirement that two of them should be an expression of the majority and one of the opposition. This solution seems to emphasize the political representation of the Senate, to the detriment of territorial representation. The latter is also an element that might adversely affect the balancing role with respect to the President's powers.

The 1994 constitutional reform introduced a more complex appointments procedure for federal lower court judges, which requires the *Consejo de la Magistratura* to the present closed lists of three candidates to the President. We have already examined the

composition of this body and expressed our reservations on the prevalence of political appointees, which could adversely affect the choice of candidates to put to the President. Again, the Senate is required to approve the presidential appointees in a public session, although only a simple majority is needed. The publicity of the procedure should contribute to the accountability of both the Council for the Judiciary and the senators.

3.4. Definition of a coherent system to overcome jurisdictional disputes

Following the description of the essential features of the organization of judicial power at both federal and provincial levels, one must askes oneself whether a coherent system of overcoming jurisdictional disputes exists. Once again, Argentina has some interesting distinguishing features, which can be identified through an analysis of the system of constitutional review. Indeed, it has a system that links the provincial and federal judicial systems together. Let us not forget that, as mentioned above, Argentina has a dualist structure of the judiciary.

The constitutional provision that one should refer to is Art. 31 which establishes the principle of supremacy of the federal legislation:

> This Constitution, the laws of the Nation enacted by Congress in pursuance thereof, and treaties with foreign powers, are the supreme law of the Nation; and the authorities of each Province are bound thereby, notwithstanding any provision to the contrary included in the provincial laws or constitutions, except for the Province of Buenos Aires, the treaties ratified after the Pact of November 11, 1859.

The original text of the Constitution did not expressly establish any form of constitutional review nonetheless, it was developed very early on inspired by the US model of diffused review through the famous case *Agustín de Vedia* of 1865 (see Dalla Via 1997). Accordingly, all judges, both federal and provincial, can exercise constitutional review of legislation and disapply laws that encroach the Constitution.

Both federal and provincial Supreme Courts are obviously courts of final instance under their respective jurisdictions. In particular, the Supreme Court of the Nation is qualified as 'la cabeza del Poder Judicial Federal y la intérprete final e irrevocable de la Constitucion Nacional'(see Hernández 2009: 94).

Again, the Argentine system of constitutional justice has some important distinguishing features, which in several respects brings it closer to the concentrated European model. In fact, both at federal and provincial level, the diffused concrete review coexists with various forms of abstract review, which imply that there is a direct gateway to the highest Courts.[LIX] For reasons of brevity we cannot specifically address herein the system of constitutional review at provincial level, but one should note that it offers numerous and interesting elements to be reflected upon (see Díaz Ricci 2009). Instead, our focus will be on constitutional review carried out by the Supreme Court of Justice at federal level with the aim of verifying its impact on the allocation of judicial power between the Federation and the Provinces.

In this regard, the most interesting direct gateway to the Supreme Court is the *Recurso extraordinario federal*, as it can jeopardize the balanced functioning of the two levels. It is regulated by Art. 14 of Law n. 48 of 1863, which contemplates three hypotheses in which final decisions of higher courts of the Provinces can be challenged before the Federal Supreme Court: a) when the validity of a treaty, a law of the Congress or an authority exercised on behalf of the nation has been denied; b) when the validity of a law, or a decree of an authority of the Province was challenged for contrasts with the national Constitution, treaties and laws of the Congress and the decision was in favour of their validity; c) when the interpretation of a clause of the Constitution, a treaty or a law of Congress is contested and the decision is against the validity of the title, right, privilege or exemption which is based on this clause and it is the subject of the dispute. One should note that the subsequent Art. 15 excludes the possibility of promoting an appeal in relation to the interpretation and application of codes for the sole fact that they are, as already mentioned, laws of Congress.

Scholars have elaborated a series of classifications in relation to the *Recurso extraordinario federal*, distinguishing between simple and complex issues, depending on whether they concern the interpretation of the Constitution, of a treaty or federal law, rather than a conflict between a norm and the Constitution (conflict which in turn can be direct or indirect) (see Bidart Campos 2008: 432 ff.).

In its case law, the Supreme Court has introduced two further hypotheses for advancing an extraordinary appeal: in the case of an arbitrary judgment (*sentencia arbitraria*), and in the case of institutional gravity (*gravedad istitucional*). Antonio M. Hernández has

pointed out that the first hypothesis – arbitrary judgment – is the one which determines the greatest number of cases submitted to the Supreme Court (see Hernández 2009: 108). This represents a problematic situation, as the intervention of the Supreme Court risks becoming a further instance of judgment with respect to decisions taken at provincial level, instead of functioning as an instrument aimed to ensure the primacy of federal law. This obviously affects the model of judicial federalism too because it could lead to an overlap and a prevalence of federal jurisdiction over provincial jurisdiction.

In order to find a balance, Law 23.774 of 1990 introduced within Art. 280 of the National Code of Civil and Commercial Procedure a kind of *writ of certiorari* that allows the Court to reject extraordinary appeals when there is no relevant federal offense, or when the issues raised are unsustainable or unimportant (lack of *transcendencia*).[LX] The latter has been subject to criticism as it limits the areas of protection, also for individuals; however, it allows the Court to rationalize its docket, reduce its workload and concentrate on the most relevant issues. A better organization of the Court's work is also important for defining the relations between the federal and provincial levels. In its role of guardian of the Federal Constitution, the Court also has to safeguard the allocation of competences established by the constitutional act, with inevitable repercussions on the provincial level of the judiciary. Moreover, the Supreme Court has recognized that

> No todas las leyes de la Nación, por el simple hecho de ser tales, tendrán supremacía sobre las de las provincias; la tendrán, si han sido dictadas en consecuencia de la Constitución, es decir, en consecuencia, o en virtud de los poderes que de modo expreso o por conveniente implicancia ha otorgado aquella al Congreso. Una ley nacional puede no ser constitucional frente a una ley provincial, que sí lo es; en este supuesto, tiene supremacía la segunda. La supremacía final, en tal caso, es como siempre la de la Constitución, porque ambos órdenes de gobierno, el nacional y el provincial, actúan dentro del marco de poderes que le está señalado por dicha ley fundamental.[LXI]

In finding the right balance between the two systems, the Supreme Court has further specified that when a federal question arises in an ongoing trial at provincial level, a decision must be taken first by the provincial Supreme Court.[LXII] Regardless of the procedural implications, this is in line with the dualist model and functional to its better implementation.

Without going into further detail on these gateways to the Federal Supreme Court, there is no doubt that they allow for a broad intervention of the latter in deciding on issues that arise at provincial level. At the same time, however, the Court can exercise self-restraint if it believes the case does have federal significance. In any case, even when there is a clash with the Constitution (and with federal law), the provincial supreme judges must hand down a judgment first. It is self-evident that all these gateways put the judiciary at the centre of the stage, especially the Supreme Court, and therefore, once again, the independence of the judiciary is essential.

4. Concluding remarks

In this examination of judicial federalism, we have to stress the peculiarities of the Argentine system which make it difficult to trace back to more consolidated models elsewhere in the world.

Returning to what we said in the Introduction one must emphasize that the influence exercised by the US Constitution is undeniable as we can see from the textual assonances that we highlighted. At the same time, however, elements of differentiation have emerged and, indeed, these elements have been strengthened by most recent reforms, thus suggesting that the country is still looking for a definite and balanced system to regulate its judicial system.

We can see this, first of all, in relation to the principle of independence. Although part of a common constitutional development at global level, the establishment of the Council for the Judiciary (see Garoupa and Ginsburg 2008) does not seem to have strengthened the protection of judges from political interference. Moreover, the Council is an institution that has developed, in particular, in Europe (and especially in France and Italy) and is based on the concept of what we might call a 'career judiciary' aimed at avoiding adverse influence of the executive. In Argentina, there is a mix: on one hand, the model of the judiciary is more similar to the Anglo-American model based on professional judges, on the other, some of the powers that are exercised in Europe by the Minister of Justice, belong to higher courts (and a similar situation exists in other Latin American countries). As a consequence, the reforms we have mentioned have been much more difficult to interpret and apply. The reason for this is also due to the fact that the composition of the new bodies appears to

have strengthened rather than weakened political interference. And, of course, let us not forget a context characterized by a form of hyper-presidentialism, and frequent attempts by the President to condition the judiciary.

With regard, more specifically, to the relationship between the allocation of power between the Federation and the Province and the structure of the judiciary, the typical characteristics of a federal system clearly emerge. Compared to the United States, however, Argentina is characterized by greater centralization, which also affects the judiciary. First of all, the main codes are adopted at the federal level, with the consequent presence of uniform legislation in all the Provinces. In addition, as underlined in the previous paragraph, there are numerous gateways though which decisions taken at a provincial level can be submitted to the review of the Supreme Court of the Nation. Finally, at an organizational level, despite the dualist structure of the judiciary, there is substantive uniformity between the provisions adopted at provincial and federal level. In this case, however, the comparison reveals what one could define as a 'circularity of models' where, in some cases, the Provinces have anticipated the choices adopted at federal level.

Finally, the federal structure, the regulation of the judiciary and the system of constitutional justice have all found a source of inspiration in the United States and Europe, but they have been shaped and moulded by the historical, political and geographical peculiarities of the country. With reference to the extraordinary appeal to the Federal Supreme Court, Narciso Lugones observes that '... only asumiendo la mezcla de amba tradiciones - que por otra parte es una realidad histórica - es que podremos mejorarlas y superarlas' (Lugones 1985: 714-715).

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[I] The reference is to the PRIN project (2010-2011) on 'Jurisdiction and Pluralisms' (JPs), coordinated by prof. Roberto Toniatti from the University of Trento. The summary of the research group meeting in Turin on January 2014, drafted by Anna Mastromarino is available on the project website at: http://www.jupls.eu/.
Another aspect of increasing significance, which cannot be addressed here, is that of relations with international and supranational systems. In fact, different profiles relating to 'justice' are subjected to external regulations or control, with repercussions that can also affect judicial federalism: for instance, the Inter-American Court of Human Rights has condemned Argentina for the situation in its prison system which is regulated at provincial level. This represents just one example that emphasizes the elements of 'interconnection' between different 'types' of pluralism, in this case normative and integrative, which renders the reflections on the relative repercussions on the jurisdiction even more complex.

[II] This is the title of a 2007 article written by Marzia Rosti, who refers to the studies of Mario Losano, and reflects upon reconstructions proposed by both European and non-European scholars. For more see Rosti 2007. Also see the following works written by the same author: Rosti 1999 and Rosti 2011.

[III] See Marini 2011, in particular 163-164; see also Marini 2010 and Somma 2015. For an analysis of different profiles of constitutionalism in the area see Dixon and Ginsburg 2017.

[IV] On the role of indigenous law in Latin American legal experience see Somma 2015: 30 ff.
[V] See, for example, Merryman and Clark (1978: 207): «This feature of Latin America legal system can be simply, with only partial accuracy, summarized by saying that Latin America public law is more North American than European in character». See also Losano 2000: 177; Pegoraro 2010: 569 ff.
[VI] On Latin America's involvement in liberal revolutions see Brewer-Carias 2008 (with particular reference to the cases of Venezuela and Colombia), and Langley 1996.
[VII] See Fernández Segado 2003: 13 ff.; Gros Espiell 2002: 143 ff. For a reconstruction of the circulation of North American and European legal thought, as well as the principal contributions of a Latin American scholars see Rosti 1999.
[VIII] See Frosini and. Pegoraro 2009.
[IX] See, for example, Rolla 2012: 329 ff.; Carbonnel 2009: 35 ff.
[X] See, for example, Nolte and Schilling-Vacaflor 2012.
[XI] It should be noted that the Constitution has been amended various times. The current text is based on the 1994 constitutional reform.
[XII] On the evolution of a federal system see Hernández 2008: Chapter. III, *El Federalismo Argentino*, 55 ff.; on the reconstruction of historical events see Ramos Mejía 1889. For a comparison of different federal experiences in the Americas see Rosenn 1994.
[XIII] It is interesting to note that the liberals, mostly present in the cities and in Buenos Aires in particular, were contrary to the federal solution, which was supported, on the contrary, by the largely conservative Provinces, as it was seen by the latter as an instrument to preserve their privileges. For a reconstruction of the various steps that led to the 1853 constitutional amendment see Rosti *1999passim*; see also Pisarello 2006: 403 ff.
[XIV] The defeat in the *Batalla de Cepeda* was followed by the *Pacto de San José de Flores*, o *Pacto de Unión* of 10 November 1859, according to which the Province of Buenos Aires became part of the Federation, with the power to propose changes to the 1853 Constitution, which were then approved on 23 September 1860. The 1860 amendment played an important role in defining the Argentine institutional system, so much so that several authors refer to the Constitution of 1853-1860: see, for example, Bidart Campos 1992: 37 ff. See also Rosti 1999, *passim*.
[XV] See, among others, Cheibub, Elkins, and Ginsburg 2011.
[XVI] Juan Bautista Alberdi (1810-1884) was one of the most important constitutional law scholars in Argentina. His book – *Bases y puntos de partida para la Organización Política de la República Argentina* (eds F. Cruz, Buenos Aires, 1914, 1st edition 1852) – had an enormous impact on the drafting of the first Constitution of Argentina. He adapting the US model to the peculiarities of the country by strengthening the powers of the federal level of government and, in particular, the President: see Hernández (undated) and Ferreyra 2012, with parallel text.
[XVII] See Dalla Vía 2015: 161 ff.; see also Rose-Ackerman, Desierto, and Volosin 2011; Hernández 2015: 141 ff.
[XVIII] See, among others, Hernández 1997; Bazán 2013: 37 ff.; Hernández, Rezk, and Capello 2015.
[XIX] As better explained below, the introduction of Councils for the Judiciary took place first at provincial level and was only accepted at federal level at a later stage.
[XX] It can be noted that in Europe, a common model of guarantees of the independence of the judiciary is gradually emerging, and that its fundamental element is given by Councils for the Judiciary: see Montanari 2011: 103 ff. For the use of the term 'Council for the Judiciary' see, *inter alia*, the Recommendation CM/Rec (2010)12 of the Committee of Ministers [of the Council of Europe] to member states on judges: independence, efficiency and responsibilities, 17 November 2010.
[XXI] For the US solutions see Comba (2017: 1-11, and in this symposium).
[XXII] For an exam of the judicial power at the provincial level see Vigo and Gattinoni de Mujía 2013; Hernández 2009: 91 ff.; Vergara 2008: 425 ff.; Castagnola 2010b: 161 ff. and Castagnola 2010a.
[XXIII] Art. 91 of the original text stated that 'El Poder Judicial de la Confederación será ejercido por una Corte Suprema de Justicia, compuesta de nueve jueces y dos fiscales, que residirá en la Capital, y por los demás tribunales inferiores que el Congreso estableciere en el territorio de la Confederación;' the latter has been changed in 1860 by erasing indications on the number of judges, which has been subsequently established by ordinary legislation. The number has thus changed over the years several times, from five judges established by the Law n. 27 of 1863 to the current nine, in accordance with the Law n. 23.774 of 1991 (the Law 15.271 of 1958 established seven judges, while the Law 16.895 of 1962 diminished this number to five). The lack of constitutional guarantees has thus facilitated changes in relation to the composition of the Court and

favoured the interference of political power: for an analysis of the discipline established at provincial level see Castagnola 2010a: 17 ff.

[XXIV] In this case the number of the article remained unchanged, but the content was amended by erasing the provision that established the power of the Congress to exercise a preventive review over provincial Constitutions.

[XXV] The 1994 constitutional amendment recognized the special status of the city of Buenos Aires, the federal capital and the economic and political centre of the country. See, in particular, Art. 129 of the Constitution, and – with specific reference to the powers in the jurisdictional sphere – the Law 24.588 and Law 26.288. For a critical overview of this new discipline, see Palacio 2002; Di Pietromica 2013: 1263 ff.

[XXVI] See note 22.

[XXVII] On these aspects see, among others, Midón 2013: 973 ff.; Bidart Campos 2008, in particular, Capítulo XLIII, *El poder judicial*; Sagüés 2012:337 ff.; Vigo and Gattinoni de Mujía 2013.

[XXVIII] It should be added that in 1992 the National Criminal Cassation Chamber has been established and located in the federal capital (its denomination has been then changed in Federal Criminal Cassation Chamber: see Law 24.121 of 1992, and Law 26.371 of 2008). The latter has jurisdiction over all national territory, and according the Code of Criminal Procedure and other complementary legislation it deals with specific subject matters in the event of non-compliance or incorrect application of substantive or procedural rules in the processes that take place before national jurisdiction. It is positioned at an intermediate level between appellate courts and the Supreme Court.

[XXIX] Once all other legal remedies which exist at provincial level have been exhausted, as established by Law n. 48 of 1863. See Art. 14 of *Ley sobre la jurisdiccion y competencia de los Tribunales nacionales* of 1863, n. 48: see Bidart Campos 2008, in particular Capítulo L, *El recurso extraordinario*.

[XXX] Introduced in the Constitution with the 1994 reform. These institutes had first developed as a matter of practice and were then regulated by ordinary legislation, and finally inserted in the Constitution thanks to the 1994 reform: see Dalla Via 1997: 42 ff.

[XXXI] Among other things, it should be not forgotten that under the Constitution the federal jurisdiction includes disputes involving citizens of different Provinces, with the possibility that in these cases federal judges apply codes directly.

[XXXII] See in particular Articles 99(4), and 114 of the Constitution.

[XXXIII] Only six Provinces have not established the Council for the Judiciary, thus maintaining the original procedure of appointment the executive and parliamentary approval: see Vergara (2008: 436), who proposes a classification of competences of the different provincial Councils in the appointments procedure, *ivi*, at 439. For a different analysis of provincial experiences see Vigo and Gattinoni de Mujía 2013. Finally, some interesting indications can be found in Castagnola 2010b, *passim*. On the circulation of Councils for the Judiciary in Latin America and related problems see, generally, Hammergren 2002.

[XXXIV] It has been pointed out that the federal framers of the Constitution were able to take as a reference the European experiences, in particular Spain and Italy, but also the provincial ones: see Midón 2013: 988.

[XXXV] In some Provinces the appointment of Supreme Court judges falls under the competence of the legislature, which proposes three candidates to the executive, while in two Provinces (Chaco and Tierra del Fuego) the executive decides on the basis of a proposal put forward by the Council for the Judiciary: see Castagnola 2010a: 57 ff.

[XXXVI] The appointments procedure for the Federal Supreme Court will be explored further in the next paragraph so as to investigate the role assigned to Provinces.

[XXXVII] It is recalled that the creation of the Council for the Judiciary had the purpose to limit the '*amiguismo*' and the '*partitismo*' that affected the appointments of judges: *Ibidem*.

[XXXVIII] The solution indicated in the text is the result of the amendment introduced by Law 26.080 of 2006. It changed the original provisions introduced by Law 24.937 of 1997, which ensured a better balance between the political and expert members, although it also established the presence of only five judges out of twenty members.

[XXXIX] See the recommendation of the Committee of Ministers of the Council of Europe: Recommendation of the Committee of Ministers to member states on judges: independence, efficiency and responsibilities, op. cit.

[XL] The composition of the Council for the Judiciary and its inability to strengthen judicial independence has been criticized by several Argentine scholars: Midón 2013: 995; Hernández 2009: 100; J. Horacio Gentile 2014.

[XLI] The reform was introduced through Law n. 26855, in B.O. 27.05.2013, for a comment see Cassetti 2013:

6.

[XLII] Fallos: 336:760. See also Cassetti 2013: 7; Sanabria 2013.

In reflecting on the guarantees of the independence of judges, the issue of substitute judges ('subrogantes') also deserves to be mentioned given that in recent years they have assumed an increasingly important role in Argentina, considering their number and functions. In fact, substitute judges do not enjoy the same guarantees of tenured judges and for this reason the Supreme Court has recognized the unconstitutionality of Law 27145 of 2015: see decision *Uriarte Rodolfo Marcelo y otro c/ Consejo de la Magistratura de la Nación s/ acción mere declarativa de inconstitucionalidad* of 4 November 2015, Fallo FLP 9116/2015. See also Van Zyl Smit 2016; Fuentes 2016: 499 ff.

[XLIII] See the transitional clause 11, which provided for the entry into force after 5 years since 1999.

[XLIV] The Justice Carlos Fayt, born in 1918, was appointed to the Supreme Court in 1983 by President Alfonsin. In more recent years, several strong clashes between Justice Fayt and the President de Kirchner emerged, leading the President to ask for his resignation on several occasions by contesting his ability to carry out the professional activity. The resignation arrived only in 2015; Justice Fayt died on 23 November 2016.

[XLV] The case started as administrative proceedings and then arrived to the Supreme Court through an extraordinary appeal of the attorney general: see Fallos 322:1616. As a result of the ruling of the Supreme Court, all judges who reached the age limit were able to appeal to the Court by asking for the disapplication of the provision.

[XLVI] See Dixon and Landau 2015; Harding 2000.

[XLVII] For a reconstruction and critical evaluation of the decision of the Supreme Court see Hernández 2001, which contains in appendix also the decision of the Supreme Court.

[XLVIII] See the decision *Schiffrin Leopoldo Héctor c/ Poder Ejecutivo Nacional,* Fallo CSJ 159/2012.

[XLIX] Castagnola 2010b: 7. Also, for the analysis of the various solutions see Castagnola 2010a: 45 ff.

[L] For the analysis of the provisions adopted at the provincial level see again Castagnola 2010a: 71 ff.; Vigo and Gattinoni de Mujía 2013, *passim*.

[LI] Such provisions can be found today in the Provinces of San Luis and Tierra del Fuego: Castagnola 2010a: 75-76.

[LII] Please refer for details to provisions contained in the Law on the Council for the Judiciary: see Law 24.937 as amended by the Law 26.080 of 2006, Articles 22 and 23.

[LIII] The Law on the Council for the Judiciary specifies which behaviors give rise to disciplinary responsibility and the applicable sanctions: *Ibidem*, Art. 14.

[LIV] See the decision of 15 November 1985, *Bonorino but v. Estado Nacional Fallo*s, 307:3174, in particular p.to 5, the decision also recalls the reasons of the guarantee of the intangibility of remuneration; on this issue see Jiménez (undated: 15 ff.).

[LV] See on these aspects Sagüés 2012: 356 ff.

[LVI] Among the many critical observations see Antonio M. Hernández, who – highlighting the distance that in many cases exists between the law in the books and law in action in a lot of Latin American countries – points out an increasing political influence on the judiciary following the reform: Hernández 2009: 98 ff. More generally, on the limited effectiveness of judicial reforms in this area see Hammergren 2002, *passim*.

[LVII] The reference is to a *reflective judiciary*, which assumes particular importance in federal systems and, in general, in those countries with a particularly complex social structure. The appointments system to the US Supreme Court represents a paradigmatic example, see Caielli and Mastromarino 2018.

[LVIII] Decree 222/2003 on *Procedimiento para el ejercicio de la facultad que el inciso 4 del artículo 99 de la Constitución de la Nación Argentina le confiere al Presidente de la Nación para el nombramiento de los magistrados de la Corte Suprema de Justicia de la Nación. Marco normativo para la preselección de candidatos para la cobertura de vacantes*, Bs. As., 19/6/2003; it has been recently modified by the Decree 491/2018, *Atribuciones del poder ejecutivo nacional*, 30/05/2018. See Van Zyl Smit 2016: 27 ff.

[LIX] The reference is to the development of different forms of *amparo*, which emerged firstly in the case law, and has been then recognized by the 1994 constitutional reform that changed the Art. 43 of the Constitution: see for all Fernández Segado 2009: 215 ff.

[LX] The text of the Art. 280 can be cited: 'Cuando la Corte Suprema conociere por recurso extraordinario, la recepción de la causa implicará el llamamiento de autos. La Corte, según su sana discreción, y con la sola invocación de esta norma, podrá rechazar el recurso extraordinario, por falta de agravio federal suficiente o cuando las cuestiones planteadas resultaren insustanciales o carentes de trascendencia.'

[LXI] See Dumon 2016, who cites *Banco de la Provincia de Buenos Aires c. Nación Argentina* (Fallos, 186: 201).

[LXII] Cases *Strada* of 1986 (Fallos, 308:490), and *Di Mascio* of 1988 (Fallos, 311:2478).

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The Challenge of Diversity in a Multinational Federation: The Impact of the Judiciary on Pluralism in Canada

by

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Abstract

Political rhetoric aside, has Canada, 150 years after its foundation, achieved its goal of preserving pluralism? How is pluralism defined within the Canadian framework? What was the judiciary's contribution to that effect? In other words, how have Canadian courts dealt with pluralism throughout the years? Have they been successful in tackling such a challenge?

This paper begins with a brief description of the organization of the Canadian judicial system, namely the hierarchy of the courts, the nomination and compensation of judges, and the guarantees of judicial independence. After that, the paper discusses the evolution of pluralism within the Canadian Courts, from three different viewpoints: a) the separation of powers; b) the institutions, like Senate reform, Supreme Court composition, and Quebec secession; and c) the *Canadian Charter of Rights and Freedoms* and other parts of the *Constitution Act, 1982*, where a special focus will be given to language and Aboriginal rights.

Key-words

Canada, judicial federalism, pluralism, separation of powers, Canadian Charter of Rights and Freedoms

> "*Now, when we [are] united together, if union [is] attained, we [shall] form a political nationality with which neither the national origin, nor the religion of any individual, [will] interfere. [...] In our own Federation we [will] have Catholic and Protestant, English, French, Irish and Scotch, and each by his efforts and his success [will] increase the prosperity and glory of the new Confederacy… [W]e [are] of different races, not for the purpose of warring against each other, but in order to compete and emulate for the general welfare.*"
>
> *-George-Étienne Cartier*[I]

Introduction

Those words from one of Canada's Fathers of Confederation are certainly a fair description of the country's willingness to embrace pluralism through federalism. In fact, opting for federalism was "a legal response to the underlying political and cultural realities that existed at Confederation and continue to exist today. […] At Confederation, political leaders told their respective communities that the Canadian union would be able to reconcile diversity with unity."[II]

Political rhetoric aside, has Canada, 150 years after its foundation, achieved its goal of preserving pluralism? How is pluralism defined within the Canadian framework? What was the judiciary's contribution to that effect? In other words, how have Canadian courts dealt with pluralism throughout the years? Have they been successful in tackling such a challenge?

The present analysis will begin with a brief description of the organization of the Canadian judicial system, namely the hierarchy of the courts, the nomination and compensation of judges, and the guarantees of judicial independence. Then there will be a discussion on the evolution of pluralism within the Canadian Courts, from three different viewpoints: a) the separation of powers; b) the institutions, like Senate reform, Supreme Court composition, and Quebec secession; and c) the *Canadian Charter of Rights and Freedoms* and other parts of the *Constitution Act, 1982*, where a special focus will be given to language and Aboriginal rights.

1. Organization of the Canadian judicial system

a) Hierarchy of the courts:

The Canadian judicial system may be depicted as a pyramid, atop which sit, in decreasing order of importance, the Supreme Court of Canada, the provincial Courts of Appeal, and the provincial Superior Courts. The federal Parliament appoints the judges of all of these courts.

Beneath these – at the very base of the pyramid – are the remaining provincial courts, whose judges are appointed by their respective provincial legislatures. In most provinces, the Superior Court is a court of original general jurisdiction, and will be the starting point of a constitutional challenge.

It should be noted that there is no specific court devoted to constitutional litigation in Canada:

> The provincial power over the administration of justice in the province enables a province to invest its courts with jurisdiction over the full range of cases, whether the applicable law is federal or provincial or constitutional. […] The general jurisdiction of the provincial courts means that there is no need for a separate system of federal courts to decide "federal" questions. Nor does the power to decide federal questions have to be specifically granted to the provincial courts by the federal Parliament. On the contrary, if federal law calls for the exercise of adjudication, but is silent as to the forum, the appropriate forum will be the provincial courts (Hogg 2013: 7-3).

Therefore:

> The provincial superior courts have always occupied a position of prime importance in the constitutional pattern of this country. They are the descendants of the Royal Courts of Justice as courts of general jurisdiction. They cross the dividing line, as it were, in the federal-provincial scheme of division of jurisdiction, being organized by the provinces under s. 92(14) of the *Constitution Act* […].[III]

In parallel, the federal Parliament has established a tailor-made system of federal courts whose jurisdiction extends solely to federal matters, such as copyright, trademarks, patents, admiralty, tax, and citizenship (Hogg 2013: 7-27). The Federal Court – and its appeal division, the Federal Court of Appeal – operate under the authority of the *Federal Courts Act*[IV], in particular sections 3[V] and 4[VI] thereof, and ultimately of section 101 of the *Constitution Act, 1867*[VII] (previously known as the *British North America Act*).

b) Nomination and compensation of judges:

Pursuant to section 96 of the *Constitution Act, 1867*[VIII], the federal Parliament nominates the judges of the provincial Superior Courts and Courts of Appeal, and section 100[IX] establishes that it is also responsible for their compensation. The provincial legislatures are respectively responsible for the nomination and compensation of the remaining provincial judges.

c) Guarantees of judicial independence:

Unlike the guarantees of judicial independence for federally appointed judges which are established in the *Constitution Act, 1867*[X], those for provincially appointed judges are contained in the jurisprudence of the Supreme Court of Canada. Those guarantees consist of: security of tenure[XI], financial security[XII], and institutional independence[XIII].

Despite explicit constitutional references to these guarantees, namely sections 96 to 100 of the *Constitution Act, 1867* and 11(d) of the *Canadian Charter of Rights and Freedoms*, the Supreme Court declared that judicial independence is "at root an unwritten constitutional principle."[XIV]

The Supreme Court stressed on multiple occasions that judicial independence is "important both for public confidence in the proper administration of justice and for the constitutional separation of powers."[XV] This independence should be interpreted in the interest of the public rather than that of the judges.[XVI] Therefore, it is important that the courts not only be independent, but also be perceived, in the eyes of the public, as such.[XVII] In a pluralistic context, it is only logical – as well as essential to the stability and flourishing of the federation – that sub-national entities be confident their diversity will be recognized, and their rights, adjudicated, in an impartial manner.

2. The evolution of pluralism in the Canadian federation under the influence of the judicial power

a) The separation of powers according to the Constitution:

According to the Supreme Court of Canada, the separation of powers established in the *Constitution Act, 1867* is a core part of the country's organization.[XVIII]

Section 91 of the *Constitution Act, 1867* defines the jurisdiction of the federal Parliament and section 92 establishes that of the provincial legislatures.[XIX] According to the theory of

"watertight compartments", there should be no overlap between the respective jurisdictions of the federal and provincial legislatures.[XX] In theory, both the federal and provincial legislatures are considered equally sovereign[XXI] and exclusively competent in their respective jurisdictions – in that each may not infringe on the other's jurisdiction, even in the absence of action by the competent authority. Nonetheless, some provisions of the *Constitution Act, 1867* as well as theories elaborated by jurisprudence have nuanced or even revoked this general principle, mostly in favour of the federal Parliament. This is an obstacle to pluralism within the Canadian federation as it hinders "the reconciliation of unity with diversity within a single society" (Gaudreault-DesBiens & Fabien Gélinas 2005: 56, emphasis added).

According to the *Constitution Act, 1867*, the federal Parliament may unilaterally decide to exercise its jurisdiction over matters which it considers to be "for the general Advantage of Canada."[XXII] This "works and undertakings power" has been used 470 times between 1867 and the end of the 1960s, but only twice since then; the last instance being in 1987.[XXIII] Moreover, the *Constitution Act, 1867* grants "disallowance and reservation powers" to the federal Parliament; powers which are presently regarded as obsolete.

The federal Parliament also inherited the ability "to make Laws for the Peace, Order, and good Government of Canada" (POGG).[XXIV] It thus received the residual power to legislate over such matters which were unconceivable and that consequently could not have been divided in 1867. The courts have historically limited the scope of this power (Lysyk 1979: 545–46).

POGG has been employed as an underlying premise to other jurisprudential theories which have expanded the legislative jurisdiction of the federal Parliament. One example is the theory of "emergency power", which allows the federal government to legislate regarding a subject which would normally fall under provincial jurisdiction, given exceptional circumstances such as war or famine[XXV], or more recently, high inflation[XXVI]. Another example is the theory of "national concern", which allows the federal government to legislate over subjects which were not granted specifically to the provinces and that could not be handled efficiently by the provinces due to their nature.[XXVII] This second power is very controversial and consequently has rarely been used by the courts recently[XXVIII].

However, the separation of powers is not to be interpreted to the exclusive advantage of the federal Parliament. Rather, it is necessary to mention that some provisions of the *Constitution Act, 1867*[XXIX] list specific subjects which are of a concurrent – that is, of both federal and provincial – jurisdiction. The federal and provincial legislatures can therefore both legislate with respect to old age pensions[XXX], as well as in regards to agriculture and immigration[XXXI]. In the former case, precedence is given to the provincial law; in the latter, precedence is given to the federal law.

In addition, case law has elaborated theories which, without giving precedence to one particular level of government, emphasize the interrelation between both levels: the doctrines of "double aspect" and of "ancillary effects" are notable examples. Regarding the "double aspect" doctrine, the Supreme Court deemed that a province's exercise of its legislative jurisdiction over one subject is not incompatible with that of a concurrent exercise by the federal Parliament on the same subject (and vice-versa), so long as both legislatures could link their actions to a subject matter devoted to them by the constitutional separation of powers.[XXXII] Regarding the "ancillary effects" doctrine, the Supreme Court determined that, in certain circumstances, a legislature may exercise its jurisdiction in a manner which could entail repercussions on that of the other without being considered *ultra vires*, provided that the action in question could be justified by the separation of powers, and the legislature could demonstrate the necessity of those repercussions.[XXXIII]

In all the previously mentioned cases other than those deemed to be of concurrent jurisdiction, federal law has precedence over that of a provincial legislature if an unsolvable conflict arises between both laws (Hogg 2013: 16-2 to 16-3).

Finally, regarding to the distribution of legislative powers, the Supreme Court of Canada has recently adopted a stance which is more compatible with the essence and objectives of both federalism and pluralism. This is perhaps best exemplified by the Court's decision in the *Reference re Securities Act*, in which it reiterated the importance of provincial independence with respect to jurisdictional decision- and law-making powers:

> While flexibility and cooperation are important to federalism, they cannot override or modify the separation of powers. The *Secession Reference* affirmed federalism as an underlying constitutional principle that demands respect for the constitutional division of powers and the maintenance of a constitutional balance between federal and provincial powers.

> In summary, notwithstanding the Court's promotion of cooperative and flexible federalism, the constitutional boundaries that underlie the division of powers must be respected. The "dominant tide" of flexible federalism, however strong its pull may be, cannot sweep designated powers out to sea, nor erode the constitutional balance inherent in the Canadian federal state.[XXXIV]

The Court took a similar stance in *Quebec (Attorney General) v A* (also known as the *Lola* case), in which it demonstrated substantial deference towards the province of Quebec's historically distinct approach to private law, and more particularly to family law:

> [T]he articles of the *Civil Code of Québec* whose constitutional validity is being challenged by A do not express or perpetuate prejudice against *de facto* spouses. On the contrary, it appears that, by respecting personal autonomy and the freedom of *de facto* spouses to organize their relationships on the basis of their needs, those provisions are consistent with two of the values underlying s. 15(1) of the Charter. They were enacted as part of a long and complex legislative process during which the Quebec National Assembly was concerned about keeping step with changes in society and about adapting family law to new types of conjugal relationships in a manner compatible with the freedom of spouses.[XXXV]

It bears noting here that provinces possess jurisdiction over "property and civil rights", which practically confers them the main legislative position with respect to the enactment of statutes regarding private law matters. It is that jurisdiction which allowed Quebec to maintain the civil law tradition as the province's *jus commune*, as opposed to the other provinces where the common law constitutes that *jus commune*.

Regarding the separation of powers, these Supreme Court decisions may be regarded as a breath of fresh – or, at least, refreshed – air for the provinces. Unlike the Judicial Committee of the Privy Council, the ancestor of the Canadian Supreme Court, which was very decentralizing in nature and highly respectful of provincial autonomy[XXXVI], the Supreme Court was initially much more inclined towards centralization (Leclair 2005: 383). Furthermore, the "disallowance and reservation powers", the "works and undertakings power", and the controversial theory of "national concern", which all undermine provincial autonomy within the Canadian federation, have all fallen into obsolescence. Now that the Supreme Court embraces a more pluralistic approach to the separation of powers, it is safe to say that perspectives are looking better – if not great – for the provinces and for the federation.

b) The institutions and the secession issue:

Even though the Supreme Court of Canada had adopted since 1949 many centralizing positions, its more recent decisions have demonstrated a greater respect for provincial jurisdictions, especially for the particularities of the province of Quebec.[XXXVII] In the *Reference re Supreme Court Act, ss. 5 and 6* (also known as the *Nadon* case), the Court wrote:

> [The] function [of section 6] is to limit the Governor in Council's otherwise broad discretion to appoint judges, in order to ensure expertise in civil law and that Quebec's legal traditions and social values are reflected in the judges on the Supreme Court, and to enhance the confidence of the people of Quebec in the Court.[XXXVIII]

The Court pointed out that the confidence of Quebec in the Supreme Court has been a matter of concern since Confederation:

> Section 6 reflects the historical compromise that led to the creation of the Supreme Court. Just as the protection of minority language, religion and education rights were central considerations in the negotiations leading up to Confederation, the protection of Quebec through a minimum number of Quebec judges was central to the creation of this Court. A purposive interpretation of s. 6 must be informed by and not undermine that compromise.[XXXIX]

Thus, the Court concluded that the federal Parliament could not unilaterally modify the eligibility requirements for an appointment to the bench of the Supreme Court without contravening section 41(d) of the *Constitution Act, 1982*[XL]:

> Accepting this argument would have two practical consequences that the provinces could not have intended. First, it would mean that Parliament could unilaterally and fundamentally change the Court, including Quebec's historically guaranteed representation, through ordinary legislation. Quebec, a signatory to the April Accord, would not have agreed to this, nor would have the other provinces. Second, it would mean that the Court would have less protection than at any other point in its history since the abolition of appeals to the Privy Council. This outcome illustrates the absurdity of denying Part V its plain meaning. The framers cannot have intended to diminish the constitutional protection accorded to the Court, while at the same time enhancing its constitutional role under the *Constitution Act, 1982*.[XLI]

The Court took a similar stance in the *Reference re Senate Reform*, in which it declared that the federal Parliament could not proceed unilaterally to reform Canada's upper chamber.[XLII]

These rulings have their roots in two landmark decisions which emphasized the Court's inclination towards federalism. In *Re: Resolution to amend the Constitution*, the Court concluded to the existence of a constitutional convention that prevented the federal Parliament from proceeding on its own to the patriation of the Canadian Constitution.[XLIII] The Court intended to force the political actors to reach a consensual agreement. The government of Quebec, led at the time by the Parti québécois, a separatist party, was excluded from the final deal due to a breakdown in the political negotiations. Nonetheless, Quebec is officially a party to the Canadian Constitution, even though its legislature symbolically voted several motions to express its disagreement with the patriation and its direct consequence, the *Constitution Act, 1982* (Webber 2015: 42–47).

Likewise, the Supreme Court, basing itself on the underlying constitutional principles of federalism, democracy, respect for minority rights, and constitutionalism and the rule of law, established that the clear expression by the people of Quebec of their desire to pursue secession "would give rise to a reciprocal obligation on all parties to Confederation to negotiate constitutional changes to respond to that desire."[XLIV] The Court clearly stated the role of federalism in this regard: it is "inherent in the structure of our constitutional arrangements, […] the lodestar by which the courts have been guided."[XLV] Thus, Quebec could not, even with a clear majority obtained in a referendum, unilaterally invoke a right to self-determination and dictate the terms of secession to other provinces. Bilateral or multilateral negotiations would be imperative.[XLVI] That being said, the Court, basing itself on the underlying constitutional principle of democracy, stressed that "the rights of other provinces and the federal government cannot deny the right of the government of Quebec to pursue secession, should a clear majority of the people of Quebec choose that goal, so long as in doing so, Quebec respects the rights of others."[XLVII]

c) The *Canadian Charter of Rights and Freedoms* and the *Constitution Act, 1982*:

The *Canadian Charter of Rights and Freedoms* (hereafter the "Charter") is a bill of rights that "guarantees a set of civil liberties that are regarded as so important that they should receive immunity, or at least special protection, from state action" (Hogg 2013: 36-3). As the Charter consists of Part I (s. 1 to 34) of the *Constitution Act, 1982*[XLVIII], it has been incorporated into the Constitution of Canada (Hogg 2013: 34-14). Therefore, it can only be modified by constitutional amendment – unlike its predecessor, the *Canadian Bill of Rights*[XLIX], which was but an ordinary law (Hogg 2013: 36-2 to 36-3).

The late constitutional scholar Peter Hogg wrote of the Charter's influence on the Canadian federal system:

> It is sometimes said that a bill of rights is a centralizing force in a federal state. This is not true in any obvious sense. The [Charter] did not confer any additional powers on the federal Parliament. On the contrary, it limited the powers of the federal Parliament as well as the provincial Legislatures. But the Charter is a centralizing force in a subtle sense. It supplies a set of uniform national standards for the protection of civil liberties. These apply throughout the country, and in fields of formerly exclusive provincial jurisdiction. Some of these standards, namely, the mobility rights of s. 6 and the language rights of ss. 16 to 23, are avowedly directed to national unity, facilitating personal mobility and attempting to make the whole of Canada a homeland for French-speaking as well as English-speaking Canadians. But all of the provisions of the Charter give to persons whose civil liberties have been abridged by provincial (or federal) action the right to appeal to national norms which will be enforced by the court system, and ultimately by a national court, the Supreme Court of Canada (Hogg 2013, 36-4).

Section 24 of the Charter[L] grants an individual whose rights were infringed upon the right to apply for a remedy. In contrast, section 52 of the *Constitution Act, 1982*[LI] grants any individual with standing the ability to apply for a declaratory judgment regarding the constitutionality of a particular state action (Hogg 2013: 40-2). The judiciary is, according to section 52, allowed to invalidate any state action – that is, any provision of Canadian law, regulation, action or even inaction on the part of the executive power[LII] – which contravenes or is inconsistent with the Charter, or more broadly, the Canadian Constitution.[LIII]

The Canadian courts have developed certain guidelines to ensure that state actions comply with the Constitution; most of which refer to the concept of "dialogue"[LIV] between the different branches of government, especially since the advent of the Charter (Hogg et al. 2007: 45:1; Wright 2010: 625). That being said, the Court has been prone to postpone the declaration of invalidity – that is, to grant a grace period of temporary validity – when striking down an unconstitutional law.[LV] This allows Parliament or the provincial legislature, as the case may be, to react and rewrite the struck down legislation and/or pass new legislation.[LVI] Section 33 of the *Constitution Act, 1982* (also known as the "notwithstanding clause") grants Parliament and the provincial legislatures the ability to suspend the effects of a declaration of invalidity for a renewable five-year period. Such situations are rare.[LVII] Moreover, the legislative power may only use this "notwithstanding clause" regarding rights guaranteed by sections 2 and 7 to 15 of the Charter.

Accepting the premise that "the Charter is a centralizing force in a subtle sense […] [by supplying] a set of uniform national standards for the protection of civil liberties" (Hogg 2013: 36-4), one might ask whether the Supreme Court was able to embrace the challenges of pluralism within a federative context. This is effectively the case regarding language rights and, to a lesser extent, Aboriginal rights, which are protected by section 35 of the *Constitution Act, 1982*.

(i) The Charter and language rights

Sections 16 to 23 of the Charter have brought a new dimension to language rights in Canada. In addition to reinforcing the notion that Canada is a bilingual country, these sections confirm New Brunswick as the only province that is officially and institutionally bilingual (Hogg 2013: 56-22). In contrast, prior to the Charter, section 133 of the *Constitution Act, 1867*[LVIII] and section 23 of the *Manitoba Act, 1870*[LIX] only required a "limited form of bilingualism" (Hogg 2013: 56-21) in federal institutions and in the provinces of Quebec and Manitoba. It has been argued that the absence of a constitutional requirement with respect to bilingualism at the provincial level in seven of the ten provinces was an obstacle to the development of bijuralism in Canada (Gaudreault-DesBiens 2007: 23), although some pieces of legislation, such as Ontario's *French Language Services Act*[LX], Prince Edward Island's *French Language Services Act*[LXI], and Nova Scotia's *Act Respecting the Delivery of French-language Services by the Public Service*[LXII], have attempted to counterbalance this phenomenon.

While the Court's interpretation of sections 16 to 23 of the Charter has greatly favoured Francophone minorities outside of Quebec, the same cannot be said of the Anglophone minority in Quebec.

In *R v Beaulac*, the Supreme Court confirmed that section 530 of Canada's *Criminal Code*[LXIII] grants any accused in any province the right to a trial in the official language of his or her choice, and suggested that language rights ought to be interpreted liberally and extensively.[LXIV] In this case, the accused was a French-speaking individual living in British Columbia.

In *Lalonde v Ontario (Commission de restructuration des services de santé)* (2001), the Health Services Restructuring Commission of Ontario was prohibited from closing Montfort Hospital, a French-speaking institution in the region of Ottawa, on the grounds of minority language rights protection.[LXV]

In stark contrast, the decision *Baie-d'Urfé (Ville de) v Québec (Procureur général)*, rendered a few weeks later by the Court of Appeal of Quebec rejected the plaintiffs' argument that the merger of an Anglophone borough with the city of Montreal violated their right to minority protection, even though the merger resulted in the loss of decisional power and relative representation.[LXVI]

This difference between the judicial treatment of Anglophone and Francophone minorities in Canada is all the more striking through the lens of language rights in education. In fact, pursuant to section 23 of the *Constitution Act, 1982*[LXVII], the Court has been keen to force the executive power to fulfill its constitutional obligations towards the Francophone minority outside of Quebec, whereas the realities of the Anglophone minority in Quebec have been barely addressed by the Supreme Court (Bérard 2017: chapters 3 and 6).

In *Mahe v Alberta*, the Supreme Court established that section 23 of the Charter grants Francophone parents the right to manage and control the minority-language school facilities in the Edmonton region.[LXVIII]

In the *Reference re Public Schools Act*, the Court drew the distinction between formal and substantive equality – pointing out to the importance of the latter – and went on to explain that "the answers to the questions should ideally be guided by that which will most effectively encourage the flourishing and preservation of the French-language minority in the province."[LXIX]

A decade later, in *Arsenault-Cameron v Prince Edward Island*, the Court stressed that section 23 is "premised on the fact that substantive equality requires that official language minorities be treated differently, if necessary, according to their particular circumstances and needs, in order to provide them with a standard of education equivalent to that of the official language majority."[LXX]

In *Doucet-Boudreau*, the Supreme Court was particularly severe towards the Nova Scotia legislature for failing to protect the rights of the Francophone minority under section 23 of the Charter. The Court accepted that an order by the trial judge to the effect that he would personally hear progress reports from the legislature as to the construction of minority language school facilities was constitutional.[LXXI]

Finally, in *Association des parents de l'école Rose-des-vents v British Columbia (Education)*, the Supreme Court based itself on the principle of substantial equality, previously stated in

Mahe[LXXII], to establish that the British Columbia legislature was violating its obligations towards the province's Francophone minority under section 23 of the Charter.[LXXIII]

These decisions somewhat contrast with the treatment received by the Anglophone minority in Quebec. While invalidating, or attenuating the interpretation of some provisions of Quebec's Charter of French Language in light of s. 23 of the Canadian Charter, the Supreme Court managed in three cases to strike a delicate balance between the protection of minority rights and its sensitivity toward the particular socio-demographic status of the French language in Quebec.

In *Solski (Tutor of) v Quebec (Attorney General)*, the Supreme Court demonstrated great deference towards the autonomy of the Quebec National Assembly while assessing its obligations under section 23 of the Charter:

> [O]n the collective level, these language issues are related to the development and existence of the English-speaking minority in Quebec and the French-speaking minorities elsewhere in Canada. They also inevitably have an impact on how Quebec's French-speaking community perceives its future in Canada, since that community, which is in the majority in Quebec, is in the minority in Canada, and even more so in North America as a whole. To this picture must be added the serious difficulties resulting from the rate of assimilation of French-speaking minority groups outside Quebec, whose current language rights were acquired only recently, at considerable expense and with great difficulty. Thus, in interpreting these rights, the courts have a responsibility to reconcile sometimes divergent interests and priorities, and to be sensitive to the future of each language community. Our country's social context, demographics and history will therefore necessarily comprise the backdrop for the analysis of language rights.[LXXIV]

In *Nguyen*, although the Supreme Court did find certain provisions of the *Charter of the French Language*[LXXV] unconstitutional, it decided nonetheless to suspend the declaration of invalidity for one year "[b]ecause of the difficulties [it] may entail."[LXXVI] Last, in *Gosselin (Tutor of) v Quebec (Attorney General)*, where the prohibition imposed on French-speaking parents to send their children to English schools was challenged, the Court determined that "schools for the minority language community should not operate to undermine the desire of the majority to protect and enhance French as the majority language in Quebec, knowing that it will remain the minority language in the broader context of Canada as a whole."[LXXVII]

In other words, the Supreme Court, in *Solski*, *Nguyen*, and *Gosselin*, demonstrated a particular sensitivity to the reality of the French language in Quebec and towards the

autonomy of the National Assembly of Quebec as the sole North American legislature accountable to a French majority (Bérard 2017: 92-121).

Applying a Dworkinian framework to this situation, this discrepancy in the treatment received by the two minority groups embodies the "right to treatment as an equal" (in opposition to the "right to equal treatment") with the long-term perspective of "making the community more equal overall" (Dworkin 1977: 67–68). Simply put, the Supreme Court has, since the advent of the Charter, gone to a larger extent to protect the Francophone minority outside of Quebec, since it perceives that Francophones and their culture are more vulnerable in Canada as a whole (cf Hosein 1992; see also Kymlicka 2007). Notwithstanding the fact that the concept of substantive equality has been used exhaustively to protect the rights of Francophone minorities across Canada, the Supreme Court has relied on the context-based approach underlain by substantive equality to protect in an asymmetrical manner the rights of the most well-off minority of the country, that is the Anglophone minority in Quebec (Bérard 2017: 92–117).

(ii) *The Constitution and Aboriginal rights*

Part II of the *Constitution Act, 1982*, especially section 35[LXXVIII] thereof, addresses the rights of the Aboriginal peoples of Canada.

While provincial powers and linguistic minorities – the Francophone minority outside of Quebec, that is – have recently been treated with deference by the Supreme Court, the Aboriginal peoples of Canada have yet to benefit from the same degree of recognition.

To this effect, some authors have pleaded for the acknowledgement of this reality in the Canadian judicial system, in order to "respect the inevitable diversity of […] modern communities and to avoid the appeal of homogenization" (Leclair 2015: 64–66). For instance:

> Multijuridical or pluralist better describes the Canadian legal system. However, there is a schism between the de facto operation of Indigenous peoples' systems in Canada and the de jure recognition of these systems. For Canada to truly be a pluralist country there needs to be more comprehensive recognition of Indigenous laws as part of the mainstream Canadian legal system (Gunn 2007: para 15, emphasis added).

Likewise:

> Perhaps most fundamentally, the judiciary must confront and move past Eurocentric notions about the inferiority of Indigenous law that continue to permeate Canadian society (Newell 2013: para 48).

For Webber, however, all is not lost:

> [O]ne of the great developments in the last 20 years in Aboriginal rights scholarship has been a focus on the content of Aboriginal legal traditions themselves. Increasing numbers of scholars, usually Aboriginal, have moved away from discussions of the common law and the interpretation of section 35 and begun to ask, in collaboration with their communities, 'What does it mean to govern oneself as Anishinabek, Mi'kamq, Métis, or Inuvialuit?'. They have built their conception of Aboriginal constitutionalism on that foundation. They do not reject relations with non-Aboriginal governments: they generally see themselves as laying the foundations for a more equal relationship, one that draws substantially on the normative traditions of Aboriginal as well as non-Aboriginal peoples (Webber 2015: 252–53, footnotes omitted).

This perception has been enhanced by recent Supreme Court decisions on section 35 of the *Constitution Act, 1982*. Although Aboriginal rights had already been recognized in *Calder v British Columbia (Attorney-General)*[LXXIX] and *Guerin v The Queen* [LXXX], the first major case to address the question of Aboriginal rights in the post-Charter era was *R v Sparrow*[LXXXI], in which the Court recognized the "right of a member of the Musqueam Indian band to fish for salmon in the Fraser River [in British Columbia]" (Hogg 2013: 28-21).

In *R v Van der Peet*, the Supreme Court defined Aboriginal rights under the Charter as "an element of a practice, custom or tradition integral to the distinctive culture of the aboriginal group claiming the right."[LXXXII] That is, the practice, custom or tradition ought to have been "one of the things which made the culture of the society distinctive"[LXXXIII] and to have developed "prior to contact between aboriginal and European societies"[LXXXIV], although there was a dissent regarding this last requirement. In *R v Sappier*[LXXXV], the Court ruled that the "harvesting of wood for domestic uses was integral to the distinctive culture of the Maliset and Mi'kamq people" (Hogg 2013: 28-24.1).

Furthermore, the Court initially gave an extensive interpretation to the notion of Aboriginal treaty rights, which are also protected under section 35 of the *Constitution Act, 1982*.[LXXXVI] The Court subsequently narrowed its position over the years.[LXXXVII]

The Court has also been keen to recognize Aboriginal titles.[LXXXVIII] In this regard, the test to be applied by the courts was defined in *Delgamuukw v British Columbia*.[LXXXIX] In *R v Côté*, the Supreme Court stressed that Aboriginal rights could exist independently of Aboriginal titles[XC], thereby upholding an Aboriginal's right to fish for food in this specific case.[XCI]

That being said:

> "Even if the courts are willing to make firm declarations of title, litigation is a long drawn-out and frustrating process, limited in what it can achieve. Moreover, until the Supreme Court's decision in *Haida Nation*[XCII] (2004), Aboriginal peoples generally had to watch in the meantime as their traditional lands were logged, mined, dammed or sold for other developments, with no control or financial return for the communities concerned. One of the most important changes has therefore been the growth of interim measures that ensure that, pending judicial determination, Aboriginal peoples can participate in the management of the land, share the benefits and have their interest in the land at least partially protected" (Webber 2015: 242, emphasis added).

An interesting illustration of the limits of litigation to promote Aboriginal rights can be found in the *Ktunaxa Nation* case, in which the Supreme Court of Canada rejected that nation's claim that a governmental approval of a resort project in an area which, in their cosmology, hosted the Grizzly Bear Spirit, violated both their freedom of religion and their Aboriginal rights.[XCIII]

Although the situation is not perfect, one must acknowledge that there have been significant judicial developments that do take into consideration the distinct realities of the Aboriginal peoples of Canada, including the differences between them[XCIV]. Progress has been made and will – should the current trend persist – continue to be made, but in an incremental way.

Conclusion

Needless to say, diversity is a challenge for all multinational federations. In order to tackle these sensitive issues, the courts have come to the rescue. Through recent decisions in three fundamental spheres, i.e. the separation of powers, the institutions and secession, and the Charter as well as the *Constitution Act, 1982*, the Supreme Court of Canada's record, albeit not perfect, gives great importance to the value of pluralism within the federal framework[XCV].

The illustrations are, in fact, numerous. While the *Lola* case and the references on the Supreme Court, Senate, Secession of Quebec and *Securities Act* all demonstrated the high regard which the Supreme Court holds for Quebec's distinctiveness, social values and legislative autonomy, the decisions rendered on language rights permeate a strong bias in

favour of Canada's most vulnerable language minority, the Francophone community outside of Quebec. Although such a favourable bias is not as obvious in terms of Aboriginal rights, recent jurisprudential developments might lead one to identify a similar tendency.

In other words, the impulse of pluralism in the Canadian federation through the judicial power is, as we write this article, some kind of a no-brainer. Indeed, the Supreme Court of Canada 2.0 tackled the challenge of diversity in offering a "legal response to the underlying political and cultural realities that existed at Confederation and continue to exist today"[XCVI], thus reconciling diversity with unity in a most Canadian way.

Yet again, it remains important to acknowledge the inherently limited reach of any judicial pronouncement on diversity. Granted, courts may mobilize constitutional provisions to protect rights against some violations. More broadly, they can (positively) alter the dynamics underlying the protection and promotion of diversity. However, their main role remains that of a watchdog. The genuine blossoming of diversity also presupposes some form of political will, particularly on the part of majorities. In Canada as in other countries, such a will is not always manifest, or, if one prefers, it sometimes reveals itself in an asymmetrical manner. For example, in spite of significant jurisprudential progress concerning the legal status of French-speaking minorities, the defense of their rights remains a daily battle against provincial governments which often see minority institutions as liabilities rather than as assets. Aboriginal peoples also suffer from a political environment which is not always optimal for the resolution of their claims. To wit, the conflict in 2020 opposing hereditary chiefs (under customary law) of the Wet'suwet'en Nation in British Columbia to elected band leaders (under the Indian Act), over the approval by the latter of a pipeline project affecting that nation's alleged traditional lands. The problem is that the latter had jurisdiction over the territory of reserves, while the former possessed residuary jurisdiction over other parts of the nation's traditional territory. Hence, a conflict of laws – state law v. customary laws -, and a conflict of legitimacies – elected officials v. hereditary chiefs. In that volatile political context, a blockade had been erected on the territory to prevent the construction of the pipeline, but it had been forcefully dismantled by the Royal Canadian Mounted Police after the issuance of a court order in that sense. News of this dismantlement provoked a wave of support across Canada for the hereditary chiefs' position, and several rail blockades were erected by

Aboriginal groups all across the country. Although this move was supported by many non-Aboriginals, it was also strongly resented by some others, as the blockades were hampering not only the country's economy, but also their very livelihood. After almost three months, the blockades were finally removed. Yet, it took such a full-fledged national crisis to prompt the federal and British Columbia governments to engage in further discussions with representatives of the Wet'suwet'en, which culminated in a provisional agreement on the latter's land rights. Diversity indeed raises challenges from both a legal and a political perspective...

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[I] Cited in *Reference re Secession of Quebec*, [1998] 2 SCR 217 at para 43 [*Secession Reference*].

[II] *Ibid.*

[III] *A.G. Can. v Law Society of B.C.*, [1982] 2 SCR 307 at 326–27. *Cf Ontario v Criminal Lawyers' Association of Ontario*, 2013 SCC 43 at para 18.

[IV] RSC 1985, c F-7.

[V] "The division of the Federal Court of Canada called the Federal Court – Appeal Division is continued under the name "Federal Court of Appeal" in English and "Cour d'appel fédérale" in French. It is continued as an additional court of law, equity and admiralty in and for Canada, for the better administration of the laws of Canada and as a superior court of record having civil and criminal jurisdiction." [emphasis added]

[VI] "The division of the Federal Court of Canada called the Federal Court – Trial Division is continued under the name "Federal Court" in English and "Cour fédérale" in French. It is continued as an additional court of law, equity and admiralty in and for Canada, for the better administration of the laws of Canada and as a superior court of record having civil and criminal jurisdiction." [emphasis added]

[VII] 30 & 31 Vict, c 3, s 101, reprinted in RSC 1985, Appendix II, No 5: "The Parliament of Canada may, notwithstanding anything in this Act, from Time to Time provide for the Constitution, Maintenance, and Organization of a General Court of Appeal for Canada, and for the Establishment of any additional Courts for the better Administration of the Laws of Canada." [emphasis added]

[VIII] "The Governor General shall appoint the Judges of the Superior, District, and County Courts in each Province, except those of the Courts of Probate in Nova Scotia and New Brunswick."

[IX] "The Salaries, Allowances, and Pensions of the Judges of the Superior, District, and County Courts (except the Courts of Probate in Nova Scotia and New Brunswick), and of the Admiralty Courts in Cases where the Judges thereof are for the Time being paid by Salary, shall be fixed and provided by the Parliament of Canada."

[X] *Supra* note VII, ss 99–100.

[XI] *Valente v The Queen*, [1985] 2 SCR 673 at paras 27–31 [*Valente*]. Specifically, see paragraph 30 of the Court's decision: "It is sufficient if a judge may be removed only for cause related to the capacity to perform judicial functions." *Cf Ell v Alberta*, 2003 SCC 35 [*Ell*]; *Mackin v New Brunswick (Minister of Finance); Rice v New Brunswick*, 2002 SCC 13 [*Mackin*]. See also Hogg 2013: 7-14.

[XII] *Valente*, *supra* note XI at paras 40–46. Specifically, see paragraph 40 of the Court's decision: "The essence of such security is that the right to salary and pension should be established by law and not be subject to arbitrary interference by the Executive in a manner that could affect judicial independence." *Cf Beauregard v Canada*, [1986] 2 SCR 56. See also Hogg 2013: 7-14.

[XIII] *Valente*, *supra* note XI at paras 47–52. *Cf* Hogg 2013: 7-14: "This [does] not preclude involvement by the

Attorney General in the administration of the courts, but it [does] require that the judges control the assignment of judges, sittings of the court, and court lists." [footnotes omitted]

[XIV] *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 SCR 3 at para 83 [*PEI Reference*].

[XV] *Conférence des juges de paix magistrats du Québec v Québec (Attorney General)*, 2016 SCC 39 at para 31 [*Conférence Québec*]. See also *Ell*, *supra* note XI at para 23; *Mackin*, *supra* note XI at para 38; *PEI Reference*, *supra* note XIV.

[XVI] *Conférence Québec*, *supra* note XV at para 33.

[XVII] *Valente*, *supra* note XI at para 22.

[XVIII] *Secession Reference*, *supra* note I at para 43.

[XIX] *Supra* note VII, ss 91–92. See also sections 94A and 95, which will be addressed shortly.

[XX] *Reference re: Weekly Rest in Industrial Undertakings Act (Can.)*, [1937] AC 326 at 354 (PC).

[XXI] *Reference re: Liquor License Act of 1877 (Ont.)*, [1883] 9 AC 117 (PC) [*Hodge*].

[XXII] *Supra* note VII, s 92(10)(c); *Ontario Hydro v Ontario*, [1993] 3 SCR 327.

[XXIII] Hogg 2013: 22-15 to 22-18. See also Lajoie 1969.

[XXIV] *Constitution Act, 1867*, *supra* note VII, s 91.

[XXV] *Cf Reference re: Board of Commerce Act, 1919 (Can.)*, [1922] 1 AC 191 (PC).

[XXVI] *Re: Anti-Inflation Act*, [1976] 2 SCR 373.

[XXVII] *R v Crown Zellerbach Canada Ltd*, [1988] 1 SCR 401.

[XXVIII] See, however: *Reference re Greenhouse Gas Pollution Pricing Act*, 2019 ONCA 544, upholding the constitutionality of a federal statute establishing pan-Canadian pricing mechanisms to a broad set of greenhouse gas emission sources; however, see the contrary opinion of the Alberta Court of Appeal on the same statute: *Reference re Greenhouse Gas Pollution Pricing Act*, 2020 ABCA 74. It is very likely that the question of the constitutionality of this statute will reach the Supreme Court in the near future.

[XXIX] *Supra* note VII, s 94A-95.

[XXX] *Ibid*, s 94A.

[XXXI] *Ibid*, s 95.

[XXXII] *Rio Hotel Ltd v New Brunswick (Liquor Licensing Board)*, [1987] 2 SCR 59.

[XXXIII] *Attorney General (Que.) v Kellogg's Co. of Canada*, [1978] 2 SCR 211.

[XXXIV] 2011 SCC 66 at paras 61– 62. However, the Supreme Court later found that the federal Parliament could legislate, on the basis of its trade and commerce power, in respect of "systemic risk", as it may affect the financial sector, in Reference re Pan-Canadian Securities Regulation, 2018 SCC 48. This finding was notably based on the fact that provinces cannot, separately or together, effectively respond to such a risk, thereby requiring a centralized, e.g. federal, response.

[XXXV] 2013 SCC 5 at para 267.

[XXXVI] *Cf Maritime Bank of Canada (Liquidators of) v New Brunswick (Receiver-General)*, [1892] AC 437 at para 4 (PC); *Hodge*, *supra* note XXI at para 36.

[XXXVII] *Ibid.*

[XXXVIII] 2014 SCC 21 at para 59 [*Nadon*]. See also paragraphs 93 and 146 of the Court's decision. *Cf Supreme Court Act*, RSC 1985, c S-26, s 6: "At least three of the judges shall be appointed from among the judges of the Court of Appeal or of the Superior Court of the Province of Quebec or from among the advocates of that Province." *Cf* Brouillet & Tanguay (2012: 81): "In addition to the three judges from Quebec, the bench of the Court is usually composed of three judges from Ontario, two from western Canada, and one from the Atlantic provinces."

[XXXIX] *Nadon*, *supra* note XXXVIII at para 48 [footnotes omitted].

[XL] *Constitution Act, 1982*, s 41(d), being Schedule B to the *Canada Act 1982* (UK), 1982, c 11: "An amendment to the Constitution of Canada in relation to the following matters may be made by proclamation issued by the Governor General under the Great Seal of Canada only where authorized by resolutions of the Senate and House of Commons and of the legislative assembly of each province: […] the composition of the Supreme Court of Canada."

[XLI] *Nadon*, *supra* note XXXVIII at para 99.

[XLII] 2014 SCC 32 at para 3.

[XLIII] [1981] 1 SCR 753 at 909.

[XLIV] *Secession Reference*, *supra* note I at para 88.

[XLV] *Ibid* at para 56.

[XLVI] *Ibid* at para 90–92.

XLVII *Ibid* at para 92.
XLVIII *Supra* note XL.
XLIX SC 1960, c 44.
L "Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances."
LI "The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect."
LII *Doucet-Boudreau v Nova Scotia (Minister of Education)*, 2003 SCC 62 at para 43 [*Doucet-Boudreau*].
LIII *Cf Re Manitoba Language Rights*, [1985] 1 SCR 721 at para 48 [*Manitoba Reference*].
LIV *Vriend v Alberta*, [1998] 1 SCR 493 at paras 138–39 [*Vriend*].
LV Hogg 2013: 40-4 to 40-4.1. *Cf Carter v Canada (Attorney General)*, 2015 SCC 5; *Canada (Attorney General) v Bedford*, 2013 SCC 72; *Quebec (Education, Recreation and Sports) v Nguyen*, 2009 SCC 47 [*Nguyen*].
LVI In a pluralistic federation, the temporary period of validity can be used to protect minority groups, such as the Francophone minority outside of Quebec. *Cf. Manitoba Reference*, *supra* note 65 at para 150: Even though this decision was not rendered under the Charter, the Supreme Court deemed that the province of Manitoba had a constitutional obligation to enact laws in both French and English, which had not been fulfilled as its laws were only enacted in English. The Court thus granted temporary validity to the laws of the province while awaiting for their translation, in order for the legislature to fulfill its obligations towards the Francophone population of the province. See also Hogg, *supra* note 3 at 40-5.
LVII *Cf Vriend*, *supra* note LIV. The government of Quebec notably employed the notwithstanding clause in the aftermath of the decision *Ford v Quebec (Attorney General)*, [1988] 2 SCR 712. This decision from the Quebec legislature led some Anglophones in Quebec to petition the United Nations Human Rights Committee: *Ballantyne v Canada*, U.N. Doc. CCPR/C/47/D/359/1989 and 385/1989/Rev.1 (1993). After the Committee ruled in favour of the plaintiffs, Quebec decided not to extend the notwithstanding clause.
LVIII "Either the English or the French Language may be used by any Person in the Debates of the Houses of the Parliament of Canada and of the Houses of the Legislature of Quebec; and both those Languages shall be used in the respective Records and Journals of those Houses; and either of those Languages may be used by any Person or in any Pleading or Process in or issuing from any Court of Canada established under this Act, and in or from all or any of the Courts of Quebec. […]" [emphasis added]
LIX Either the English or the French language may be used by any person in the debates of the Houses of the Legislature, and both those languages shall be used in the respective Records and Journals of those Houses; and either of those languages may be used by any person, or in any Pleading or Process, in or issuing from any Court of Canada established under the *Constitution Act, 1867*, or in or from all or any of the Courts of the Province. The Acts of the Legislature shall be printed and published in both those languages." [emphasis added]
LX RSO 1990, c F-32.
LXI RSPEI 1988, c F-15.2.
LXII SNS 2004, c 26, as amended by *An Act Respecting the Administration of Government*, SNS 2011, c 9, ss 17–22.
LXIII RSC 1985, c C-46, s 530.
LXIV [1999] 1 SCR 768 at paras 25, 34, 56.
LXV 208 DLR (4th) 577 (Ont CA).
LXVI [2001] RJQ 2520 (CA).
LXVII "Citizens of Canada (a) whose first language learned and still understood is that of the English or French linguistic minority population of the province in which they reside, or (b) who have received their primary school instruction in Canada in English or French and reside in a province where the language in which they received that instruction is the language of the English or French linguistic minority population of the province, have the right to have their children receive primary and secondary school instruction in that language in that province."
LXVIII [1990] 1 SCR 342 [*Mahe*].
LXIX *Reference re Public Schools Act (Man.), s. 79(3), (4) and (7)*, [1993] 1 SCR 839 at 850; Bérard 2017: 175.
LXX 2000 SCC 1 at para 31.
LXXI *Supra* note LII.
LXXII *Supra* note LXVIII.
LXXIII 2015 SCC 21.

[LXXIV] 2005 SCC 14 at para 5. See also Bérard 2017: 92–99.
[LXXV] CQLR, c C-11.
[LXXVI] *Supra* note LV at para 46.
[LXXVII] 2005 SCC 15 at para 31.
[LXXVIII] "The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed."
[LXXIX] [1973] SCR 313.
[LXXX] [1984] 2 SCR 335.
[LXXXI] [1990] 1 SCR 1075.
[LXXXII] [1996] 2 S.C.R. 507 at para 46 [*Van der Peet*]; Hogg, *supra* note 3 at 28-22 to 28-23.
[LXXXIII] *Van der Peet*, *supra* note LXXXII at para 55; Hogg 2013: 28-23.
[LXXXIV] *Van der Peet*, *supra* note LXXXII at para 60; Hogg 2013: 28-23.
[LXXXV] *R v Sappier; R v Gray*, 2006 SCC 54.
[LXXXVI] *R v Marshall*, [1999] 3 SCR 456; Hogg 2013: at 28-38 to 28-39.
[LXXXVII] *R v Marshall*, [1999] 3 SCR 533; *R v Marshall; R v Bernard*, 2005 SCC 43.
[LXXXVIII] For a definition, see Hogg 2013: 28-28.
[LXXXIX] [1997] 3 SCR 1010.
[XC] [1996] 3 SCR 139 at paras 38–39.
[XCI] *Ibid* at para 71.
[XCII] *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73.
[XCIII] *Ktunaxa Nation v. British Columbia (Forests, Lands and Natural Resource Operations), 2017 SCC 54*.
[XCIV] *R. v. Powley*, 2003 CSC 43; *Daniels v. Canada (Indian Affairs and Northern Development)*, 2016 SCC 12.
[XCV] For an analysis on the logics underlying the legal management of diversity in Canada, see Gaudreault-DesBiens 2010: 195.
[XCVI] *Secession Reference*, *supra* note I at para 43.

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Judicial Functions and Organisation in Belgium

by

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Abstract

Unlike most other federal states, the Belgian federation has kept the organisation of the judiciary as a federal competence. The reasons are historical, principled, practical as well as political. Meanwhile, some fragmentation has taken place, with sub-state competences related to several aspects of the judicial organisation, and a regularly used leeway for Communities and Regions to establish administrative courts. Moreover, the linguistic divide, which has inspired the construction of the Belgian dyadic federation, has also permeated the organisation of the judiciary. This article looks into the organisation of the Belgian judiciary from the viewpoint of federalism. In so doing, it highlights the institutional complexity of the judiciary in Belgium.

Key-words

Belgium, federalism, judicial pluralism, representation of sub-national entities, language pluralism

1. Introduction

1.1 The pluralist judicial system

The judicial system in Belgium is a pluralist one: it consists of three different types of courts, and the – sometimes uneasy – co-existence of three different supreme courts.

The eldest branch is the ordinary judiciary under the hierarchic supervision of the supreme court, called Court of Cassation (*Cour de Cassation*). According to Art. 144 of the Belgian Constitution, disputes about civil rights belong exclusively to the competence of these courts, although a new provision was added to enable administrative courts to award damages for non-compliance with their judgments. Art. 145 Constitution attributes disputes about political rights also to the competence of the ordinary courts, but allows for exceptions established by an Act of Parliament.

Hence, administrative courts can be established by law (as confirmed in Art. 161 Constitution), to decide upon disputes between persons and public authorities on matters such as taxes, permits, refugees, etc. – i.e. those disputes, according to the Constitutional Court, that are closely related to the prerogatives of the State's public authority.[I] Moreover, Art. 160 Constitution establishes the supreme administrative court, the Council of State, with two functions. The 'section legislation' provides opinions on drafts of legislative and regulatory acts to the parliaments and executives. This is not further discussed in this chapter. The 'section administrative litigation' acts as a supreme court with regards to administrative courts, and has the power to annul administrative acts and regulations. While the Constituent had in mind to give a quasi-monopoly to the ordinary judiciary, a labyrinth of administrative courts has in the meantime been established, each with their own composition and procedural rules. To guide citizens in this tangled ball, the law prescribes that individual decisions mention the instance, terms and modalities for appeal.[II]

Finally, the Constitutional Court, based on Art. 142 Constitution, provides centralized constitutional review. The Court has the power to annul Acts of (federal or regional) Parliaments on request of governments or any person with an interest. It also has to power to declare Acts of Parliaments unconstitutional and therefor non-applicable, on the preliminary reference of a court. The other apex courts, the Court of Cassation and the Council of State, are sometimes under the obligation of referring a preliminary request.

Ordinary and administrative courts are unable to review Acts of Parliament, with three exceptions: (1) they have the power, assumed by the Court of Cassation in 1971, to review Acts of Parliaments against international norms with direct effect;[III] (2) they have the power to review Brussels Acts of Parliament (called 'ordinances') against those provisions in the Constitution and the Brussels institutional act that do not fall under the Constitutional Court's jurisdiction;[IV] (3) they may conclude the constitutionality of an Act of Parliament if it is 'manifest' that this Act does not violate the Constitution.[V] The Constitutional Court was established in the 1980s in the wake of the Belgian federalisation process. As equality of the federated entities *vis-à-vis* the federal entity is a basic principle, a neutral arbitrator was required to solve federal competence disputes. Initially, this was the only power of the Court, then called 'Court of Arbitration'. Gradually, however, the Court transformed into a genuine constitutional court.

1.2 The Belgian federal system

Belgium is a fragmenting federation. It was established in 1830 as a unitary state but, since 1970, turned into a federal state with confederal traits in the course of – so far – six state reforms.[VI] Federalism in Belgium is a device for multinational conflict management. Its most important feature is that it is a dyadic federation which revolves around two major language groups, the French and the Dutch, divided by language, but also by wealth and ideology. Each language group is mainly situated in its own territory: the Flemish majority in the north, the Francophones in the south, and a small German-speaking community, that consists of less than 1 percent of the population, in the south-east. By contrast, the capital region Brussels is bilingual, with a large majority of francophone people.

As to structure, the federation consists of several overlapping jurisdictions: three Communities and three Regions, as well as two small entities in Brussels with a limited set of legislative powers in community matters. The territorial overlap is manifold. For example, the Walloon Region coincides with the French Community, but the latter also includes the Brussels territory whereas the former also includes the territory of the German-speaking Community. In Brussels, the Brussels Region has jurisdiction, but also the French and the Flemish Community with regard to unilinguistic institutions, as well as two minor entities, the Joint Community Commission and the French Community

Commission. The division between major language groups, however, structures the federal decision process: Parliament consists of two language groups, with a veto power in specific matters, and the Government is composed on the basis of language parity.

The Communities were established on the demand of the Flemings to protect their language and culture. Communities have powers in the field of education, culture, person-related matters and the use of languages. The Regions were established because the Walloons, eager after WWII to save old mine and coal industries through government subsidies, claimed autonomy over economic policy. Presently, Regions have powers in a variety of matters such as economy, employment policy, energy, spatial planning, housing, environment, animal welfare, mobility, road safety, public works and local authorities. Flemings, however, prefer the division in Communities, whereas Walloons accentuate the Regions. This resulted in asymmetrical developments, with the institutions of the Flemish Region merging into the Flemish Community, and the French-speaking Community transferring competences to the Walloon Region and the French Community Council, a francophone institution in Brussels.

With each state reform, matters have been transferred to the federated entities to unblock federal decision making, with distrust of the other language group as motive.[VII] The Belgian federation is therefore organised as a dual state, with exclusivity as the main principle for the allocation of powers: matters are the exclusive competence of either the federal entity, the Communities, or the Regions.[VIII] Also, legislative and executive powers remain within the competence of the same entity; examples of executive federalism are rare. The downside is that this often results in fragmentation: matters are split in sub-parts, whereby some sub-parts are conferred to the Communities or Regions, whereas others remain with the federal authorities.

2. The impact of the federal system on the functions of the judiciary

As in other matters, exclusivity is the main principle for the allocation of powers with regard to the judiciary. The situation, however, is slightly different depending of the type of judiciary. For all categories, the federal authorities have the exclusive competence. This is the logical starting point: as Belgium is a fragmenting federation, all powers were initially in the realm of the central authorities, whereas the federated entities, having been established

later, had to negotiate for the transfer of each power. The federated entities, however, do have additional powers to establish administrative courts, and there is some fragmentation with regards to the ordinary judiciary.

2.1 The ordinary judiciary

Justice and the organisation and functioning of the ordinary judiciary is a fragmented but essentially exclusive federal power, with only few aspects in which the Communities and Regions have parallel powers (a). Proposals to transfer this power to the level of the sub-states have been debated in political and scholarly circles, but this has remained a theoretical debate (b). Nonetheless, in practice the dual federal model has also inflicted the judicial organisation (c).

a. A fragmented but essentially federal power…

The Constitution explicitly regards the establishment of the Courts, the public prosecutor and the High Council of Justice as a federal matter.[IX] Also, the special majority law that allocates powers to the Communities and the Regions, explicitly reserves certain judicial powers for the federal state, such as the organisation of and procedures before juvenile courts. By contrast, procedural rules are part of the federal entity's residual powers.[X] Hence, the judiciary, in all its aspect, is in principle an exclusive federal matter, with only few exceptions.

Before the sixth state reform in 2012-2013, laws on the organisation of the courts had to find approval by both the House of Representatives and the Senate. Since then, the Senate has been transformed to a chamber of the sub-states, with a better representation of the Communities and Regions, but has been left with reduced powers. As a result, the Communities and Regions do not even participate in the legislation on the organisation of the courts through the Senate.

Presently, four aspects have explicitly been allocated to the sub-states: (1) aspects of penal law, (2) aspects of juveniles sanctions, (3) expropriation and (4) first-line assistance and Justice Centers.

First, Communities and Regions have the power to make non-compliance with their laws punishable. For punishments and penalizations that deviate from the federal code

book, the federal authorities need to give approval. Within their sphere of competences, Communities and Regions also have the power to assign the capacity of officer of the judicial police to their civil servants, regulate the evidential value of summons, and decide in which cases a house search can take place.[XI] Hence, Communities and Regions had the power to make violation of their laws punishable, but they had no say in the judicial enforcement thereof, for instance to prioritize environmental offences. This changed since the sixth state reform in 2012-2013.[XII] Since then, the members of the sub-state executives have the (indirect) right of injunction, as they can oblige the federal Minister of Justice to order prosecution in matters within their sphere of competences. Also, they are involved in the development of guidelines for penal policy, including tracing and prosecution policy, in the development of the National Security Plan, and in the meetings of the Committee of Attorney-Generals, where priorities in prosecution policy are discussed.[XIII]

Second, while the organisation, territorial competence and judicial procedure of juvenile courts is an explicit federal competence,[XIV] Communities have the power to decide what type of matters can be brought before the juvenile courts.[XV] Recently, they also acquired the power to decide the measures that juvenile courts can take to sanction juveniles.

Third, the judicial procedure for the expropriation of land is a parallel competence of the Regions; the federal legislator still determines the procedure for expropriations executed by the federal authorities.[XVI]

Finally, Communities have competence over first-line assistance and the power to regulate the organisation, functioning and tasks of Justice Centres as well as the agencies that organise and supervise electronic surveillance.[XVII] Justice Centres have several tasks, among which victim support, mediation in penal cases and supervision of alternative sanctions. The federal authorities still have the exclusive power to decide upon the Justice Centres' tasks in the framework of judicial procedures or the implementation of judicial decisions.[XVIII] Whenever Communities or the federal government modifies the Centres' tasks, they have to consult each other.[XIX]

Federated entities also have implied powers, on the condition that the matter lends itself for differentiated regulations, and the measure is necessary to exercise their powers and impacts only marginally on federal competence. For example, Communities may oblige judges of juvenile courts to write a report used in the procedure for the recognition of

juvenile institutions or require particular evidence for their decision to remove juveniles to another institution.[XX] Also, Communities and Regions may designate the competent (federal) court to decide upon specific matters.[XXI]

b. … under debate…

It was the clear purpose of the constituent to keep judicial dispute resolution uniform throughout the entire country.[XXII] This way, all courts are able to apply all legal rules, irrespective of their (local, subnational, federal, supranational or international) source. The drawback is that the sub-states are unable to establish specialized courts to resolve conflicts in matters within their sphere of competence, whereas the federal legislature can establish such courts whenever it feels the need to do so – for example labour courts which include lay judges.[XXIII]

The transfer of powers in the field of judicial competences has been debated in political[XXIV] and scholarly circles. Such debates, however, easily become exponents of political rivalry between the language communities. The competence over the judiciary was traditionally associated with the essence of central state power,[XXV] whereas proposals for decentralisation are suspected of fitting in a confederal or separatist agenda.[XXVI] After all, institutional capacity is one of several conditions that facilitate secessionist movements.[XXVII] This may explain why the topic is debated in Flemish but hardly in francophone circles.[XXVIII] The reasons invoked for a transfer of competences regarding the organisation of justice also have to do with the divide between the Flemings and the francophone people: authors point out differences in workload but also in preferences,[XXIX] and claim that judges only read jurisprudence and doctrine in their own language.[XXX] It has also been noted that as a result thereof, the Bar has already split in a francophone and a separate Flemish Bar.[XXXI] Basically, Flemish proponents argue that federalism is incomplete if Communities have the power to make laws but not to enforce them.[XXXII]

Some persons propose the establishment of 'community chambers' within the federal courts, appointed by the sub-state government to apply sub-state laws.[XXXIII] Others find parallel circuits where federal courts apply federal laws and subnational courts apply subnational law unrealistic – in Brussels alone, this would require six parallel circuits for six types of legislators.[XXXIV] Also, fragmentation of competences may oblige courts to apply laws from different jurisdictions. Instead, these scholars propose, in the line of exclusivity

of competences, that Communities acquire the exclusive competence to establish and organise courts, and the federal state may only establish a federal court to explain how federal law should be interpreted on the basis of preliminary references and would keep a limited framework competence to establish minimum guarantees for the functioning of the judiciary.[XXXV] This would, however, require special measures for the German-speaking Community, which is too small to organise its own judiciary.[XXXVI] Others prefer transfer of the competence over the organisation of the judiciary to the Regions rather than the Communities, for territorial clarity[XXXVII] – unlike the Regions, the Flemish and French Community overlap in Brussels. Objections to that are based on the fact that the Flemish minority in the Brussels Region would need special protection.[XXXVIII] There is also disagreement as to the question of whether rules of civil procedure should remain a federal competence,[XXXIX] or should become a sub-state[XL] or shared[XLI] competence.

c. … and permeated with dualism characteristic of Belgian federalism.

Nevertheless, justice is still regarded as an essentially federal power. In its organization, however, the dyadic nature of Belgian federalism becomes apparent, especially since the split of the judicial district in the bilingual territory of Brussels.[XLII] This is because the language divide that determines dualism in the Belgian federation, leads to linguistic requirements and the organization of Dutch- and French-speaking courts. Also, the involvement of Dutch- or French-speaking chambers of the High Council of Justice in the training and appointment of judges respects the singularity of the major language communities.[XLIII] This is explained further in Section 3.

2.2 Administrative courts

Communities and Regions have the power to organize administrative appeal within their sphere of competences. By contrast, the establishment and organization of administrative courts for judicial appeal against administrative decisions, is federal competence. This also applies to the Council of State. Art. 160 of the Constitution assigns its organization – composition, competences and functioning - to the federal Parliament. The Council of State impacts considerably on the functioning of the Communities and Regions: governments are obliged to ask the Council's advisory opinions on draft bills and regulatory decisions and the division administrative litigation has the power to annul their

administrative acts. Nonetheless, since the sixth state reform, the Senate is not greatly involved in the legislation on the Council of State or administrative courts. It can discuss bills approved by the House, but has no decisive say in the matter.[XLIV]

However, the sub-states can establish and organize specific administrative courts as part of their implied powers,[XLV] even to the point that the Council of State is deprived of its power to annul.[XLVI] Communities and Regions have made use of these implied powers to establish administrative courts to challenge decisions such as exam results, building permits or environmental permits. It is argued in doctrine that Communities and Regions also have the power to introduce specific measures in the procedure before the Council of State in matters within their sphere of competences.[XLVII]

In doctrine, proposals have been made to either organize community chambers for the review of sub-state regulations[XLVIII] or to preserve the Council of State only for annulment requests of federal acts and Brussels acts (because of the bilingual status of Brussels), but to assign to the Communities the competence to organize the system of administrative courts for their own Community and related Region.[XLIX] In political circles, the idea to transfer the full competence to establish administrative courts was considered but not accomplished in the sixth state reform. As a result, Communities and Regions do not have the power to adopt a general framework for the functioning of administrative courts.

2.3 The Constitutional Court

Art. 142 of the Constitution establishes the Constitutional Court and assigns its organization – composition, competences and functioning – to the federal Parliament. A special majority is required, which implies approval in both the House of Representatives and the Senate by a majority in each language group and an overall majority of two thirds. Since the sixth state reform, the Senate has transformed into a (more or less) genuine chamber of the sub-states. This way, the sub-states are involved in the organization of the Constitutional Court.

In doctrine a proposal was made to let Communities and Regions organize decentralized constitutional review and to keep the federal Constitutional Court for conflicts of competence and, as a court of last instance or a preliminary questions court, for

the protection of constitutional fundamental rights.[L] The establishment of sub-state constitutional courts, however, has not been a topic of discussion.

3. Representation of sub-national entities in federal courts

It is rather unusual for federal states to organize courts quasi exclusively at the federal level. One might therefor expect that extra attention is paid to the representation of sub-national entities in federal courts. This chapter discusses two aspects in that respect, (a) the involvement of the sub-states in the appointment of judges and (b) the representation of sub-states in the composition of the court. The picture is different for each type of court. In all cases, however, the dyadic character of the Belgian federation, based on two major linguistic communities, prevails over the involvement of the territorial sub-states.

3.1. The judiciary

a. The selection of judges

Judges are appointed by the King – which, in practice, means by the Minister of Justice – on nomination by the relevant nomination and appointment committee of the High Council of Justice with a two thirds majority.[LI] For appointments in appeal courts or the Court of Cassation, the court concerned issues a reasoned opinion prior to the nomination.[LII] The sub-states are not involved in this process. However, the linguistic communities are represented through the High Council of Justice.

The Council is entrusted with the nomination of judges and officers of the public prosecution office, their training, the organization of comparative exams for access to the judiciary, the drafting of general profiles, the giving of advice on proposals concerning the general operation and organization of the judiciary, general surveillances, the follow-up of complaints and the conducting of enquiries on the operation of the judiciary.[LIII] It is composed of a Dutch-speaking and a French-speaking college, each with 22 members.[LIV] Each college consists of an equal number of, on the one hand, judges and officers of the public prosecutor's office elected directly by their peers, and, on the other hand, members appointed by the Senate by a two thirds majority.[LV] This way, the sub-states as well are indirectly involved in the selection of judges.

Within each college, a nomination and appointment committee is established. The Dutch-speaking committee nominates judges in the Dutch-speaking districts and the Dutch-speaking courts in Brussels, the French-speaking committee nominates judges in the French- and German-speaking districts and the French-speaking courts in Brussels.

b. The composition of courts

As a result of the language divide, Belgium is divided in four linguistic areas: the Dutch-speaking area, the French-speaking area, the German-speaking area and the bilingual Brussels area.[LVI] The administration should only use the language of the linguistic area – with the exception of so-called 'facilities municipalities', where individuals have the right to communicate with the public authorities in another language. For example, in six 'facilities municipalities' around Brussels, on Flemish territory, Francophones have the right to communicate with the administration in French. The legislation on the use of languages in judicial affairs is also based on these linguistic territories.[LVII] Two perspectives determine the rules in place: the institutional perspective, regarding the language requirements for judges, and the litigant's perspective, regarding the language of the process. The latter is discussed in Section 4. The first is discussed in this section, as the language requirements come down to linguistic quota with the purpose of a balanced representation of the major linguistic communities.

In Flemish districts, judges must have acquired their law degree in the Dutch language, whereas in French-speaking districts, they must have acquired their law degree in the French language.[LVIII] In the German-speaking district of Eupen, they must have acquired a law degree in French, and they have to give proof of their knowledge of the German language.[LIX]

In Brussels, specific arrangements are in place.

While the division in judicial districts in principle respects the language borders, there was traditionally one exception in place: the judicial district of Brussels and Halle-Vilvoorde, covering the bilingual area of Brussels as well as part of the Dutch-speaking territory. The judicial district coincided with the electoral district of Brussels-Halle-Vilvoorde, which was challenged by Flemish political parties and was eventually split as part of the sixth state reform.[LX] For the judicial district, a complex arrangement was implemented.

The office of the public prosecutor was split, with a Dutch-speaking prosecutor in Halle-Vilvoorde and a bilingual prosecutor in Brussels. This was more efficient, also because criminality in the Brussels capital is of a different type than criminality in the more residential area of Halle-Vilvoorde.[LXI] Part of the political agreement was that the prosecutor in Brussels was French-speaking – i.e. had acquired his or her degree in law in the French language - with profound knowledge of Dutch, and was assisted by a Dutch-speaking deputy prosecutor. The Constitutional Court, however, annulled the exclusion of a Flemish prosecutor in the bilingual district of Brussels for violation of the equality- and non-discrimination clause.[LXII] A number of French-speaking magistrates were detached to the office of public prosecution in Halle-Vilvoorde, to secure the continuation of cases that were brought to the French linguistic register. They are put under the authority of the Flemish prosecutor of Halle-Vilvoorde for the implementation of prosecution policy, but remain under the hierarchical authority of the Brussels prosecutor. This was contested by some Flemish politicians and the Flemish Bar, for fear of francophone intrusion in the Flemish office.[LXIII]

However, for the courts, the judicial district Brussels-Halle-Vilvoorde remained, but the courts (with the exception of the justice of the peace courts) were split in separate Dutch- and French-speaking courts with jurisdiction in both Brussels and Halle-Vilvoorde. The president of each court is required to have a profound knowledge of the other language. In the French- and the Dutch-speaking courts, one third of the magistrates has to be able to use both languages. Previously, two thirds of the magistrates had to be bilingual, but this required resulted in unfilled vacancies for French-speaking judges.[LXIV] The number of judges for Dutch- and French-speaking courts is to be determined on the basis of a workload assessment. The workload assessment, however, has not yet been accomplished. In the meantime, 80% of the judges in Brussels are allocated to the French-speaking courts and 20% to the Dutch-speaking courts, and a 60-40 ratio applies with regard to the commercial courts. The ratio was criticized as disproportional and leading to backlog before the Dutch-speaking courts. The Council of State, in an advisory opinion, noted that unreasonable delay resulting from a disproportional ratio would ultimately incur the lawmaker's liability.[LXV] Therefore, a monitoring committee was established, and additional judges can be temporarily detached to remedy delays.[LXVI]

In the supreme court, the Court of Cassation, language parity is the rule: half of the judges have acquired a law degree in Dutch, half in French.[LXVII] This has been criticized, mainly in Flemish circles, as parity does not reflect the workload.[LXVIII] For example, in the five-year period 2012-2016 the Court of Cassation pronounced 15,212 judgments, 57 percent of which in Dutch.[LXIX] However, as the Court's backlog is manageable, there is no political incentive to break the linguistic balance which includes linguistic parity in apex courts.

3.2. Administrative courts

The selection of administrative judges and the composition of the administrative courts differ for each specific administrative court. Therefore, we will only discuss the apex court: the Council of State. The Council of State consists of Councilors, the Auditor's Office, a Coordination Office and a Registry. This section focuses on the Councilors of State.

a. The selection of judges

The Councilors of State are appointed by the King (i.e. the Minister of Internal Affairs) from a list of three nominations by the Council of State. The Minister appoints the first ranked candidate, unless (s)he or the House of Representatives or the Senate refuse the nomination to avoid overrepresentation of judges originated from the Council's Auditor's Office. Also, the House or Senate may propose an alternative list of candidates.[LXX] Through the Senate, the sub-states play a marginal role in the selection of the Councilors of State.

b. The composition of the Council of State

The Council of State consists of 44 Councilors.[LXXI] As in the other apex courts, the composition is based on a linguistic parity: 22 Councilors are Dutch-speaking, the other half is French-speaking. The Council of State consists of a Legislation Section and the Administrative Litigation Section. The Legislation Section gives advisory on governmental drafts of federal and sub-state laws and government regulations or parliamentary drafts. The Administrative Litigation Section is the jurisdictional branch, acting as an abstract review court as well as the administrative supreme court. It consists of one bilingual bench, five Dutch-speaking benches and five French-speaking benches. Usually, the bench

consists of three Councilors. Exceptionally, cases are send to the general assembly, to secure unity of case law of the various benches. Nevertheless, observers have noticed that the French- and the Dutch-speaking benches develop divergent case law on a specific set of issues – although they emphasized that the number of divergences remains limited and is often the result of decisions in urgency procedures, decided by single councilors.[LXXII]

3.3. The Constitutional Court

a. The selection of judges

The judges of the Constitutional Court are selected by, alternately, the House of Representatives and the Senate by a two-third majority and appointed by a Royal Order.[LXXIII] In practice, however, the political parties in the governing coalition select the judges according to a proportional rotation plan within each language group.[LXXIV] While this selection process is very political in nature, the political ideologies represented in the Court balance each other out.

Proposal have been made to involve sub-states in the selection of the judges of the Constitutional Court.[LXXV] A concrete proposal was to let the federal government select half of the judges and to let the sub-states select the others. [LXXVI] It is, however, unclear whether the author envisaged the selection of a joint candidate by all sub-states, or a rotation plan amongst the sub-states, including the German-speaking Community. In the meantime, the Senate has transformed into a more genuine chamber of the sub-states. This way, the sub-states are involved in the selection process. Moreover, as political parties are region-based, the informal selection procedures secure the involvement of the major language groups.

b. The composition of the Constitutional Court

The Court is composed of twelve judges, with a double parity, based on language and professional background. Half of the judges are French-speaking, the other half is Dutch-speaking. Within each language group, half of the judges have a legal background, the other half has a political background: they have been a member of a federal or sub-state parliament for at least five years.

The functioning of the Court also reflects the importance of linguistic parity. Cases are decided in chambers of seven judges or in plenary sessions of ten or twelve judges. There is

always a linguistic parity, with the remaining judge in the chamber of seven alternating between the Dutch and the French language group. Two presidents are appointed, one from each language group. In plenary sessions, the tie-breaking vote rotates between the Dutch- and the French-speaking president on a yearly basis.[LXXVII] The emphasis on linguistic parity reveals once more that the dyadic nature of the Belgian federation based on linguistic communities is more important than representation of the territorial sub-state entities. Along with the absence of majority votes or dissenting and concurring opinions, linguistic parity is essential to ensure that the decisions of the Court are accepted on both sides of the language border. Recent empirical research shows that this institutional design has succeeded in eliminating the impact of ideological preferences of the individual judges in the resolution of federalism disputes.[LXXVIII]

4. Language regulations

4.1. Civil and criminal proceedings

In a divided state such as Belgium, based on linguistic conflict, the use of languages in public affairs is an important but sensitive matter. According to Art. 30 Constitution, the use of languages spoken in Belgium is optional; only an Act of Parliament can rule on this matter and only for acts of the public authorities and for judicial affairs. This provision dates from the original 1831 Constitution and was a reaction against the language policy of King William I of the United Kingdom of the Netherlands' policy of 'Dutchification'.[LXXIX] Through regulation of the use of languages in public and judicial affairs, the Belgian government, initially, tried to create a homogeneous French-speaking nation. With the rise of the Flemish Movement, however, the strategy turned towards the creation of (linguistically) homogeneous territories, with a Dutch-speaking, a French-speaking and a German-speaking linguistic territory, and one bilingual territory of Brussels. As homogeneity was not perfect, arrangements were made to protect linguistic minorities in so-called 'municipalities with language facilities', where residents, upon request, may in their communication with the authorities use another language (depending upon the territory, French, Dutch or German) instead of the language of the territory.

Initially, judicial proceedings as a rule were held in French. The sentencing to death of two Flemish workers in 1865, accused of murder in a language they did not understand,

brought about a public outrage that was buried in the first language law on the use of Dutch in criminal proceedings in Flanders in 1973. This law was limited to criminal proceedings in Flanders and still allowed for the use of French if the accused was considered to understand that language.[LXXX] In practice, the law did not bring about fundamental change. The Court of Cassation held that lawyers, themselves naturally educated in the French language, should employ the language understood by the judges. The Attorney-General considered the Dutch language 'an idiom, interesting perhaps from an archeological and philological perspective, but of minor use, limited to a small part of the world and varying, so to speak, from village to village'.[LXXXI] This changed in 1935, when the law on the use of languages in judicial affairs proclaimed the equality of French and Dutch in judicial proceedings and established the use of the language of the region.

In civil proceedings, the language of the region is used. In the bilingual Brussels region, French is used by the French courts and Dutch by the Dutch courts.[LXXXII] The defendant's place of residence determines the language of the proceedings. If the defendant lives in the bilingual region or does not reside in Belgium, (s)he may choose between Dutch and French as the language of the proceedings.[LXXXIII] In Flemish municipalities with linguistic facilities, the defendant may request the use of French in judicial proceedings.

In penal proceedings as well, the language of the region is used. The accused, however, may request translation of documents or transferal of the case to a court in another language region where proceedings are held in his or her language. In Brussels, the Dutch language is used if the accused lives in the Dutch-speaking region and the French language is used if (s)he lives in the French-speaking region; if the accused lives in the bilingual Brussels region, the language in which (s)he made statements during the judicial inquiry.[LXXXIV]

4.2 Administrative courts

In administrative courts as well, the language of the region is used. In this section, we only discuss the Council of State.

In principle, the language used by the Council of State, depends upon the language which the public authority whose decision is challenged, is required to use.[LXXXV] Specific regulations are in force for specific situations. For example, if the requesting party is a civil servant challenging a decision that affects his or her individual position, several criteria are

listed, in order of priority, to determine the use of the language, such as the unilingual status of the region where the civil servant exercises his or her office, his or her linguistic register, the language in which he or her sat for the entrance exam, the language of the degree on which his or her appointment was based or the language of his or her request.[LXXXVI]

If the parties before the Council of State are private persons, they may choose the language used in procedural acts and statements – unless (s)he is a candidate refugee: in that case, the language of the asylum claim, as determined by the law on the access to Belgian territory, applies. If needed, they may make use of a translator at the State's expenses.[LXXXVII] If the parties are administrations, they have to use the language imposed by the law on the use of languages in administrative affairs. Acts submitted in another language are void.[LXXXVIII]

Cases referred to the bilingual chamber are treated in both languages. Such referral is obligatory under certain circumstances, for example if several parties are involved resorting under different language systems.[LXXXIX]

Judgments are pronounced in the language in which the proceedings took place.[XC] They are also pronounced in German if the case concerns a person residing in the German-Speaking linguistic region and has requested the use of the German language.[XCI]

4.3. The Constitutional Court

Cases are brought before the Constitutional Court in Dutch, French or German,[XCII] but this does not determine the use of languages during the inquiry or the language used by the parties.

Individuals may choose to bring a case before the court in Dutch, French or German. Public persons that fall under the legislation on the use of languages in administrative affairs are obliged to use the language determined by this legislation. For example, sub-state governments use the language of their region; courts use the language in which they have to pronounce their judgments; the presidents of the federal chambers or the Brussels Parliament use both French and Dutch.[XCIII] Here as well, acts submitted in another language, are void.

The Court uses the language in which the case is brought,[XCIV] with two exceptions. First, if the case is brought before the Court in German or in both French and Dutch, the Court chooses the use of French or Dutch during its inquiry.[XCV] Second, if the petitioner – or a majority of petitioners[XCVI] – lives in a linguistic region without special language facilities, the Court uses the language of this linguistic region.[XCVII] If needed, acts are translated to French or Dutch.[XCVIII] Oral discussions before the Court are held in French, Dutch or German, with simultaneous translation.[XCIX]

Judgments are pronounced in both French and Dutch. The reasons and decision are published in the Official Gazette in French and Dutch, with a German translation. They are also pronounced in German in the case of annulment requests or if the case was brought before the Court in German.[C]

5. Conclusion

Unlike most other federal states, the Belgian federation has kept the organisation of the judiciary as a federal competence. The reasons are historical, principled, practical as well as political. First of all, Belgium is a devolutionary federation, which means that the federated entities did not have a judiciary in the first place and a transfer of judicial competence is part of state reform negotiations. Secondly, it was the constituent's choice to keep judicial dispute resolution uniform throughout the entire country. Next, practical considerations are linked with the fact that the Belgian federal system consists of two types of overlapping sub-states and that the Brussels Region and the German-speaking Community are considered unable to bear the costs of a separate judiciary. Finally, the claim for separate sub-state courts may be suspected of being part of a Flemish confederalist or even separatist agenda.

Meanwhile, some fragmentation has taken place, with sub-state competences related to several aspects of the judicial organisation, and a regularly used leeway for Communities and Regions to establish administrative courts. Moreover, the linguistic divide, which has inspired the construction of the Belgian dyadic federation, has also permeated the organisation of the judiciary. This is apparent in the composition of the three apex courts based on linguistic parity, the language legislation regarding both the appointment of judges and the judicial procedure, and the establishment of separate Dutch- and French-speaking

courts in Brussels. The result is institutional complexity, especially in Brussels, where the judicial districts are not identical with regard to courts on the one hand and public prosecution on the other. More fundamentally, the representation of the two major language groups appears more important than the involvement of the territorial subnational entities in the organisation of the judiciary.

In principle, however, the judiciary is still an exclusive federal competence. Several drawbacks have been reported as a result thereof. One drawback is that sub-states are unable to establish specialized courts to resolve conflicts in matters within their sphere of competence, whenever this need may rise, whereas the federal government may have no interest in doing so. Another is that a central organisation may have difficulties in accommodating differences in workload and preferences between the two major language groups. In this regard, it is claimed that judges do not sufficiently take into account legal sources written in another language than their own, and the split of the Bar in two separate Bars based on language is invoked to support a decentralisation claim. Further, linguistic requirements have resulted in unfilled vacancies, leading to delays, and uneven workload. Also, it is regretted that while dual federalism implies that the transfer of matters relates to both legislative and executive power, Communities and Regions do not have the power to enforce their own laws. Demands for sub-state powers in the field of the judiciary, however, are all situated within Flemish circles and is hardly debated at the francophone side.

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[I] Const. Court No. 14/97, 18 March 1997; No 81/2008, 27 May 2008.

[II] Art. 2, 4° Law on the openness of administration; Art. 35 Flemish Law on the openness of administration; Art. 6 Brussels Ordonnance on the openness of administration; Art. 2 French Community Law on the openness of administration; Art. 3, 3° Walloon Region Law on the openness of administration; Art. 2 Law of the German-speaking Community on the openness of administration.

[III] *Franco Suisse Le Ski*, Cass. 27 May 1971, *Pas.* 1971, I, 886.

[IV] The Constitutional Court is only able to review directly against provisions that allocate competences between the federal state and the federated states, or against provisions in title II (fundamental rights), Art. 172 (fiscal rights) and Art. 191 (equal treatment of foreigners on Belgian soil) of the Constitution.

[V] Art. 26 §4, 4° Special Majority Law on the Constitutional Court.

[VI] For an overview of this process, see P Popelier and K Lemmens, *The Constitution of Belgium*, Oxford, Hart, 2015, 18-32.

[VII] P Coenraets and E Mahon, 'Les transferts de compétences de l'autorité fédérale vers les communautés et les régions', in *Les réformes institutionnelles de 1993. Vers un fédéralisme achevé ?* (Brussels: Bruylant, 1994) 188; W Pas, 'A Dynamic Federation Built on Static Principles: The Case of Belgium', G.A. Tarr, R.F. Williams and J Marko, *Federalism, Subnational Constitutions and Minority Rights,* Westport, Connecticut: Praeger 2004), 160, 167.

[VIII] This is further elaborated in P Popelier, 'Zuständigkeitsteilung in Belgien: Kompetenzverteilung als Kennzeichen multinationalen Konfliktsmanagements', in A Gamper *et al.* (eds) *Federale Kompetenzverteilung in*

Europa (Baden-Baden, Nomos 2016) 142-148.
[IX] For an overview of all the relevant provisions, see J. Vanpraet, *De latente staatshervorming* (Bruges, die Keure 2011) 272-276.
[X] Const. Court No. 49/1993, 24 June 1993.
[XI] Art. 11 Special Majority Law on the reform of institutions.
[XII] For an overview of earlier proposals and practical arrangements, see W. Vandenbruwaene, 'Justitie: strafrechtelijk beleid, jeugdsanctierecht en justitiehuizen', in J. Velaers *et al.* (eds), *De zesde staatshervorming: instellingen, bevoegdheden en middelen* (Antwerp, Intersentia 2014) 300-301.
[XIII] Art. 151, § 1 Constitution and 11*bis* Special Law on the reform of institutions and an intrafederal cooperation agreement of 7 January 2014. For practical aspects, see Y Liègeois, 'Beschouwingen inzake de impact van de zesde staatshervorming op de werking van justitie', in J. Velaers *et al.* (eds), *De zesde staatshervorming: instellingen, bevoegdheden en middelen* (Antwerp, Intersentia 2014) 315-344.
[XIV] Art. 5, § 1, II, 6°, c Special Majority Law on the reform of institutions.
[XV] J. Vanpraet, *De latente staatshervorming* (Bruges, die Keure 2011) 282-283.
[XVI] Art. 6*quater* Special Majority Law on the reform of institutions.
[XVII] Art. 5, § 1, II, 8° and III Special Majority Law on the reform of institutions and the intra-federal cooperation agreement of 17 December 2013.
[XVIII] Art. 5, § 1, III Special Majority Law on the reform of institutions.
[XIX] Art. 6, §3*bis*, 4° Special Majority Law on the reform of institutions.
[XX] Const. Court No. 66/88, 30 June 1988; No. 4/93, 21 January 1993.
[XXI] E.g. Const. Court No 19/2001, 14 February 2001. For an overview, see V. Thiry, 'La défédéralisation de la justice: une pièce en trois actes', in *Liber amicorum Jo Stevens* (Bruges, die Keure 2011), 580-584.
[XXII] J. Vanpraet, *De latente staatshervorming* (Bruges, die Keure 2011) 270.
[XXIII] J. Vanpraet, *De latente staatshervorming* (Bruges, die Keure 2011) 271.
[XXIV] For an overview of political documents, see L. Deconinck 'Rechterlijke organisatie en justitie in het federale België', in *Liber Amicorum Ludovic De Gryse* (Brussels, Larcier 2010) 555.
[XXV] F. Judo, 'Justitie in de zesde staatshervorming' (2011) *Tijdschrift voor Bestuurswetenschappen en Publiekrecht* 516.
[XXVI] Proposals are often made by persons with a Flemish-nationalist affiliation, even in scholarly debates. For example, Matthias Storme has been member of the city Council of Gent for the flemish-nationalist party N-VA and is a member of the party executive committee.
[XXVII] L.M. Anderson, 'The Institutional Basis of Secessionist Politics: Federalism and Secession in the United States', (2004) 34 *Publius* 2004, 7-10. See also J. McGarry and O´Leary, 'Federation and managing nations', in M. Burgess and J. Pinder, *Multinational Federations* (Abingdon, Routledge, 2007) 192.
[XXVIII] As noted by L. Deconinck 'Rechterlijke organisatie en justitie in het federale België', in *Liber Amicorum Ludovic De Gryse* (Brussels, Larcier 2010) 554. V. Thiry, 'La défédéralisation de la justice: une pièce en trois actes', in *Liber amicorum Jo Stevens* (Bruges, die Keure 2011), 575 reports that in francophone circles the Flemish debate is regarded with 'astonishment'.
[XXIX] B. Bouckaert, 'Defederalisering van de Belgische justitie? Een rechtseconomische overvlucht', in M Taeymans (ed), *Defederalisering van justitie,* Brussel, Larcier, 2003, 41-42; L. Deconinck 'Rechterlijke organisatie en justitie in het federale België', in *Liber Amicorum Ludovic De Gryse* (Brussels, Larcier 2010) 557; M.E. Storme, 'Een Vlaamse justitie?', (2001) *Rechtskundig Weekblad* 1118; P. Van Orshoven, 'Defederalisering van de rechtspraak', in A. Van Oevelen *et al.* (eds), *Hulde aan Prof. Dr. Jean Laenens* (Antwerp, Intersentia 2008) 363.
[XXX] R. Landuyt, 'De federalisering van de Belgische justitie', in B. Timmeman en A. Verbeke (eds), *Actualia Vermogensrecht. Liber Alumnorum Kulak* (Brugge, die Keure 2005) 716. P. Van Orshoven, 'Defederalisering van de rechtspraak', in A. Van Oevelen *et al.* (eds), *Hulde aan Prof. Dr. Jean Laenens* (Antwerp, Intersentia 2008) 363 suggests that mainly francophone judges have no or insufficient knowledge of the other language.
[XXXI] M.E. Storme, 'Een Vlaamse justitie?', (2001) *Rechtskundig Weekblad* 1118.
[XXXII] R. Landuyt, 'De federalisering van de Belgische justitie', in B. Timmeman en A. Verbeke (eds), *Actualia Vermogensrecht. Liber Alumnorum Kulak* (Brugge, die Keure 2005) 716.
[XXXIII] R. Landuyt, 'De federalisering van de Belgische justitie', in B. Timmeman en A. Verbeke (eds), *Actualia Vermogensrecht. Liber Alumnorum Kulak* (Brugge, die Keure 2005) 719.
[XXXIV] The federal authorities, the Brussels Region, the Flemish Community, the French Community, the Joint Community Council and the French Community Council all have legislative competences in the Brussels territory of 121 km². See also K Rimanque, 'De organisatie van de rechtsbedeling in federale staten: een bevoegdheid voor de deelstaten? Vergelijkend overzicht en mogelijkheden in België', in M Taeymans (ed),

Defederalisering van justitie, Brussel, Larcier, 2003, 24-25; M.E. Storme, 'Een Vlaamse justitie?', (2001) *Rechtskundig Weekblad* 1117; M. Storme, 'De defederalisering van het gerecht in België', in M Taeymans (ed), *Defederalisering van justitie,* Brussel, Larcier, 2003, 59-60; and L. Deconinck 'Rechterlijke organisatie en justitie in het federale België', in *Liber Amicorum Ludovic De Gryse* (Brussels, Larcier 2010) 557. See, however, more nuanced M. Storme, 'De defederalisering van het gerecht in België', in M Taeymans (ed), *Defederalisering van justitie,* Brussel, Larcier, 2003, 63.

[XXXV] M.E. Storme, 'Een Vlaamse justitie?', (2001) *Rechtskundig Weekblad* 1117-1119; P. Van Orshoven, 'Defederalisering van de rechtspraak', in A. Van Oevelen *et al.* (eds), *Hulde aan Prof. Dr. Jean Laenens* (Antwerp, Intersentia 2008) 364-365.

[XXXVI] B. Bouckaert, 'Defederalisering van de Belgische justitie? Een rechtseconomische overvlucht', in M Taeymans (ed), *Defederalisering van justitie,* Brussel, Larcier, 2003, 35; P. Van Orshoven, 'Defederalisering van de rechtspraak', in A. Van Oevelen *et al.* (eds), *Hulde aan Prof. Dr. Jean Laenens* (Antwerp, Intersentia 2008) 365. L. Deconinck 'Rechterlijke organisatie en justitie in het federale België', in *Liber Amicorum Ludovic De Gryse* (Brussels, Larcier 2010) 554 that asymmetry in this matter is not unusual.

[XXXVII] K Rimanque, 'De organisatie van de rechtsbedeling in federale staten: een bevoegdheid van oor de deelstaten? Vergelijkend overzicht en mogelijkheden in België', in M Taeymans (ed), *Defederalisering van justitie,* Brussel, Larcier, 2003, 28-29.

[XXXVIII] M. Storme, 'De defederalisering van het gerecht in België', in M Taeymans (ed), *Defederalisering van justitie,* Brussel, Larcier, 2003, 63.

[XXXIX] R. Landuyt, 'De federalisering van de Belgische justitie', in B. Timmeman en A. Verbeke (eds), *Actualia Vermogensrecht. Liber Alumnorum Kulak* (Brugge, die Keure 2005) 721.

[XL] P. Van Orshoven, 'Defederalisering van de rechtspraak', in A. Van Oevelen *et al.* (eds), *Hulde aan Prof. Dr. Jean Laenens* (Antwerp, Intersentia 2008) 365-366.

[XLI] L. Deconinck 'Rechterlijke organisatie en justitie in het federale België', in *Liber Amicorum Ludovic De Gryse* (Brussels, Larcier 2010) 558.

[XLII] W. Vandenbruwaene, 'Justitie: strafrechtelijk beleid, jeugdsanctierecht en justitiehuizen', in J. Velaers *et al.* (eds), *De zesde staatshervorming: instellingen, bevoegdheden en middelen* (Antwerp, Intersentia 2014) 296.

[XLIII] R. Landuyt, 'De federalisering van de Belgische justitie', in B. Timmeman en A. Verbeke (eds), *Actualia Vermogensrecht. Liber Alumnorum Kulak* (Brugge, die Keure 2005) 716; K Rimanque, 'De organisatie van de rechtsbedeling in federale staten: een bevoegdheid van oor de deelstaten? Vergelijkend overzicht en mogelijkheden in België', in M Taeymans (ed), *Defederalisering van justitie,* Brussel, Larcier, 2003, 25.

[XLIV] Art. 78, §1, 4° Constitution.

[XLV] E.g. Const. Court No. 49/2003, 30 April 2003; Const. Court No. 8/2011, 27 January 2011.

[XLVI] Const. Court No. 8/2011, 27 January 2011. Critical: V. Thiry, 'La déféderalisation de la justice: une pièce en trois actes', in *Liber amicorum Jo Stevens* (Bruges, die Keure 2011), 585.

[XLVII] J. Vanpraet, *De latente staatshervorming* (Bruges, die Keure 2011), 305.

[XLVIII] R. Landuyt, 'De federalisering van de Belgische justitie', in B. Timmeman en A. Verbeke (eds), *Actualia Vermogensrecht. Liber Alumnorum Kulak* (Brugge, die Keure 2005) 720.

[XLIX] M. Storme, 'De defederalisering van het gerecht in België', in M Taeymans (ed), *Defederalisering van justitie,* Brussel, Larcier, 2003, 67-74.

[L] M. Storme, 'De defederalisering van het gerecht in België', in M Taeymans (ed), *Defederalisering van justitie,* Brussel, Larcier, 2003, 70-72; 85-87.

[LI] Art. 151, § 4 Constitution.

[LII] Art. 151, § 4 Constitution.

[LIII] Art. 151, § 3 Constitution.

[LIV] Art. 259*bis*1 Judicial Code.

[LV] Art. 151, § 2 Constitution.

[LVI] Art. 4 Constitution.

[LVII] See further, Section **xx**

[LVIII] Art. 43 Law on the use of languages in judicial affairs.

[LIX] Art. 45*bis* on the use of languages in judicial affairs.

[LX]

[LXI] B. Van Lerberghe, 'De hervorming van het gerechtelijk arrondissement Brussel', (2012-13) *Rechtskundig Weekblad* 1683.

[LXII] Const. Court No 96/2014, 30 June 2014.

[LXIII] B. Van Lerberghe, 'De hervorming van het gerechtelijk arrondissement Brussel', (2012-13) *Rechtskundig Weekblad* 1685-1686.
[LXIV] B. Van Lerberghe, 'De hervorming van het gerechtelijk arrondissement Brussel', (2012-13) *Rechtskundig Weekblad* 1691.
[LXV] Council of State, Advice of 3 May 2012, *Parl.Doc.* House of Representatives 2011-2012, No. 53-2140/002, at p. 23. Earlier, the Court of Cassation had rules that the Belgian State can be held liable for faults and omissions by Parliament, aiming at the legislation that resulted in unfilled vacancies for French-speaking judges in Brussels, Cass. **Citeer.** The provision was challenged before the Constitutional Court, but the Court did not go into the ground of the matter, Const. Court No 96/2014, 30 June 2014.
[LXVI] B. Van Lerberghe, 'De hervorming van het gerechtelijk arrondissement Brussel', (2012-13) *Rechtskundig Weekblad* 1693.
[LXVII] Art. 43*quater* Law on the use of languages in judicial affairs.
[LXVIII] Amongst others: B. Bouckaert, 'Defederalisering van de Belgische justitie? Een rechtseconomische overvlucht', in M Taeymans (ed), *Defederalisering van justitie,* Brussel, Larcier, 2003, 51; K Rimanque, 'De organisatie van de rechtsbedeling in federale staten: een bevoegdheid van oor de deelstaten? Vergelijkend overzicht en mogelijkheden in België', in M Taeymans (ed), *Defederalisering van justitie,* Brussel, Larcier, 2003, 26.
[LXIX] Based on the data in Court of Cassation, *Annual report 2016* (Brussels, 2017) 220.
[LXX] Art. 70, § 1 coordinated laws on the Council of State.
[LXXI] Art. 69 coordinated laws on the Council of State.
[LXXII] B. Lombaert, F. Vandendriessche and S. Devos, 'Divergences de juriprudence entre les chambres de langue française et de langue néerlandaise du Conseil d'Etat: y a-t-il deux Conseilds d'Etats en Belgique?', in C. De Koninck *et al.* (eds) *Chroniques des marchés publics 2009-2010* (Brussels, E.B.P.) 365-395 discuss examples in the domain of public procurements.
[LXXIII] Art. 32 Special Majority Law on the Constitutional Court.
[LXXIV] M Bossuyt, *Séparation des pouvoirs et indépendance des cours constitutionnelles et instances équivalentes*, Report for the Belgian Court at the Second World Congress of Constitutional Courts, Rio de Janeiro, 16-18 January 2011, at p. 7, available at http://www.venice.coe.int/WCCJ/Rio/Papers/BEL_Cour_constitutionnelle_F.pdf (accessed 14 September 2017); S Graeziadei, 'Power Sharing Courts', (2016) 3 *Contemporary Southern Europe* 1, 80.
[LXXV] L. Deconinck 'Rechterlijke organisatie en justitie in het federale België', in *Liber Amicorum Ludovic De Gryse* (Brussels, Larcier 2010) 558; R. Landuyt, 'De federalisering van de Belgische justitie', in B. Timmeman and A. Verbeke (eds), *Actualia Vermogensrecht. Liber Alumnorum Kulak* (Bruges, die Keure 2005) 721.
[LXXVI] M. Storme, 'De defederalisering van het gerecht in België', in M Taeymans (ed), *Defederalisering van justitie* (Brussels, Larcier, 2003) 73.
[LXXVII] Art 32 Special Majority Law on the Constitutional Court.
[LXXVIII] P. Popelier and S. Bielen, 'How Courts decide Federalism Disputes: the Revaluation of Legal Merit in the Jurisprudence of the Belgian Constitutional Court' (under review).
[LXXIX] S. Van der Jeught, 'Territoriality and freedom of language: the case of Belgium', (2017) 18 *Current Issues in Language Planning* 183.
[LXXX] S. Van der Jeught, 'Territoriality and freedom of language: the case of Belgium', (2017) 18 *Current Issues in Language Planning* 184.
[LXXXI] For an overview, quotes and references, see R. Janssens, 'Het Hof van Cassatie van België – Enkele hoofdmomenten van zijn ontwikkeling', (1977) 95 *Tijdschrift voor Geschiedenis* 99-101.
[LXXXII] Art. 2 and 3 Law 1935 on the use of languages in judicial affairs.
[LXXXIII] Art. 4 Law 1935 on the use of languages in judicial affairs.
[LXXXIV] For details, see B. Van Lerberghe, 'De hervorming van het gerechtelijk arrondissement Brussel', (2012-13) *Rechtskundig Weekblad* 1689-1690.
[LXXXV] Art. 52-53 coordinated laws on the Council of State.
[LXXXVI] Art. 54 coordinated laws on the Council of State.
[LXXXVII] Art. 66 coordinated laws on the Council of State.
[LXXXVIII] Art. 65 coordinated laws on the Council of State.
[LXXXIX] Art. 61-62 coordinated laws on the Council of State.
[XC] Art. 63 coordinated laws on the Council of State.
[XCI] Art. 63 coordinated laws on the Council of State.

[xcii] For more details, see M-F Rigaux and B Renauld, *La Cour Constitutionnelle* (Brussels, Bruylant 2008) 265-266.
[xciii] Art. 62 Special Majority Law on the Constitutional Court.
[xciv] Art. 63, § 1 Special Majority Law on the Constitutional Court.
[xcv] Art. 63, § 2 Special Majority Law on the Constitutional Court.
[xcvi] M-F Rigaux and B Renauld, *La Cour Constitutionnelle* (Brussels, Bruylant 2008) 272.
[xcvii] Art. 63, § 3 Special Majority Law on the Constitutional Court.
[xcviii] Art. 63, § 4 Special Majority Law on the Constitutional Court.
[xcix] Art. 64 Special Majority Law on the Constitutional Court.
[c] Art. 65 Special Majority Law on the Constitutional Court.

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The Judiciary in Federal Systems in Africa

by

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Abstract

Eight states in Africa that have federal or federal-type government systems and most of these federations emerged in the post-Cold War period. The African federations are in various degrees characterised by a limited extent of self-rule and the concentration of power at the centre. The question this article addresses is whether, and if so, how, the federal character of the state organisation impacts on the administration of justice. In other words, is the judicial branch of government also part of the federal arrangements, and if so, how has that been manifested? Four sub-questions are posed in this regard. First, does the structure of the judicial institutions also follow the vertical division of powers between the central and subnational governments? Secondly, given the non-centrist or centrist structure of the courts, how are judges appointed? Thirdly, as language and ethnic diversity are often the key reasons for the establishment of federal arrangements, how is the language question dealt within in the administration of justice? Finally, what role have the courts played in realisation of the federal character of the state?

Key-words

Africa, federalism, judicial pluralism, language and ethnic diversity

1. Introduction

There are eight states in Africa that have federal or federal-type government systems and most of these federations emerged in the post-cold period; South Africa (1994); Ethiopia (1995); Nigeria (1999, re-establishing earlier federal constitutions); the Comoros (1996, 2001); the Democratic Republic of Congo (2005); the Sudan (2005), Kenya (2010); South Sudan (2011) and Somalia (2012). Federal system in these countries was adopted mostly as an institutional response to the challenges of inter-ethnic conflicts. The African federations are in various degrees characterised by a limited extent of self-rule and the concentration of power at the centre. The key characteristics of this style of federalism are: the fracturing of subnational governments into small units; a limited devolution of powers (mainly through concurrent powers which are then dominated by the centre); centralising taxing powers and rendering subnational governments dependent on transfers; the central dominance of intergovernmental relations; and intervention powers.[I]

The question this article addresses is whether, and if so, how, the federal character of the state organisation impacts on the administration of justice. In other words, is the judicial branch of government also part of the federal arrangements, and if so, how has that been manifested. Four sub-questions are posed in this regard:

First, does the structure of the judicial institutions also follow the vertical division of powers between the central and subnational governments? The organisation and functions of a judiciary in a federal system may take one or a combination of two approaches; non-centralised (which includes dualist model) or centralised approaches.[II] In the first case courts are established at a federal and state levels. The courts at each level of government exercise judicial functions on matters that are within the exclusive legislative competences of the relevant level of government. Hence state courts decide cases based on state laws and federal courts entertain cases having federal elements. In the dualist model state courts have a final say on state matters while federal courts have final decision-making powers on federal matters.[III] In a centralised (or unitary) approach, judicial functions are essentially a national competence. The constitution establishes a single judiciary which is funded by the federal government. Courts in such federations have only deconcentrated branches at subnational level and these are not considered to be the third branch of the latter. Cheryl

Saunders also makes similar distinctions between three categories: a dualist system, where there is no link between the federal and state judiciaries; an integrated system where there are some linkages between the two distinct levels of courts; and a single judicial authority which resides under the central government.[IV] For her, the US is an example of a dual system, Germany, Canada, Nigeria and India of an integrated system, while South Africa is of a single court authority system.[V] For the purposes of this essay, we use the broad distinction between a non-central and a centrist (single judicial authority) systems. Given these models, what model(s) prevail among the four 'federations', and what are the consequences of such model(s) in practice?

Secondly, given the non-centrist or centrist structure of the courts, how are judges appointed? In the non-centrist system, does the centre play any role in the appointment of the judiciary as the subnational level? Conversely, do subnational governments in centrist system have a say in the appointment of judges functioning in their territory?

Thirdly, as language and ethnic diversity are often the key reasons for the establishment of federal arrangements, how is the language question dealt within in the administration of justice?

Finally, what role have the courts played in realisation of the federal character of the state? Have courts in non-centrist systems been more protective of federalism or devolution than those in a unitary system? What does their jurisprudential record suggest? Any such role, however, is premised on the practice of judicial independence.

This contribution seeks to answer these questions with reference to the four-major federal/federal-type systems in Africa, i.e. Nigeria, Ethiopia, Kenya and South Africa. The essay argues, first, that Kenya and South Africa, reflecting the general ethos of their centralised federations, have established unitary judicial systems. In these countries, the judiciary is firmly a national function. On the other hand, Ethiopia and Nigeria have federalised court structures; the judicial function is split between the centre and subnational government. However, the non-centralism of the judicial system in these two federations does not produce end result a very distinctive from South Africa's and Kenya's centrist system. Secondly, the non-centrist system in Nigeria and Ethiopia does not preclude federal involvement in the appointment of the state judiciary. In both a non-centrist (Nigeria) and a unitary system (South Africa), subnational governments can play a role in the appointments of federal/national judiciary through the second house of Parliament.

Thirdly, apart from Ethiopia, the other three countries display a strong unitary character in allowing one official court language. Finally, although the federal jurisprudence of the apex courts (excluding Ethiopia, where a political body is the final interpreter of the Constitution) may in Nigeria and South Africa tend towards favouring the centre, their independence from the executive is more important for the survival of the federal systems.

The article analyses the judiciary in Ethiopia followed by Nigeria, Kenya and South Africa with reference to the four questions. It concludes with a few comparative observations.

2. The Ethiopian federal system

Ethiopia is federal country made up of nine states and two federal cities.[VI] Underpinned by the need to manage the ethnic diversity of the Ethiopian people, the boundaries of the states are delineated along ethnic lines. None of the states is however ethnically homogenous. Indeed, only five of them have a numerically dominant ethnic community[VII] while the rest have none. The Constitution envisages that intra-regional ethnic diversity would be territorially managed at the local level. Hence, five multi-ethnic states have established ethnic-based sub-regional units called special *woredas* and special (ethnic) zones.[VIII]

The Ethiopian federal system is often referred to as a dual federal system in that it divides political, administrative, and financial as well as judicial powers between the federal and state governments.[IX] This duality is however vapid since the balance in the constitutional division of power between the federal government and the states decidedly tilts in favour of the former. The Constitution contains a long list of federal exclusive competences - 22 broadly defined items. It leaves residual powers to the states over and above the short list of exclusive state competences it contains. Yet the Constitution provides the federal government with a significant leeway allowing it to assume most of the state competences thereby taming the duality of the federal system.[X] This is also reflected in the manner that the federal and state judicatures are structured and function.

2.1. Structure and jurisdiction of courts

The court structure is as a rule based on the principle of duality at federal and state levels and each exists side by side.[XI] The Constitution establishes the federal Supreme Court and authorises Parliament to establish federal high and first instance courts in some or all parts of the country, a decision that Parliament has to approve with a special majority.[XII] The Constitution also explicitly provides that each state would have a supreme court, a high court and courts of first instance.[XIII] Although proceeding from a base of duality, the structure and functions of the federal and state courts also show some degree of integration. The federal government has established federal first instance and high courts in the two federal cities since the latter do not have constitutionally defined judicial powers. It has also issued a proclamation establishing federal high courts in Afar, Somali, the Southern Nations, Nationalities and Peoples' Region (SNNPR), Benishangul-Gumuz, and Gambella states.[XIV] However, in the states where the federal government has not established federal courts, state high courts and states supreme courts are constitutionally authorised to assume the jurisdictions of the federal first instance and high courts, respectively.[XV]

The Constitution also contains a principle of duality in the jurisdictional division of federal and state courts. Federal courts are empowered to resolve disputes relating to federal matters using federal laws and international treaties whereas state courts are empowered to resolve legal disputes relating to states matters, based on state laws.[XVI] This means federal courts have exclusive jurisdiction on most criminal matters, except those that are covered by state laws. State courts have exclusive jurisdiction on most civil matters relating to family, succession, property and the like, with the exception of the ten items that are listed under Article 5 of Proclamation 25 (1996).[XVII] In the two federal cities, the federal courts exercise jurisdiction on all federal matters and on matters that are, under the Constitution, listed as state competences, including those relating to family and succession. The federal Supreme Court has the power to provide a final and authoritative interpretation on specific provisions of a federal law.[XVIII] To this extent the dual federal principle is reflected in the functional jurisdiction of the federal and state courts.

The Constitution provides that a state supreme court has 'the highest and final judicial power over State matters'.[XIX] Article 80(3) of the Constitution also provides that a state supreme court has a power of cassation on the interpretation of a state law. It is however

unclear whether a state Supreme Court has the last word on the interpretation of a specific provision in a state law since the Constitution also provides that the federal Supreme Court has 'power of cassation *over any final court decision* containing a basic error of law'. Moreover, Article 10 of Proclamation 25 (1996), the Proclamation establishing federal courts, provides that the Cassation Division of the Federal Supreme Court has power of cassation on final decisions of the [state] Supreme Court that the latter rendered as a regular division or in its appellate jurisdiction.

There are two opposing arguments on the issue above. The first argument is that the phrase '*over any final court decision'* implies that the power of cassation of the federal Supreme Court extends to reviewing decisions of a state supreme court, including those of the cassation divisions of a state supreme court.[XX] The other argument is that the aforementioned phrase, viewed in light of the dual federal principle, should be construed to mean only a final decision of federal courts or a decision of a state court that the latter passed in its capacity as a federal court. This argument further goes that Article 10 of Proclamation 25 (1996) does not explicitly authorise the federal Supreme Court to review the decision of the cassation division of state supreme courts. It simply states that the federal Supreme Court can review the decisions of a state supreme court that the latter passed 'as a regular division or in its appellate jurisdiction'. This refers, so the argument goes, to a decision that a state Supreme Court passed on federal matter in its capacity as a federal high court. The cassation division of a state supreme court thus has a final say on the interpretation of state laws.

In light of the dual federal principle, the second argument seems to be more convincing. However, practice shows that the Cassation Division of the Federal Supreme Court reviews decisions of the cassation divisions of state supreme courts. One can thus approach the Federal Supreme Court if he/she can show *prima face* case that a state supreme court, including the cassation division of the state supreme court, has made basic error in interpreting a specific provision in a state law.[XXI]

The power to resolve constitutional disputes is arguably within the exclusive jurisdiction of the House of Federation (HoF). There is little agreement regarding whether federal courts can use the Constitution to resolve legal disputes. Some argue federal courts can do so even though they cannot make a final and authoritative pronouncement on constitutional issues. Others maintain federal courts can use only ordinary federal laws, and

never the Constitution, to resolve legal disputes. In practice, the courts hardly invoke the constitution to decide cases.[XXII] Likewise, the power to interpret state constitutions is entrusted in an organ called Constitution Interpretation Commission (CIC). In the SNNP, the power to interpret the state constitution belongs to the Council of Nationalities, the second chamber of the state council and a mirror image of the HoF. While the HoF has dealt with several constitutional matters, the practice with respect to the interpretation of state constitutions is unclear.

2.2 Appointment of judges

The manner in which judges of federal and state courts are nominated and appointed shows both elements of federal duality and integration. The final say on the appointment of judges of federal courts resides in the House of People Representatives (HoPRs) while state councils have final decision-making power on the appointment of judges of state courts. To this extent the appointment of judges of federal and state courts is based on duality. However, as will be seen below, the involvement of the Federal Judicial Administration Council (FJAC) in the appointment of judges of state courts brings about an element of fusion.

The Constitution implicitly provides that there would be an FJAC which would have the power to nominate persons who it deems are suitable for appointment as federal judges. The Constitution, while implying its establishment, is silent on who its members are and how they are appointed. This is regulated by a federal law which provides that the FJAC would be composed of the presidents of the three federal courts, the vice president of the Supreme Court, three members of Parliament, a Minister of Justice, a judge representing the three federal courts, a law professor of a higher education institution and a distinguished citizen.[XXIII] Clearly the states do not have representation in the FJAC.

The FJAC hence submits a list of its nominees to the Prime Minister (PM) and the latter in turn submits the names of the nominees to HoPRs for confirmation.[XXIV] The PM seems to have the discretion not to submit to the HoPRs the names of some or all of those that the FJAC nominates. He/she cannot, however, submit his own list of nominees. The PM has the authority to nominate the president and vice presidents of the Federal Supreme Court who would then be appointed by the HoPR.[XXV]

The Constitution also provides that a State Judicial Administration Council (SJAC) would be established in each state with the power to nominate judges of state courts and submit the names of the nominees to a state council.[XXVI] The Constitution does not envisage the involvement of a regional president in the appointment of judges of state courts since the SJAC is authorised to directly submit the names of its nominees to the state council (legislature). He/she is however authorised to appoint the president and vice president of the state supreme court subject to confirmation by the state council.[XXVII] A SJAC has the obligation to seek the opinion of the FJAC regarding its nominees for judgeship of state high and supreme courts.[XXVIII] The SJAC is also required to disclose to the state council the FJAC's opinion, if any, regarding the nominees.[XXIX] The FJAC is hence involved in the appointment of judges of state courts. This brings an element of fusion in the judicial federalism even though the FJAC does not seem to have more power than giving its opinion on the nominees of the SJAC. The opinion of the FJAC on the SJAC's nominees is required seemingly because, as was indicated above, state high and supreme courts also act as federal first instance and high courts respectively. Yet, there is nothing in the Constitution that relieves the SJAC from consulting the FJAC even when the federal government establishes its own first instance and high courts in the state. This clearly tames the duality in the structuring and functioning of federal and state courts.

The state constitutions establishing special *woredas* and zones (ethnic local government units) provide that special *woredas* and zones should be consulted regarding the appointment of judges who would be presiding in state first instance and/or high courts having jurisdiction in the territorial areas of the special *woreda* or zone.[XXX] This reflects the fact that the federal system is underpinned by accommodation of ethnic diversity.

2.3 Language

Amharic (*Amharigna*), a language that is supposedly spoken by about 70 percent of the Ethiopian population, is constitutionally designated to be the working language the federal government.[XXXI] The Constitution allows the states to choose and adopt their own working languages.[XXXII] Accordingly Afar, Amhara, Oromia, Somali and Tigray each has decided to use the language of the ethnic community that is in majority in it. The other four states have opted to use Amharic as their working language. The working language of the federal government is by default the working language of federal courts while the working

language of a state also serves as the working language of the state's courts. The federal and state governments, except the Hareri region, are monolingual in a sense each has only a single working language. The same is, therefore, true to federal and state courts.

It is unclear whether a state Supreme Court and high courts are required to use Amharic for hearing and deciding cases when acting as a federal high court. Practice shows that state courts use the working language of the relevant state government when hearing both state and federal matters. The whole proceeding is translated to Amharic if and when the case is taken on appeal to the federal Supreme Court or its Cassation Division. As stated above, some of the special *woredas* and zones, especially those in the Amhara and SNNP states, have adopted local working languages. It is unclear whether a state first instance and high courts that exercises jurisdiction in the special *woredas* and zones, have to use the working language of the latter in their proceedings. However, even if that is the case, state laws are hardly ever translated into sub-state official languages.

Regardless of the language that a state court uses for administering justice, the Constitution recognises the rights of an arrested person to be informed of the reason of his/her arrest and his/her right to remain silent in the language he/she understands. It also recognises the right of an accused person, if he/she seeks, to receive the assistance of an interpreter at the state's expense.[XXXIII]

2.4 Federal jurisprudence

It is often assumed that the regular courts of a federation would give 'shape and texture' to the federal system when they are established based on federal duality. They do so by simply applying the laws of their coordinate legislatures and by interpreting the constitutions of the relevant level of government.[XXXIV] As indicated above, the Ethiopian courts are established principally based on federal duality. The Ethiopian federal and state courts have however played a minimal role in terms of developing federal jurisprudences or giving shape and texture to the Ethiopian federal system.[XXXV] There is barely any decision that the court passed impacting the federal system. There are several factors hindering the courts from playing any role in this regard. As indicated above, state courts in Ethiopia do not have the final word on the interpretation of state laws since their decisions are reviewed by the Cassation Division of the Federal Supreme Court. A study by Yonatan Fessha and Zemelak Ayele shows that the Cassation Division of the Federal Supreme

Court has reversed over 60 per cent of the cases that state supreme courts or their cassation divisions decided based on state laws.[XXXVI] By insisting on uniformity, the Federal Supreme Court has thus undermined the role that state courts could have played in terms of giving 'shape and texture' to the federal system by interpreting state laws. Moreover, as stated above, state courts do not have the authority to interpret, even to refer to, state constitutions. Their decisions are thus often found to be inconsistent with certain constitutional principles or individual rights that are guaranteed in the Bill of Rights of the federal Constitution; inconsistencies that the state courts could have avoided by simply referring to the bills of rights in state constitutions.

The federal courts also play minimal role in terms of judicially impacting the federal system since they are not empowered to apply the federal Constitution to resolve legal disputes. Moreover, despite the constitutional guarantees to this effect,[XXXVII] state and federal courts lack institutional independence and the judges lack personal independence which are critical for developing federal jurisprudence. The Ethiopian courts operate in a political context which is dominated by a single party, EPRDF. There is thus a general perception that judges both at federal and state level lack personal independence since they are allegedly appointed and dismissed based on political consideration and that the judges often face interferences by politicians.[XXXVIII]

2.5. Concluding remarks

Ethiopia has a dual federal system in which government is organised at federal and state level. The duality of the federal system is also reflected in the manner that the regular courts are structured and their jurisdictions are delimited. The duality is not however perfect since the state courts also entertain federal cases and that the FJAC is involved in the appointment of judges of state courts. Most importantly the decision of the highest state court is reviewed by the federal Supreme Court. Indeed, state courts serve the purpose of accommodating the linguistic diversity in the country. However, the fact that they have no final say on state matters and that their final decisions are reviewed by federal courts render state courts largely redundant.

3. Nigeria

Nigeria has been a federation since it attained independence in 1962, which makes it the oldest federation in Africa. The country has lurched back and forth between democracy and military rule until, in 1999, it returned again to civilian rule. The Nigerian federation is composed of 36 states, a federal capital territory (FCT), Abuja, and a federal government. The Nigerian Constitution allocates an extensive list of exclusive powers to the federal government, while the states are endowed with the residual powers as well as a list of powers shared with the federal government. The Nigerian federal system is viewed as overly centralised, a legacy of the military rule the country underwent for over four decades.[XXXIX] As will be discussed below, features of centralisation are also reflected in the manner that the judiciary is structured and functions.

3.1. The structure and jurisdiction of courts

The judiciary in Nigerian reflects the duality of the country's federal system in that there are courts that are established for the federation as well as those that are established for the states.[XL] The federal and state courts are as a rule separate and exist side by side and exercise judicial functions on matters that are assigned to the federal government and the states, respectively. At the apex of the federal judiciary is the Federal Supreme Court.[XLI] A Court of Appeal and a Federal High Court are established below the Supreme Court. The High Court, Sharia Court of Appeal and the Customary Court of Appeal are also considered parts of the federal judicature.[XLII]

The highest judicial organs at state level are a state High Court, a state Sharia Court of Appeal, and a state Customary Court of Appeal.[XLIII] These three judicial offices are of equal rank but apply different laws for resolving cases. The states and the FCT are also authorised to establish 'lower courts' such as magistrates and customary courts. However, 'the lower courts' do not have constitutional recognition or protection.[XLIV] The magistrates and the *kadis* of the lower courts are not considered a part of what the Constitution refers to as 'judicial officer'.

As a rule, federal courts are expected to exercise jurisdiction on federal matters while state courts are expected to exercise jurisdiction on matters that are assigned to the states.[XLV] The dual judicial federalism that is envisaged under the Constitution is however

much more moderated since 'there is a greater degree of interdependence between the [federal and state government] in relation to the judiciary… than in relation to the legislative and executive branches'.[XLVI] For instance, the Constitution authorises state courts to hear cases relating to federal matters[XLVII] thereby extending the judicial powers of state courts 'to justiciable matters arising under laws made by the National Assembly'. This, however, excludes those federal matters that are designated as original jurisdiction of one of the federal courts.[XLVIII] For instance, the Supreme Court has original and exclusive jurisdiction over disputes between governments. The Court of Appeal has original jurisdiction on matters relating to presidential elections. The Federal High Court has original jurisdiction over a long list of federal matters. State courts can thus hear cases relating to federal matters unless those matters are within the original and exclusive competence of one of the federal courts.

On the other hand, the Nigerian Constitution, unlike the Ethiopian Constitution, does not even provide for the establishment of a state supreme court or a state court of appeal. The Supreme Court, for instance, not only serves as the country's constitutional court, as is the practice in Ethiopia, it also has the final say on 'the interpretation and application of all laws in the country, including customary laws and Sharia'.[XLIX] Thus, in the words of Suberu, the Nigerian Constitution has created a 'unified judicial structure in which federal courts … and the sub-federal judicature (especially, the state High Court and Customary, or Sharia, Court of Appeal) are part of a single appellate hierarchy, with the Supreme Court (which exists only at the federal level) at the apex'.[L]

3.2. Appointment of judges

The Supreme Court has a maximum of 22 justices one of whom is the Chief Justice.[LI] The Court of Appeal has 50 judges including the President of the Court.[LII] At least three of the judges in the Court of Appeal are required to have knowledge of Sharia personal laws and at least other three judges are expected to be knowledgeable in customary laws.[LIII] This is because, as will be discussed below, the Court of Appeal exercises appellate jurisdiction over cases that are decided by a State Sharia Court of Appeal and a State Customary Court of Appeal. The Constitution provides that the federal legislature determines the number judges of the Federal High Court. [LIV]

The National Judicial Council (NJC)[LV] is empowered to nominate those who qualify for appointment as justices of the Supreme Court and the Court of Appeal and the judges and *Kadis* (judges deciding cases on the basis of Sharia) of the Federal High Court.[LVI] A Federal Judicial Service Commission advises the NJC in this regard.[LVII] The President can only make appointment on the basis of the recommendation of the NJC. He or she can however refuse to appoint one or all of the NJC's nominees. The Constitution enjoins the President to seek confirmation form the Senate on the appointment of all the justices of the Supreme Court and all of the heads of the federal courts i.e. the Chief Justice, the President of the Court of Appeal, and the Chief Judge of the Federal High Court.[LVIII] To this extent, the states, through their three elected senators each, can play an important role in bring state interests to bear on appointments to the highest judicial offices. However, the President is not required to seek such confirmation regarding the appointment of the rest of the justices of the Court of Appeal as well as the judges of the Federal High Court.

At state level, a governor of a state retains the power to appoint a chief judge of a state high court, a grand *kadis* of a state sharia court of appeal and a president of state customary courts of appeal.[LIX] Such appointments are again based on the recommendation of the NJC. A State Judicial Service Commission (SJSC)[LX], which is also responsible for the administration of state courts, merely advises the NCJ in the selection of 'suitable persons for appointment' in state courts. It does not make any recommendation to the state governors in this regard. The NJC makes the actual recommendations to state governors on the appointment of judges and *kadis* of a state high court, a sharia court of appeal and a customary court of appeal.[LXI] State governors also appoint other judges and *kadis* of state courts, including magistrates and *kadis* of state sharia courts and customary courts, only upon the recommendation of NJC. The Constitution expressly requires the confirmation by a State House of Assembly of the appointment of a chief judge of a state high court, a grand *kadi* of a state sharia court of appeal, and the president of a state customary court of appeal. It is however silent on whether such confirmation is needed with regard to the appointment of judges other than these three.

From the above it can be gathered that there are features of duality as well as integration in the manner that the judges and *kadises* of the federal and state courts, sharia courts and customary courts are appointed. As mentioned above, the NJC is key to the appointment of judges both for federal and state courts. Since its members are

predominately from the federal judiciary, the NJC is viewed as an essentially federal institution.[LXII] In fact, according to section 153(1)(i) of the Constitution, the NJC is one of the 'federal executive bodies'. This federal executive organ has the power to discipline and dismiss federal and state judges. It is also authorised to 'to collect, control and disburse moneys, capital and recurrent, for the judiciary'.[LXIII] The dualism in the federal system is thus watered down to the extent of the NJC's involvement in the above respect. Taking into account the role of the NJC in appointment and dismissal of judges and *kadis* of state courts, AE Obidimma and EOC Obidimma conclude that 'the 1999 Constitution … established a federal judiciary for the federation and *a quasi-federal judiciary for the states*'.[LXIV] For the same reason, Suberu also refers to the state High Courts, Sharia Courts of Appeal and Customary Courts of Appeal as 'sub-federal judicature'.[LXV]

What can perhaps be considered as truly state judiciary in Nigeria are the lower courts, which include the magistrate, the sharia court, and customary courts. However, these courts do not have constitutional recognition and are subject to the integrated appeal system. Moreover, as mentioned above, these are not covered by what the Constitution refers to as 'judicial offices' and the judges and *kadis* of these courts are not also deemed 'judicial officers'.[LXVI] The NJC is not involved in the appointment of the judges and *kadis* of these courts. They are rather 'appointed, promoted and subjected to disciplinary control of' an SJC, which is as per the Constitution, a state executive organ.[LXVII]

3.3. Language

The Constitution explicitly makes English the working language of the National Assembly and a state's Houses of Assembly even though there are hundreds of languages that are spoken in Nigeria, the major ones being Hausa, Yeruba, Ibibio, Edo, Kanuri, Igbo and Fulfulde.[LXVIII] Indeed, the National Assembly may conduct its business in Hausa, Ibo and Yoruba, but only if arrangements are made to this effect.[LXIX] A House of Assembly may also use, in addition to English, one or more of the languages spoken in the state, to conduct its business if the House so resolves.[LXX]

The Constitution is, however, silent on the working language of the courts. The Supreme Court however declared in several decisions that the language of superior courts of the country is English and that any document written in any other language, and which needs to be submitted to these courts, has to be translated to into English.[LXXI] As stated

above, the Constitution recognises Sharia and customary laws. In most cases, the Quran, Hadith and other sources of Sharia are not translated into local languages and are found only in Arabic. However, the *kadis* use the language of a particular community to administer justice using Sharia laws.[LXXII] Judges of customary courts also use local languages of a specific area to decide cases.[LXXIII]

3.4. Federal jurisprudence

Rotimi Suberu summarises the impacts of the courts, especially the Nigerian Supreme Court, in terms of impacting the federal system of the country as more 'centralist than federalist' with minimal 'transformational impact on Nigeria's centralized federal system'.[LXXIV] Yet, according to Suberu, there are two aspects of the Supreme Court's decision which have some differing impacts on the Nigerian federal system: decisions on disputes between the federal government and the states on division of revenue; and those relating to the place and status of local government.

The Court's decisions on revenue related disputes between the federal government and states were mostly centralist which, Suberu maintains, time and again confirmed the federal government's 'fiscal hegemony'.[LXXV] Its decision on the issue of on-shore and off-shore oil dichotomy in *AG Federation v AG Abia State & Ors*[LXXVI] and *AG Ogun State & Ors v AG Federation* was one impacting on the division of revenue between the federal and state governments.[LXXVII] For the purpose of determining the 13 per cent derivation from oil revenue that goes to oil-producing states, the federal government divided oil revenue into those that are collected from on-shore oil and off-shore oil drilling. According to the federal government no individual state, including those adjacent to the sea are entitled to 13 per cent of the oil revenue collected from off-shore oil drilling. Some littoral states opposed this decision and sued the federal government. The Supreme Court decided in favour of the federal government. Later the National Assembly passed a law entitling littoral states for 13 percent of off-shore oil revenue if and when the oil is extracted from an area which is "two-hundred-meter water depth Isobaths' and adjacent to a littoral state. When this law was challenged in *AG Ogun State & Ors v AG Federations* by non-oil producing states, the Supreme Court once again decided in favour of the federal government upholding the constitutionality of the Act passed by the National Assembly. In *AG Ogun State & Ors v AG Federation*, the Supreme Court decided that the federal

government was entitled deduct certain revenue from federally collected revenue before paying those in to the Federation Account. In *AG Abia State & Ors v AG Federation*, the Supreme Court found to be constitutional President Obasanajo's decision to federalize 7.5 percent of the revenue in the Federation Account, which was previously 'designated as special funds' to be used for the purpose of financial stabilisation and the like.

On the other hand, the Supreme Court's decision on the place and status of local government in the federal matrix has been decidedly in favour of the states.[LXXVIII] In several cases, the Supreme Court has protected the autonomy of the states by preventing the federal government from having a direct relationship with local government and by insisting that everything relating to local government has to pass through the states. For instance, in *AG Ogun & Ors v AG Federation (2002)*[LXXIX], the Supreme Court decided that the federal government cannot directly transfer to local government revenue that is designated as the share of the latter and that it has to be channeled through the states. The Supreme Court also ruled in *AG Abia & Ors v. AG Federation (2002)*[LXXX] that the states retain an exclusive power to regulate local elections, including determining the tenure of local councils.

3.5. Concluding remarks

Although the Nigerian judiciary appear to be dualist, both in law and practices it is unified in terms of its institutional structure and material jurisdiction. While the states through the Senate confirmation hearings have some say in federal appointments it is restricted to the highest judicial offices only. The federal institution, the NJC, on the other hand, plays a major role in the appointments to the state high courts. A further indication of the integrated nature of the judicial system is the use of English as the court language in superior courts (bar, of course the Sharia and customary courts). Given the integrated nature of the court system, it is not surprising that that the jurisprudence of the Supreme Court is also more centralist than federalist. Where it has defended the autonomy of the states it was against federal encroachment of states' control over local government.

4. Kenya

Kenya's 2010 Constitution introduced a devolved system of government with a national government at the centre and 47 counties as the second order of government. The Constitution does not provide for a third level of government, although it envisages that the counties may create sub-county administrative units in urban areas.[LXXXI] Counties are thus envisaged to take up the functions of both a meso-level government and a local government. While the Constitution provides a list of exclusive national functions, it is not clear that the list of county functions is of a similar nature, as extensive provision is made for the concurrency of powers.[LXXXII]

4.1. The structure and jurisdiction of courts

In Kenya there is 'judicial unitarism' in that the devolution of judicial function was never considered during the drafting of the 2010 Constitution[LXXXIII] According to Conrad Bosire, '[n]ot a single view was expressed to federalize or devolve judicial power during the entire constitutional review process in Kenya'.[LXXXIV] The result was thus that judicial matters are an exclusive national function.[LXXXV]

The Kenyan judiciary consists of superior and subordinate courts in which both courts form a single judiciary. The superior courts are the Supreme Court, the Court of Appeal, and the High Court. [LXXXVI] Specialized courts that may be established through legislation to resolve labour disputes and those relating to land and the environment, are also considered parts of the superior court. [LXXXVII] The subordinate courts include magistrates, *kadhis'* (Islamic courts) and courts martial.[LXXXVIII] The Chief Justice and his or her deputy serve as the head and deputy head of the entire judiciary and the Chief Registrar is the chief administrator.[LXXXIX] There is also a single Judicial Service Commission.[XC]

The Constitution nevertheless encourages the use of alternative dispute settlement mechanisms including the use of traditional courts so long as the decisions of such tribunals does not result in violation of human rights, the Constitution and other laws.[XCI]

At county level, practice shows that the counties have established county courts using the 'incidental' clause under Section 185(2) of the Constitution.[XCII] These courts may be

labeled county courts, but they are part of the unitary judicial system; the judiciary seconds magistrate to try petty offences such as littering, parking violations, garbage dumping and the like.[XCIII]

The Constitution defines the functional jurisdiction of the superior courts. The Constitution is silent on the jurisdictions of the special superior courts and the subordinate courts, authorising Parliament to define the jurisdictions of such courts through ordinary legislation.[XCIV]

4.2 Appointment of judges

The president of the country is constitutionally authorised to appoint the judges of the superior and subordinate courts, including the chief justice and the deputy chief justice, of the country.[XCV] He or she does so based on the recommendation of the Judicial Service Commission (JSC).[XCVI] The president needs the consent of the National Assembly (NA), the popular house of the Kenyan Parliament, with respect to the appointment of a chief justice and a deputy chief justice.[XCVII] A law requiring the JSC to provide the president with a list of three nominees for the latter to select and appoint the chief justice was declared unconstitutional.[XCVIII] Now the JSC nominates a single person for the office and the president has no option but to appoint the person.[XCIX] The president has the power to appoint other judges upon the recommendation of the JSC with no need to seek the approval of the NA.[C]

This process begs the question whether the counties are directly or indirectly involved in the appointment of judges. As indicated above, judicial power is within the exclusive competence of the national government; the Constitution thus does not envisage the involvement of the counties in the appointment of judges. According to Bosire the Kenyan judiciary is simply 'an independent arm of national government operationally, financially, and institutionally'.[CI] He further states that the counties play no role in the appointment of judges and that even the 'Senate, which represents and safeguards the interests of counties at the national level, is excluded from the vetting of the chief justice and the deputy chief justice.'[CII]

4.3. Language

As all African countries, Kenya has a multilingual society. Over 40 languages are spoken in the country. English (due to the country's colonial history) and Kiswahili are the most widely used languages in the country. The Constitution has thus recognised Kiswahili as the national language of the country while recognising both English and Kiswahili as official languages of the country.[CIII]

English has been used as the language of courts in Kenya since the country attained independence, but lower courts used Kiswahili in oral examination. However, 'all records of the court proceedings [were kept in English] since the records had 'to be verified by the high court'.[CIV] This practice is still maintained even if the Constitution recognises Kiswahili as the national first language.

4.4. Devolution jurisprudence

The Kenyan superior courts, especially the Supreme Court, are playing an increasingly important role in giving 'shape and texture' to the Kenyan system of devolution. The counties are also increasingly using courts to assert their rights and defend their autonomy. The role of the courts in guarding the 'constitutional space' of the counties is especially important since, given the decades old centralized system of the country, there is often an impulsive temptation from the central government to erode the constitutional space of the counties. The courts also play important role of defining the beginning and end of the constitutional space of each level of government given that the constitution is less than clear in defining the competences of the two levels of government.

Bosire argues that the courts have given shape and texture to the devolved system in three ways: by analyzing both the 'nature of the [devolution] system' and the 'significance and thrust' of the system, and by determining specific matters 'including sharing or revenue, powers and functions, and intergovernmental relations among other issues'.[CV] In terms of determining the 'nature' of the Kenyan devolved system, the issue was whether and how the system was similar or different from a federal system. In *Speaker of the Senate v Speaker of the National Assembly,* the Supreme Court has underscored that the Kenyan devolved system is not a federal system and that it is 'based on a unitary system' in which the centre gave up some of its power to counties.[CVI] With regard to the objectives of the devolved system, the Court declared that the devolved system is as important as the

Constitution itself and 'denotes self-empowerment, freedom, opportunity, self-respect, dignity and recognition'.[CVII] The courts have decided on several cases in which it protected functional competences and revenue raising powers of the counties. For instance, the Constituency Development Fund (CDF) was declared unconstitutional.[CVIII]

4.5. Concluding remarks

The devolution of judicial authority was not an issue in Kenya and the unified structure of the court was taken as a given by the drafters of the 2010 Kenyan Constitution. The resultant uniform court system is thus also evidence of the highly centralised 'federal' character of the Kenyan state, although at the fringes the counties are using their incidental powers to pay from 'local' courts, presided over to by national magistrates. In this centrist scheme the counties or their senators play no role in the appointment of the judiciary. The use of English as the only court language further emphasizes the unitary nature of the court system. Given the centrist slant of the constitution, the superior courts, in particular the Supreme Court, have however played a significant role in giving meaning and content to the devolution provisions. The Supreme Court has depicted devolution as one of the key elements of the new constitution and has not shied away from giving them full effect.

5. South Africa

The "negotiated revolution" ending white minority rule in April 1994 included a system of multilevel government.[CIX] The African National Congress, the dominant liberation movement, insisting on a strong centralized state to undo the ravages of apartheid reluctantly compromised on the establishment of provinces, but was more enthusiastic on securing a strong local government sphere of government. The 1996 Constitution, building on the 1993 Interim Constitution, established three spheres of government – the national, provincial and local governments – but with strong central control. It has thus been described as being a unitary state with federal features. Provinces have an emaciated list of exclusive competences, with the bulk of powers being concurrent with the national government, accompanied by a qualified override clause in favour of the latter. Local government has a list of powers which are exclusive to the extent that the national or

provincial governments may *regulate* those powers. The national government's powers are thus those concurrent with the provinces and all residual matters.

As the administration of justice, including the judiciary, is not listed in either the provinces' lists of exclusive or concurrent powers, it is a matter that falls within the exclusive domain of the national government. It is thus not one of the country's 'federal features'. However, there are some small elements that do reflect a federal dimension in the structure of the courts and the composition of the bench. However, very little attention is given to regional local languages as language of record. With regard to a 'federal' jurisprudence, the Courts have, on the whole, favoured the 'hourglass' approach; strengthening the national and local spheres of government at the expense of the provinces in the middle.[CX]

5.1. The structure and jurisdiction of courts

From the outset during the negotiations for the 1993 Constitution and in the Constitutional Assembly in 1995-1996 there was little debate whether some judicial powers should be devolved to provinces. In line with the overall centrist approach advanced by the African National Congress, the judiciary was not to be a provincial matter. The result was that there was strong continuity of the uniform apartheid judicial structure (and judges) into the new democratic dispensation.

Before 1994, a unified system, from the magistrates to the Supreme Court, culminating in the Appellate Division of the Supreme Court, was the norm. The Supreme Court had six divisions, one each for the four provinces, with the Cape Province, due to its geographical size, being sub-divided into three divisions: Northern Cape, Eastern Cape and Cape Provincial Divisions. In line with grand apartheid, each of the 'independent' Bantustans - Transkei, Bophuthatswana, Ciskei and Venda - had its own judiciary, with a High Court and an appellate court.

The new democratic dispensation brought some innovative measures but on the whole the courts structure remained intact. The most important innovation was the establishment of the Constitutional Court, as final arbiter on all matters constitutional, while the Appellate Division was renamed the Supreme Court of Appeal, with exclusive jurisdiction

over all matters non-constitutional.[CXI] This distinction was hard to maintain and in 2012 the Constitutional Court was also given the power to adjudicate on all matters.[CXII]

The 'provincialisation' of the courts took two decades to complete, namely the establishment of a High Court for each province. As a transitional measure, all courts functioning in 1994 continued to do so. Thus, the four Bantustan High Courts continue to dispense justice in the same territorial jurisdiction of the former Bantustans. It was fairly easy to established High Courts in the Western Cape (old Cape Provincial Division), Northern Cape, Eastern Cape, KwaZulu-Natal, and the Free State. The dismemberment of Transvaal Provincial Division was more problematic. The former Bophutatswana High Court become the North West High Court, the Venda High Court was subsumed into a new Limpopo High Court, and the last court to be established was the Mpumalanga High Court in 2017. It is only when the latter court is fully functional that the Gauteng High Court will serve only the Gauteng Province.

At local government level one finds so-called 'municipal courts'. They are courts, financially carried by a municipality, but presided over by a magistrate appointed by the Department of Justice. With a jurisdiction limited to the enforcement of municipal by-laws, it fits into the overall national judicial court structure.

The Constitutional Court, as the court of final jurisdiction on constitutional matters, has thus also the final say on the federal arrangements. The Constitution thus makes specific provision that the Constitutional Court is the only court that can "decide disputes between organs of state in the national or provincial sphere concerning the constitutional status, powers and functions of any of those organs of state."[CXIII] High Courts also have jurisdiction over constitutional matters, but where a High Court invalidates a national or provincial law, or presidential conduct, as being unconstitutional, there is an "automatic" review by the Constitutional Court; unless the Court confirms the invalidity, the law or conduct stands.[CXIV]

5.2 Appointment of judicial officers

Although the judiciary falls squarely outside the functional areas of provinces, the provinces do play an important role in judicial appointments through their indirect participation in the Judicial Service Commission (JSC). Created in 1994 as a clear break

with the long-standing practice of executive appointments, the JSC sought to make the process of appointment more transparent and less controlled by the executive. It is a powerful institution. The president appoints the chief justice and his or her deputy after consultation with the JSC and the leaders of the political parties in the National Assembly. The president needs to consult the JSC with regard to the appointment of the president and deputy president of the Supreme Court of Appeal. When it comes to the nine justices of the Constitutional Court, the president appoints them from a list provided by the JSC (there must be three names more than the vacant positions). For the appointment of all other judges, the president must follow the JSC's advice.

The JSC's members comprise: representatives from the judiciary (three, including the chief justice as chairperson); the minister of justice; the legal profession (four); law schools (one); the National Assembly (six, three of whom must be opposition MPs); National Council of Province delegates (NCOP) (four); presidential nominees (four); and the judge-president and premier of a province where a matter concerns the High Court in that province (including appointments to the provincial High Court).

The NCOP is the second house of Parliament, and as its name suggests, represents the provinces. Each of the nine provinces appoints a delegation of ten members to the NCOP (six permanently and four drawn from the provincial legislature itself). The power of the NCOP resides in their co-determination of national legislation affecting provinces (although a two thirds majority in the National Assembly may overcome an NCOP veto) and ratifying international treaties. As a body representing provincial interests, the NCOP's four nominees to the JSC is only 16 per cent of a possible 25 members, but may be important in key decisions. The inclusion of the premier of a province in decisions affecting appointments to the provincial bench adds a further provincial flavour to process. In practice, though, the NCOP delegates follow party lines rather than advancing provincial interests.

5.3 Court languages

Sharply distancing itself from the apartheid practice of only recognizing two languages – Afrikaans and English – the new democratic dispensation saw eleven official languages constitutionally recognized. The percentage breakdown of the major language groups is:

IsiZulu (22.9); IsiXhosa (17.9); Afrikaans (14.4); Sepedi (9.2); English (8.6); Setswana (8.2); and Sesotho (7.7).[CXV] Furthermore, some of these languages have a geographical base, which has resulted in seven of the nine provinces having a majority language: KwaZulu-Natal (IsiZulu); Eastern Cape (IsiXhosa); Western Cape (Afrikaans); Northern Cape (Afrikaans); North West (Setwana); Free State (SeSotho) and Limpopo (Sepedi). Effect is given to language preferences in provinces; each province may choose at least two languages for use in administration. For example, in the Western Cape, where Afrikaans is the majority language, English and IsiXhosa are also working languages. For communication between language groups, English has become the *de facto lingua franca* of South Africa. It took more than 20 years for this position to prevail also in the courts.

During the apartheid era Afrikaans and English were the only languages of record, although any accused or witness may use its language of choice (through an interpreter). The protection of Afrikaans was, of course, no longer tenable, but remained on the statute book. It was only in 2017 that it lost its exalted position. Chief Justice Mogoeng announced that English will be the only language of record, the principal reason being efficiency; not all judges are proficient in all 11 languages.[CXVI] Even where the judge and the parties to a dispute are from the same language group, the trial is conducted in English, as there may be a prospect of appeal. This ruling has, of course, upset the Afrikaans legal fraternity, who lost their once privileged position. Although some judges have argued for the use of other indigenous languages as well, in the short to medium term, the courts will be uni-lingual.

5.4 'Federal' jurisprudence[CXVII]

The Constitutional Court viewed its task of interpreting the federal elements in a purposive manner, as it did the rest of the Constitution.[CXVIII] In a decision dealing with the appropriate assignment of functions to provinces in terms of the interim Constitution, the Court said, in response to an argument that provincial powers should be construed restrictively, as follows:

In the interpretation of those schedules [listing provincial powers] there is no presumption in favour of either the national legislature or the provincial legislatures. The functional areas must be purposively interpreted in a manner which will enable the national

parliament and the provincial legislatures to exercise their respective legislative powers fully and effectively.[CXIX]

Yet, a close reading of its subsequent judgments reveals that there has indeed been a consistent pattern of interpreting provincial powers restrictively. First, in certifying whether the Western Cape draft Provincial Constitution was in accordance with the provisions of the 1996 Constitution, it found that an electoral system different from that prescribed in the national Constitution, was not included in the broad scope of a permissive provision that allowed such provincial constitution to have 'legislative and executives structures and procedures' that differed from the national constitution.[CXX] Secondly, the Court interpreted a province's meagre exclusive powers restrictively. [CXXI] So too was its analysis of provinces' incidental powers.[CXXII] Thirdly, in clarifying the overlapping powers between provinces and local government, the Court consistently favoured the latter.[CXXIII] As noted above, the pro-centre and pro-local decisions resulted in the powers of provinces being squeezed thin in an hourglass configuration. However, when it came to procedural matters, the Court adopted a generous interpretation as to when the NCOP should be part of the legislative process; any national bill that affects the interest of the provinces must also get the approval of the NCOP.[CXXIV] Consequently, laws that were adopted without such approval have been invalidated.[CXXV]

It has been argued that the Constitutional Court's parsimonious attitude towards provinces was at first influenced by the need for unity in the face of secessionist sentiments. This was bolstered by the poor service delivery record of the majority of provinces. However, given the governance failures at the national level, the Court may become more sympathetic towards well-functioning provinces.

5.5. Concluding remarks

The courts and their functioning reflect South Africa's highly centralized federal system. Although the court structure was eventually aligned to the federal territorial arrangements, provinces play as such no role in the courts' administration. Regional preferential languages, as adopted by provinces, have not become languages of court record. Despite the fact that the judiciary is not a provincial competence, the provinces, through their delegates in the NCOP, have potentially a significant role to play in appointments to the bench. Reflective also of the government's ambiguous approach to

provinces, the courts have also not interpreted provincial powers generously. This may change, however, once provinces show themselves as an effective and efficient sphere of government in advancing socio-economic development.

6. Comparative observations

At first glance it would seem that the administration of justice of two non-centrist federal countries (Nigeria and Ethiopia) would be quite different from the two unitary systems of South Africa and Kenya. From the brief overview it is apparent that the differences are not large; the dualist systems show decidedly unitary features, while South Africa, at least, has some federal traits. Only Kenya has an unadulterated centrist system.

In the non-centrist countries, the court system reflects the configuration of the constituent units. Despite its dominant unitary nature, South Africa's High Court structure is aligned with provincial boundaries, a feature which becomes significant when it comes to appointing judges. In Kenya with 47 counties, only at lower court level is alignment possible. It is also at this level that in the unitary South African and Kenyan systems that local or municipal courts are emerging; although these courts are staffed by national judicial officers, they are instituted and paid by municipalities and counties when they can meet a particular local need, thus introducing a tiny element of dualism.

Despite the fact that Ethiopia and Nigeria are generally viewed as having dual federal systems, typical of fragile federal systems, the duality is overly tamed and the gravamen of judicial powers is more concentrated at the federal level. In Nigeria, courts of appeal are established only at federal level; there is thus no exclusive judicial authority at state level. In Ethiopia a similar situation prevails; the decisions of the highest state courts are reviewed by the federal courts also on state matters. Due to the political history of both countries, the judiciary is weak; their independence compromised by executive and political interference.

The dualist systems in Nigeria and Ethiopia also hold sway with the appointment of judges; each level appoints in the main their own, although there is a varying degree of integration. The appointment of judges to the Nigerian Supreme Court and the heads of the federal courts appellate justices must be confirmed by the Senate, which represents the

states polities. In Ethiopia the states, on the other hand, have no say regarding the appointment of federal judges.

In both countries, the states' power of appointment is, however, attenuated since the federal governments are involved in the appointment of judges of state courts. In Ethiopia the FJAC is consulted regarding the appointment of judges of state courts. In Nigeria the NCJ, which is seen as a 'federal institution', has the authority to recommend qualified judges for state courts and the SJSCs play merely an advisory role in this regard.

Despite the unitary nature of the South African judicial structure, provinces are indirectly represented in the JSC and play an important role in the appointment of judges. In Kenya, again as the most centralised 'federation' of the four countries, the counties have no say, even though the Senate, on this matter.

Although all of the four countries have multilingual populations, with concentrations of linguistic communities in states, provinces and counties, only Ethiopia uses local languages in its court systems. This flows, of course, from the ethnic model of federalism Ethiopia has embraced; as the federal system was designed primarily to accommodate linguistic diversity, state courts are required to use the working language of the relevant state. Even so, in four of the nine states, Amharic is used as court language (as it is done in federal courts) despite it not being the mother tongue in any of the multi-ethnic states; it is a matter of convenience. In Nigeria, Kenya and South Africa, all of which are trying to escape the burden of ethnicity, English, the colonial language, has become, constitutionally or otherwise, the only court language.

Having no power of constitutional interpretation, both state and federal courts in Ethiopia play almost no role in giving shape and texture to the federal system. Also, its lack of independence from the executive and dominant political party has frequently been questioned. The judiciary in the other three countries, although functioning in essentially an integrated system, with notable degrees of independence, can play an important role in given effect to the federal content of their respective constitutions. The Nigerian Supreme Court have passed several judgements impacting on the federal system. Although its decisions are in general centrist in impact, some defended the autonomy of the states. In Kenya, the courts, specially the Supreme Court, are playing a major role of guarding the autonomy of counties from encroachment by the national government. The South African Constitutional Court, although its judgments on provincial matters have been criticised as

being pro-centre or pro-local government, has been outstanding in upholding the Constitution against executive onslaughts. Its unwavering commitment to constitutionalism provides basic security for upholding also the federal arrangements.

In summary, the court system and judiciary of the four 'federal' countries are reflective of the degree of decentralised or centralised federalism a country's constitution and practice display. Given that all four countries have, to varying degrees, highly centralised federal systems, it is thus no surprise that the judicial branch of government is, too, evidence of this reality. Consequently, the main difference between the four countries - the presence or absence of a non-centrist court system – matters not much.

I Nico Steytler and Jaap de Visser (2015) '"Fragile Federations": the dynamics of devolution', in Francesco Palermo and Elisabeth Alber (eds) *Federalism as decisionmaking* (Brill/Nijhoff) 79–101.

II Nicholas Aroney and John Kincaid (2017) 'Introduction: Courts in federal countries' in Nicholas Aroney and John Kincaid (eds) Courts in federal countries: Federalists or unitarists? (University of Toronto Press) 8-9.

III *Ibid.*

IV In an earlier work she only draws the distinction between dualist and integrated systems, the former including Canada, and the latter South Africa (Cheryl Saunders, 'Legislative, Executive, and Judicial Institutions: A Synthesis', in Kathy Le Roy and Cheryl Saunders (eds) *Legislative, Executive and Judicial Governance in Federal Countries* (Montreal and Kingston: McGill-Queen's University Press, 2006) 344). Her later categorisation and definitions seem more apt in reflecting the cases mentioned.

V 'Courts in Federal Countries', International IDEA, Constitutional Brief, March 2019.

VI The states are Afar, Amhara, Oromia, Somali, Tigray, Harari, Gambella, Benishangul-Gumuz, and Southern Nations and Nationalities (SNNP) states. The federal cities are Addis Ababa and Dire Dawa. However only Addis Ababa is constitutionally recognised as a federal city.

VII These are Amhara, Tigray, Afar, Oromia and Somali states.

VIII See on this Zemelak Ayele and Yonatan Fessha (2012) 'The Constitutional status of local government in federal systems: The Case of Ethiopia" 58 *Africa* Today 89–109.

IX Assefa Fiseha (2007) Federalism and the accommodation of diversity in Ethiopia: A comparative study (Nijmegen: Wolf Legal Publishers) 354-55.

X Assefa Fiseha and Zemelak Ayele (2017) 'Concurrent powers in the Ethiopian federal system' in Nico Steytler (eds) *Concurrent powers in federal systems: Meaning making and managing* (Leiden: Brill/Nijhoff) 241-260.

XI Art 78(2) & (3) Federal Democratic Republic of Ethiopia (FDRE) Constitution 1995. See also Gedion Hessebon and Abduletif Idris (2017) 'The Supreme Court of Ethiopia: Federalism's bystander' in Nicholas Aroney and John Kincaid (eds) Courts in federal countries: Federalists or unitarists? Toronto: University of Toronto Press, 165-193.

XII *Ibid.*

XIII Art 78(3).

XIV Proclamation to establish federal high courts in some regions No 322 (2003).

XV Art 78(2) FDRE Constitution.

XVI Art 80 FDRE Constitution.

XVII These include disputes to which a federal government organ is a party, disputes between residents of two states, suits involving matters of nationality etc.

XVIII Art 80(1) FDRE Constitution, 1995.

XIX Art 80(2).

XX Muradu Abdo (2007) 'Review of decisions of state courts over state matters by the federal supreme court' 1(1) *Mizan Law Review* 60-74.

XXI Muradu Abdo (2007) argues that the practice of 'cassation over cassation' is against the principle of the principle of federalism and the judicial autonomy of the states.

[xxii] See Assefa Fiseha (2007) 'Constitutional adjudication in Ethiopia: Exploring the experience of the House of Federation (HOF)' 1(1) Mizan Law Review 1-32; Yonatan Fessha (Fessha Y) (2008) 'Whose power is it anyway? The courts and constitutional interpretation in Ethiopia' 22 (1) Journal of Ethiopian Law 128-144; *Adem Abebe* 'Unique but Ineffective: Assessing the Constitutional Adjudication System in Ethiopia', in Charles Fombad (ed) *Constitutional Adjudication in Africa* (Oxford: OUP, 2017) ch 8.
[xxiii] Amended Federal Judicial Administration Council Establishment: Proclamation No. 684/2010.
[xxiv] Art 81 (1) and (2).
[xxv] Art 81(1).
[xxvi] Art 81(4) and (5).
[xxvii] Art 81(3).
[xxviii] 81(4).
[xxix] Art 81(4).
[xxx] See for instance Art 74(3) (g) Amhara State Constitution (2001), Art 76(3) SNNPR Constitution (2001).
[xxxi] Art 5(2), FDRE Constitution 1995.
[xxxii] Art 5(3), FDRE Constitution 1995.
[xxxiii] Arts 19 and 20 FDRE Constitution 1995.
[xxxiv] Gardner A J (2003) 'State courts as agents of federalism: Power and interpretation in state constitutional courts' *William & Mary Law Review* 1725-1800.
[xxxv] For more on this see Yonatan Fessha and Zemelak Ayele (2020) 'Giving 'shape and texture' to a federal system? Ethiopia's courts and its unusual umpire' in Yontan Fessha & Karl Kossler (eds) Federalism and courts in Africa: Design and impact in comparative perspective Routledge (2020) 47-67.
[xxxvi] *Ibid.*
[xxxvii] Art 79 (2) and (3) FDRE Constitution 1995.
[xxxviii] The fact that the FJAC, which is empowered to nominate and dismiss judges, is composed of politicians, including a minister and member of parliaments, is claimed to have exposed the process of judicial appointment for political manipulation. For instance, a federal judge was dismissed for having 'questionable loyalty to the constitution' simply because in various conferences he voiced his opinion that some of the provisions of the Constitution need to be amended. It is also reported that judges are given instructions either by their superiors or members of the executive to handle certain politically sensitive cases in certain way. According to a World Bank report, 'telephone calls have allegedly been placed from higher-level judges or Commission members to First Instance judges questioning decisions and perhaps trying to influence case outcomes'. The situation is worse at state level where the 'concept of state governments and separation of executive and judicial branches' is new. Yohannes Anberbir **ለሕገ መንግሥቱ ታማኝ አይደሉም የተባሉት ዳኛ ከኃላፊነታቸው ተነሱ** (A judge dismissed for being 'disloyal' to the Constitution) The Ethiopian Reporter (10 February 2016); The World Bank (2004) Ethiopia: legal and judicial sector assessment (Washington, DC: Legal Vice Presidency: The World Bank).
[xxxix] RT Suberu (2008) 'The Supreme Court and federalism in Nigeria' 46(3) *The Journal of Modern African Studies*, 454.
[xl] S 6 Constitution 1999.
[xli] See *Ameze Guobadia* 'Constitutional Adjudication in Nigeria: Formal Structures and Substantive Impact', in Charles Fombad (ed) *Constitutional Adjudication in Africa* (Oxford: OUP, 2017) ch 6.
[xlii] Ss 230-265 Constitution 1999.
[xliii] Ss 270-280 Constitution 1999.
[xliv] Ss 196 (2) and 197(6) Constitution 1999.
[xlv] S 6(1) and (2) Constitution 1999.
[xlvi] E Osieke (2006) 'The Federal Republic of Nigeria' in Katy le Roy & Cheryl Saunders (eds) Legislative, executive and judicial governance in federal countries (Montreal and Kingston: McGill-Queen's University Press) 198, 213.
[xlvii] S 286(1)(a) Constitution 1999.
[xlviii] For instance, the Federal High Court retains exclusive jurisdictions on matters relating to 'the revenue of the federal government, Admiralty Matters arising from the Companies and Allied Matters etc. as well as all the items contained in the Exclusive Legislative List. 'Furthermore, section 251(1)(p)(q)(r) further preclude States' High Courts from adjudicating on any matter concerning the administration and control of federal agencies'. AE Obidimma and EOC Obidimma (2015) 'Restructuring the Nigerian Federation for Proper Functioning of the Nigerian Federalism' 5(9) *Public Policy and Administration Research*, 151.

[XLIX] Obidimma and Obidimma(2015) 150.
[L] Suberu *(*2008*)* 455.
[LI] S 230(2) Constitution 1999.
[LII] S 237 (2) Constitution 1999.
[LIII] S 237(2)(b) Constitution 1999.
[LIV] S 249 Constitution 1999.
[LV] Obidimma and Obidimma (2015) 150.
[LVI] Ss 231(1), 238(1) and 250(1) Constitution 1999.
[LVII] Third Schedule (E), Constitution (1999).
[LVIII] Ss 231 (1) (2), 238(1) and 250(1) Constitution 1999.
[LIX] Ss 271(1), 276 (1) and 281(1) Constitution 1999.
[LX] A SJSC is composed of Chief Judge of the State (a chairperson), state Attorney General, the Grand *Kadi* of the state Sharia Court of Appeal, the President of the state Customary Court of Appeal of the State, if any, two lawyers and two other persons. Third Schedule (C), Constitution (1999).
[LXI] Ss 271(1), 276 (1) & 281(1) Constitution 1999.
[LXII] 'The Chief Justice of Nigeria dominates the [NJC] - apart from being the chairman, he alone is responsible for appointing 14 out of the 23 members, 4 of whom are members by virtue of their office including the Chief Justice himself. The other five members who shall be members of the Nigerian Bar Association are also appointed by him but on the recommendation of the National Executive Committee of the Nigerian Bar Association. Obviously, the National Judicial Council as presently constituted is inconsistent with the federal status of the country'. Obidimma and Obidimma (2015) 150.
[LXIII] S 81(3) Constitution 1999.
[LXIV] Emphasis added. *Ibid.*
[LXV] Suberu (2008) 455.
[LXVI] For the definitions of 'judicial office' and 'judicial officer' see S 318(1).
[LXVII] S 197(c) Constitution 1999.
[LXVIII] S 55 Constitution 1999.
[LXIX] *Ibid.*
[LXX] S 97 Constitution 1999.
[LXXI] O J Bamgbose (2014) *Digest of Judgments of the Supreme Court of Nigeria* (Ibadan: Safari Book Mohammed), 437. Also *Oladapo Ojengbede vs N.O Esan & Another* (2002) 1 SCM 194.
[LXXII] A A Mazuri (2009) 'Shariacracy and federal models in the era of globalisation: Nigeria in comparative perspective' 26(3) *American Journal of Islamic Social Sciences* 63.
[LXXIII] T O Opeibi (2012) 'Investigating the language situation in Africa', in Peter Tiersma & Lawrence Solan (eds) *The Oxford handbook of language and law* (Oxford: Oxford University Press) 282.
[LXXIV] R T Suberu (2017) 'The Supreme Court of Nigeria: An embattled judiciary more centralist than federalist', in Nicholas Aroney and John Kincaid (eds) *Courts in federal countries: Federalists or unitarists?* (Toronto: University of Toronto Press), 290-91.
[LXXV] *Ibid.*
[LXXVI] [2001] 9 Supreme Court Monthly-SCM.
[LXXVII] [2002] 14 SCM.
[LXXVIII] Suberu (2015) 212-218.
[LXXIX] [2002] 14 SCM.
[LXXX] [2002] 5 SCM.
[LXXXI] Jill Cottrell Ghai, 'Governing Metropolitan and Urban Areas in Kenya', in Nico Steytler and Yash Pal Ghai (eds) *Kenyan–South African Dialogue on Devolution* (Cape Town: Juta), 278–301, 285.
[LXXXII] Fourth Schedule**.** See John Mathaka Kangu (2015) *Constitutional Law of Kenya on Devolution* (Strathmore University Press, Nairobi).
[LXXXIII] Conrad Bosire (2018) *Vague centralisation or reluctant federalism? Kenya's Judiciary and its role in fostering devolution* (unpublished manuscript).
[LXXXIV] Bosire (2018).
[LXXXV] See Chapter 10 Kenya Constitution, 2010.
[LXXXVI] S 161(1) Constitution 2010.
[LXXXVII] S 162(2) Constitution 2010.
[LXXXVIII] S 161(1) Constitution 2010.

[LXXXIX] S 161(2) Constitution 2010.
[XC] S 161(3) Constitution 2010.
[XCI] S 159(2)(c) Constitution 2010.
[XCII] The Constitution authorises to 'make any laws that are necessary for, or incidental to, the effective performance the powers and functions that the country government is given under the constitution.
[XCIII] Bosire (2018).
[XCIV] S 162 -169 Constitution 2010.
[XCV] S 166(1)(a) Constitution 2010.
[XCVI] *Ibid.*
[XCVII] *Ibid.*
[XCVIII] Ochieng A 'Judges clip President's powers in choice of Chief Justice' *Daily Nation* 27 May 2016 http://www.nation.co.ke/news/President-power-to-hire-Chief-Justice-quashed/1056-3220654-g1ukxw/index.html (accessed 2 November 2016).
[XCIX] *Ibid.*
[C] S166(1)(b) Constitution 2010. There was a disagreement on whether the president has the option not to appoint some or all of the judges nominated by the JSC. This was at issue when President Kenyatta appointed 11 of the 25 nominees of the JSC and postponed the appointment of 14 nominees under the pretext of studying the list, implying that he might decline to appoint some or all of the 14 nominees. Yash Ghai wrote that the president's act was a clear violation of the Constitution, arguing that the president has no discretion whatsoever on the appointment of the nominees of the JSC. Y P Ghai 'Uhuru has broken the law over judges list' *The Star* 30 July 2014http://www.the-star.co.ke/news/2014/06/30/uhuru-has-broken-the-law-over-judges-list_c962688 (accessed 2 November 2016).
[CI] Bosire (2018).
[CII]*Ibid.*
[CIII] S 7 Constitution 2010.
[CIV] Nathan yori Ogechi (2003), 'On language rights in Kenya' 12(3) *Nordic Journal of African Studies,* 290.
[CV] *Ibid.*
[CVI] [2013] eKLR.
[CVII] *Ibid.*
[CVIII] See *The Institute for Social Accountability (TISA) and another v The National Assembly and 3 others* (eKLR 2015) Petition 71 of 2013; *Real Deals Ltd v Kenya National Highways Authority and 2 others* (2014) eKLR; *Nairobi Metropolitan PSV SACCOs Union Ltd and 25 others v County Government of Nairobi and 3 others* (eKLR 2014) Petition 486 of 2013; *Cereal Growers Association and another v County Government of Narok and 10 others* (2013) eKLR.
[CIX] Nico Steytler (2013), 'South Africa - the reluctant hybrid federal state', in John Loughlin, Wilfried Swenden and John Kincaid (eds), *The Routledge Handbook of Regionalism and Federalism* (London and New York: Routledge) 442-454.
[CX] See Nico Steytler (2017), "The Constitutional Court in South Africa: Reinforcing an Hourglass System of Multi-Level Government" in Nicholas Aroney and John Kincaid (eds) *Courts in Federal Countries: Federalists or Unitarists?* (Toronto: University of Toronto Press) 328-366
[CXI] See *Richard J. Goldstone, '*The Birth of the South African Constitutional Court', in Charles Fombad (ed) *Constitutional Adjudication in Africa* (Oxford: OUP, 2017) ch 14.
[CXII] Constitution Seventeenth Amendment Act of 2012.
[CXIII] S 168(4) Constitution, 1996.
[CXIV] S 167(5) Constitution, 1996.
[CXV] Statistics South Africa, *Stats in Brief 2002* (Pretoria: Statistics South Africa, 2002), table 2.11.
[CXVI] Jeanette Chabalala, 'English will be only language of record in courts – Mogoeng', News24, 29 September 2017, available https://www.news24.com/SouthAfrica/News/english-will-be-only-language-of-record-in-courts-mogoeng-20170929, accessed 11 July 2018.
[CXVII] This section is drawn from Steytler (2017).
[CXVIII] *James Fowkes, '*Constitutional Review in South Africa: Features, Changes, and Controversies', in Charles Fombad (ed) *Constitutional Adjudication in Africa* (Oxford: OUP, 2017) ch 7.
[CXIX] *DVB Behuising (Pty) Limited v North West Provincial Government and Another*, 2000 (4) BCLR 347 (CC), para 17.
[CXX] *In re: Certification of the Constitution of the Western Cape,* 1997 (9) BCLR 1167 (CC)

[CXXI] *Ex parte President of the Republic of South Africa: in re: Constitutionality of the Liquor Bill* 2000 (1) BCLR 1 (CC).
[CXXII] *Premier: Limpopo Province v Speaker: Limpopo Provincial Legislature and Others* 2011 (11) BCLR (CC) 1181.
[CXXIII] See Jaap de Visser and Nico Steytler (2016) 'Confronting the State of Local Government: The 2013 Constitutional Court Decisions '*Constitutional Court Review* 1-23.
[CXXIV] *Tongoane and Others v Minister of Agriculture and Land Affairs* 2010 (8) BCLR 741 (CC) (*Tongoane*).
[CXXV] Communal Land Rights Act of 2009 (*Tongoane* case); Municipal Systems Amendment Act of 2011 (*South African Municipal Workers' Union v Minister of Co-operative Governance & Traditional Affairs and Others* [2017] ZACC 7 (CC)).

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EU's Fight Against Climate Change: An Example of Leading by Example?

by

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Abstract

The European Union is well known to be one of the most prominent international actors fighting against the climate crisis and, as the President of the European Council Charles Michel has said, it is trying to lead by example in order to reach the climate neutrality by 2050. However, is the EU really leading by example in the global fight against climate change? If so, through which means and behaviours, and how effectively?

The essay tries to answer to all these questions by starting from the very understanding of the concept of 'leading by example'. The definition of leading by example this essay comes up with is wider and more comprehensive than the one provided by scholars as Hermalin and Arce. This is why it will be important, given the aim of the essay, to keep an eye on the evolution of EU's narrative on the climate crisis in the first place and, just in a second moment, to focus on its concrete internal and external action.

Key-words

Climate change, Leading by Example, European Union

Introduction

Is climate change 'just' an environmental problem? Or is it an existential threat to humanity and biodiversity? Among the effects that climate change will have on the World ecosystems, it can be worthwhile to mention increasing drought and dryness, rising sea levels, shortage of freshwater and lands degradation. As soon as the Human Systems are considered, these changes will turn into the undermining of key economic sector and services, food insecurity and spread of poverty (IPCC 2019).

Among the different policy actors involved with the climate challenge, the European Union has shown to be one of the most conscious about the relevance of the problem at stake. As a matter of facts, 'since the United States' decision not to ratify the Kyoto Protocol […], the EU has emerged as the main actor among industrialised countries to push the process forward under the UN convention' (Fischer & Geden 2015: 2). EU's approach towards the climate issue changed a lot during the last three decades and in many occasions the EU claimed to be 'leading by example in areas such as cutting greenhouse gas emissions' (European Council 2020, par. 8). However, is it possible to assess the current state of art? Is the EU 'leading by example' in the global fight against climate change?

In order to provide a satisfactory answer to the research question, the essay will firstly focus on the strategy of 'leading by example', also by proposing a new definition of it. Secondly, it will focus on EU's efforts to build a new narrative on climate change. Thirdly, there will be a spotlight on EU's concrete internal and external actions to contrast climate change, and both strengths and shortcomings will be underlined. Finally, the conclusion of the essay will be drawn.

1. Leading by example

Since the end of the Second World War, the increasing level of interdependence among states made the issue of protecting international public goods more urgent. This prompted many scholars to focus on the study of collective action and leadership. Although in a first phase the study of leadership appeared to be strictly intertwined with the realist theory of hegemony (according to which just the strongest states in both military and economic

terms are able to coordinate the action of other nations and to guarantee the protection of the international public goods at stake), Charles P. Kindleberger, already in 1981, understood that there is no need of an hegemonic power to provide international public goods, since groups of smaller states can effectively serve as example through their policies (Kindleberger 1981). However, even once taken distance from the realist school, the theories of leadership continued to rely on the assumption of an objectivist ontology and they developed a functionalist perspective. Indeed, according to Benjamin E. Hermalin, the leader can act in two ways to convince his followers to behave in a certain manner: he can make a sacrifice through side-payments to his followers (the biggest the sacrifice, the most the followers will believe the return of that action to be), or he can 'lead by example', committing efforts first to signal information about the return of that particular conduct (Hermalin 1998). Finally, it was Daniel J. Arce (in De Oliveira et al. 2005: 58) in 2001 to provide the definition of 'leading by example' that is still dominant today: 'Arce suggested the name 'leadership by example' to describe a process whereby the cooperative solution to a voluntary provision game can be obtained through the leader's unilateral commitment to an intermediate level of provision, and matching behaviour there beyond'.

According to the essay, this definition only gives a partial view of a bigger picture and it presents serious shortcomings, as the inability to explain the phenomenon of free-riding (if the importance to protect some international public goods as the global climate was self-evident, there would be no renegade states in international climate regimes). The essay maintains that all social sciences, international relations included, should acknowledge that discourses do not merely describe, but they are constitutive of social reality. A core part of the efforts of the leading actor will be to develop an authoritative and coherent narrative over the issue at stake. Having said this, a more comprehensive definition of 'leading by example' is here provided.

The name 'leadership by example' describes the process whereby the collective protection of a public good can be obtained through the leader's identification of the good at stake, and through his efforts to persuade other players to address it by following his example; the process of persuasion will take place through the leader's construction of a narrative and through the leader's concrete actions.

Differently from the functionalist definition, that dealt with resolving voluntary provision games without explaining who chooses to play which game, in this brand-new

definition nothing as a self-evident provision game exists: the public good to be protected needs to be identified first.

Besides, once the collective good has been isolated, the leader will have to convince other actors to follow him. To do so, it is necessary for the leader not just to 'commit to an intermediate level of provision, and to match behaviour there beyond' (Arce's definition), but more broadly to '*persuade* other players to address the collective protection of the public good by following his example'.

Finally, the process of persuasion requires both the construction of a narrative and concrete actions to be implemented. It is important to observe that the leader's actions will trigger other states to follow, not merely by showing them that a certain way to implement determined policies is effective (old definition of 'leading by example') but also by persuading other actors that to pursue particular objectives in specific policy sectors is of primary importance. Evidently, the new definition of 'leadership by example' does not exclude, but actually enlarges, the objects of interest of the old definition.

Consequently, it will be possible to assess if the EU is actually 'leading by example' in the global fight against climate change, by firstly focusing on EU's construction of a narrative, and secondly by analysing its concrete internal and external actions.

2. Climate change: from environmental problem to existential threat

Over the years, the EU has produced an increasing number of documents related to climate change. Some of them need to be scanned in order to appreciate how did the EU narrative over climate change evolved.

Going back to 1998, it is possible to observe the 'Presidency conclusions' at the Vienna European Council. In this context the Council met in order to 'discuss the main issues and challenges facing the European Union'. At article 70 of the document, under chapter VI on 'Environment and sustainable development', there is a reference to climate change defined as 'one of the most challenging environmental problems for the next decades' (Vienna European Council 1998, art. 70). This definition was very far from describing the climatic issue as a priority for the EU agenda, and relegated climate change to the level of an 'environmental problem' (not even the most urgent one).

Although the 'European Security Strategy' of 2003 failed to address the climatic issue, in the Paper 'Climate Change and International Security' of 2008, Climate change is described 'as a threat multiplier which exacerbates existing trends, tensions and instability […] that threatens to overburden states and regions which are already fragile and conflict prone' (High Representative and the European Commission 2008, p. 2). On the same wavelength is the 'Report on the Implementation of the European Security Strategy, Providing Security in a Changing World' dated December 2008. In the first chapter entitled 'Global Challenges and Key Threats', the last short paragraph is dedicated to climate change, still described as a 'threat multiplier' which 'exacerbates conflict, especially in situations of poverty and population growth' (European Union 2008, p. 5). In this phase, although climate change is getting closer to the security realm, it is still considered as an issue that can mainly affect EU's fragile neighbours rather than directly undermining EU's security. The consequences of climate change on the EU would mostly be indirect and its action should be addressed in a framework of solidarity towards its neighbours and through development and adaptation policies.

In the following years, climate change remained in a singular position, stuck in a limbo between development and security. This emerges from the 'Council conclusions on EU Climate Diplomacy' of 2011, stating that 'Climate change is a global environmental and development challenge. Next to the most immediate effects, it also has important security implications' (Council of the EU 2009, p. 1). Similarly, in the Reflection Paper 'EU Climate Diplomacy for 2015 and beyond' is argued that 'Climate change remains a defining global challenge of our times which, if not vigorously and urgently controlled, will put at risk not only the environment but also world economic prosperity and development' (European Commission 2015, p. 1). Although climate change is not addressed neatly as a development nor as a security issue, the entry and consolidation of climate change in this middle position has had the positive effects of recognizing the complex and broad nature of this challenge. Besides, these documents acknowledge that the consequences of climate change can directly have an impact not just on fragile and poor states, but on the entire Globe.

The 'EU Global Strategy' (2016) replaces the 'European Security Strategy' of 2003. Differently from its predecessor, it makes a lot of references to climate change (quoted twelve times) and it lists it among the threats that can directly endanger EU, together with terrorism, hybrid threats, economic volatility, and energy insecurity.

Finally, a quantum leap is evident in the description of climate change that is provided by the Council of the EU in the 'Council Conclusions on Climate Diplomacy' of February 2019. In the annex of the document it is stated that 'Climate change is a direct and existential threat, which will spare no country. […] The EU […] recognises the severe implications that climate change poses to international security and stability' (Council of the EU 2019, p. 2). On the same direction goes the 'Draft Council conclusions on Climate Diplomacy' of January 2020, that in its annex frames climate change as 'an existential threat to humanity and biodiversity across all countries and regions [which] requires an urgent collective response' (Council of the European Union 2020, p. 2). In these final formulations, climate change finally assumes the relevance and urgency of an existential threat. It is repeated once again that no country will be spared by the effects of climate change and that an immediate and collective response need to be undertaken.

It can be stated that, albeit it took a long time, the EU has been able to 'securitize' the climatic issue and to elevate climate change from the status of environmental problem to that of existential threat for humanity. This process, slow but inexorable, allowed EU to develop an unprecedented and coherent narrative over the issue. Unfortunately, there is a main shortcoming that the EU encounters: given the very nature of the Union, still far from being labelled as a federation, there are some difficulties for the voice of the EU to be perceived as a very united and creditable one. The EU possess all the economic and technological resources required to be considered as a world leader in the promotion of climate change mitigation and adaptation policies, but its peculiar institutional and political nature undermines its credibility. Making EU a more solid actor in both political and institutional terms will be necessary to reinforce EU's ability to build a credible narrative within and outside its borders and to lead by example in the fight against climate change.

3. Internal and external actions

The great number of actions that the EU put in place in its fight against climate change can be divided into two macro categories, internal actions and external actions. Although treated separately for reasons of clarity, it should be kept in mind that the domestic and external action remain mutually supportive in order to achieve EU's climate policy objective. Indeed, if the EU wants to be more credible as a leading actor fighting against

climate change, 'it will be necessary for it to close the credibility gap between international promises and domestic implementation' (Oberthür & Kelly 2008: 39).

3.1. Internal actions

Domestic actions undertaken by the EU to fight climate change encompass a wide variety of policy lines. For reasons of time, and given the aim of this essay, it will not be possible to discuss each of these actions separately. What urges here is to underline that binding rules introduced by the EU in its fight against climate change are increasing both in number and in level of comprehensiveness.

EU's efforts to implement climate policies in 1990s were mainly unsuccessful (e.g. the European Commission proposal for a combined European CO2/energy tax failed, while the programs 'Specific Actions for Vigorous Energy Efficiency' and 'ALTENER' were weakened by the end of the '90s). It was after the adoption of the Kyoto Protocol in 1997, that EU's climate policies gained a new centrality (Fischer & Geden 2015).

The introduction of the EU Emission Trading Schemes (ETS) through the 2003 EU Emissions Trading Directive is a perfect example of how the EU decided to adopt an instrument developed in the international legal framework to ensure the respect of commitments made by states parties to an international environmental treaty (i.e. the ETS were firstly introduced by the Kyoto Protocol, in 1997). The ETS were developed to help EU member states to achieve their GHGs emissions reduction through a system that allows private companies all over the Union to sell or buy emission allowances. In this way the EU could show to the whole international community to be directly interested in assuring the respect of the Protocol. After the Directive 2003/87/EC, the matter of EU ETS was regulated by five directives more (the last of which is dated March 2018) that define the rules of the EU ETS until the period 2026-2030 (European Parliament and Council of the EU, 2018).

It was always in the context of the Kyoto Protocol that the EU firstly committed to a very high reduction of GHGs. In this occasion, indeed, the EU-15 agreed to limit GHGs emissions to 8 percent below its 1990 levels during the first commitment period from 2008 to 2012, going beyond the 5 percent reduction fixed, for annex I parties to the Protocol, at art. 3 of the Kyoto Protocol (European Commission, 2004).

In the list of measures taken to decrease the GHGs emission it is also relevant to mention the Decision No 406/2009/EC, and the Regulation (EU) 2018/842. The Regulation of 2018 in particular obliges EU member states to achieve EU's aim of reducing greenhouse gas emissions by 40 percent below 1990 levels by 2030 (European Parliament and Council of the EU, 2018). In this direction goes the very ambitious Commission's Proposal for the 'European Climate Law', amended in September 2020: it is one of the core elements of the European Green Deal, and it aims at creating a comprehensive European Climatic legal framework to allow the achievement of 55 percent emission reductions by 2030 (going beyond the objective fixed by Regulation 2018/842), and the 2050 climate-neutrality objective (European Commission, 2020).

From 1990 to 2017, EU GHGs emission dropped by 21.6 percent (Eurostat, 2019). Commitments made over time by EU are particularly ambitious and this, together with the development of new instruments to achieve its objectives, shows the leading behaviour of the Union. However, the lack of homogeneity (Eurostat, 2019) between different EU countries in terms of GHGs emission is an Achille's heel, and EU should try to work on it, not only to make its internal action more effective, but also to appear as a very unitary actor in the global arena. This will require both the establishment of uniform emission reduction targets, and the identification of an acceptable balance (acceptable for EU Member States) between the urgent green transition and the social equity aspects it will affect.

3.2. External actions

Also, EU external climate action is a very complex topic to be addressed. As a matter of facts, this policy area usually borders with that of energy policies, development policies and trade policies.

It was in 2011 that the Council of the EU published the 'Council conclusion on EU Climate Diplomacy', with the aim 'to address climate change at all political levels and to strengthen the EU voice and activities internationally' (Council of the European Union 2011, p. 1).

One of the most relevant innovations introduced by the European Council in the field of external action is the creation of the 'Green Diplomacy Network', chaired by the European External Action Service (EEAS) since January 2012. As stated on the official

website of the European Commission, 'the Network consists of officials dealing with international environment and sustainable development issues in the EU's Ministries of Foreign Affairs and their diplomatic missions including the EEAS and the EU Delegations' (European Commission 2019, p. 1).

Ever since the EU has been a particularly relevant actor in international climate change negotiations. As a matter, although it had already taken part to the UNFCCC (1992) and to the Kyoto Protocol (1997), its role started to become prominent in subsequent Conferences of Parties. Despite the failure of Copenhagen Climate Summit of 2009 (COP 15), 'the EU can be considered to have scored a relative success with the Paris Agreement [of 2015 (COP21) and] this success was made possible by a moderation of the EU's policy objectives pursued proactively through an EU bridge-building and coalition-building strategy' (Oberthür & Groen 2016: 1).

EU is carrying out his climate policies also in other international fora dealing with the climatic issue (IPCC, OECD, MEF, IEA, G8 and G20), and it is putting up a series of bilateral arrangements with many non-EU countries (e.g. US, Russia, China, Brazil). Although some of the EU external climate policies are proving to be successful (e.g. EU action to support the design and the implementation of emissions trading in China), three main criticalities remain.

Firstly, when it comes to the dialogue with neighbouring developing countries, EU's climate action is mainly focused on climate change mitigation, and it is usually pushed forward (mostly but not exclusively) through development cooperation policies. It could be argued that to work on climate change resilience trough the EU Development Policy leverage might actually downsize the relevance of the climatic issue, from a security issue, to a development one. This essay acknowledges that, given the nature of the issue at stake, the development leverage is of fundamental importance when implementing climate change mitigation policies. However, EU Development policies should just support, without ever substituting, specific climate change policies.

Another important issue related to EU's foreign climate policy, concerns its approach towards energy security. The 'Energy Union Strategy' of 2015 lists decarbonization among its main priorities (European Parliament, 2015), however EU continues investing capitals for the creation of infrastructures such as the Trans-Anatolian Natural Gas Pipeline (TANAP) and the Trans Adriatic Pipeline (TAP) and its oil dependency stands at 86.7

percent by 2017 (Eurostat, 2017). Evidently, it would be useful to understand if the priority of EU energy policies is to reduce insecurity by maintaining close ties with great oil and gas exporters, or to focus on the green reconversion of its energy consumption, so to limit the import of non-renewable sources of energy whose consumption is detrimental for global climate and environment.

Finally, the EU should try to resolve the tension arising from the fact of being contemporarily a supporter of the liberalist logic of market economy and a promoter of green trade policies. To strike a balance between the two extremes will be a necessity and could finally also turn into an opportunity for the emergence and spread of a new sustainable vision of global economy.

To face these criticalities will be fundamental for the EU to gain in terms of coherence and credibility, and to lead in the global fight against climate change.

4. Conclusions

This essay started by asking the following question: 'Is the EU leading by example in the global fight against climate change?'. Once having provided a more comprehensive definition of 'leading by example', it was clarified that EU made impressive progresses in changing its narrative on climate change and its approach towards it over the last three decades. Moreover, the EU showed to be willing to undertake (and to be able to honour) very challenging emission reduction targets, and it played an active role of mediator and promoter of aspirational policy objectives both in international fora and through bilateral agreements. Having said this, and considered that no other great power (nor any coordinated group of states) has been capable to reach such high achievements, this essay concludes that the EU is actually 'leading by example' in the global fight against climate change.

However, to be a leader doesn't mean necessarily to be totally effective. Indeed, a number of criticalities remain on the ground and need to be addressed if the EU wants its action to really pursue its stated objectives. The creation of a more united EU (both in institutional terms and in terms of homogeneity of climate policy implementations) the deployment of a more sustainable approach towards developing countries, the implementation of a 'very' green energy strategy and the adoption of a new approach

towards economy (further from purely liberalist principle of market economy) are complex and sensitive issues that need to be addressed (and over which additional research will be required) in order to make EU a stronger and more successful leader in the global fight against climate change.

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