CENTRO STUDI SUL FEDERALISMO
PERSPECTIVES ON FEDERALISM

VOLUME 12

ISSUE 3
2020

CENTRO STUDI SUL FEDERALISMO
PERSPECTIVES ON FEDERALISM

ISSN: 2036-5438

VOL. 12, ISSUE 3, 2020
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EDITORIAL

ESSAYS

CENTRO STUDI SUL FEDERALISMO
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ISSN: 2036-5438

By way of introduction

by

Giacomo Delledonne *

Perspectives on Federalism, Vol. 13, issue 1, 2021

As I write these lines, the Conference on the Future of Europe is in full swing. The first round of sessions of the European Citizens' Panels was held at the European Parliament in September and October 2021. The second sessions are now set to start. Aside from its outcome, it is hard to underestimate the relevance of the Conference process, an experiment in participatory democracy that may turn into an attempt to foster reform of the European Union. This experiment is even more important, as it takes place among the uncertainties about the post-pandemic recovery. In one of the next issues, Perspectives on Federalism will pay due attention to the activities of the Conference and to their relevance in the present time.

As usual, we encourage our readers to submit articles, review essays and notes, or to submit proposals for fully-fledged special issues.

The contents of this issue

The six essays that compose this issue cover a number of topics. Three of them analyse specific aspects related to the territorial distribution of power in individual jurisdictions. Kent Eaton focuses on one country that is rarely mentioned in the studies of comparative federalism, that is, Colombia. The Colombian Constitution of 1991 marked a remarkable shift from 'shared rule with limited self-rule' to 'extensive self-rule with no shared rule'. The increased significance of the departments, that is, intermediate substate entities, went hand in hand with a radical transformation of the Senate, which had ensured equal representation of the departments under the Constitution of 1886. Since 1991, the Senate has been composed 'of one hundred members elected in one nationwide constituency' (Art. 171 of the Constitution currently in force). The current state of affairs has proved to be quite unstable. In addressing his research questions, Eaton makes some interesting points on the interplay of federalisation (in the broad sense) and democratisation in one of the most significant examples of constitutional transitions within democracy. Ajayan T considers one case of resort to Art. 356 of the Indian Constitution, under which the President of India may 'assume to himself all or any of the functions of the Government of [a] State' in response to 'failure of constitutional machinery' in that state. This happened in 1959, when the Union government put an end to

the Communist state government of Kerala, the first non-Congress administration at a time in which the Indian National Congress (INC) controlled the federal government as well as all the other state governments. Ajayan T discusses the constitutionality of such a move against the background of centre-state relations in India in the years of INC hegemony. This piece is relevant in comparative terms at it provides in-depth information on the use of extraordinary federal powers vis-à-vis one of the constituent units. In recent years, scholars in comparative federalism have extensively discussed the usefulness and purpose of these instruments with regard to secession crises and, of course, to the handling of the Covid-19 pandemic. The piece by Yonattan Araya Zemaryam focuses on a very topical issue. In 2020, an armed conflict broke out between the Tigray regional government and the Ethiopian federal government run by Prime Minister Abiy Ahmed. In his contribution, Zemaryam argues that ethnolinguistic federalism – or, better said, the way it was implemented in Ethiopia after 1995 – has not provided a remedy for the risk of interborder conflict.

The essay written by Tomasz P. Woźniakowski and Miguel Poiares Maduro builds on the well-known comparison between the federalising processes of the United States and the European Union (EU). Woźniakowski and Maduro focus on one of the most important drivers of federalisation, that is, the power to tax. The authors argue that the very existence of a 'power to tax' may not be less important than the size of the budget of the EU. In this respect, the early history of the United States is rich in insightful teachings. After years of social unrest, 'the granting to the federal government of the power to tax ultimately brought about a decrease in an overall tax burden' and contributed to relieving social tensions. Starting from this crucial watershed in the history of the American experiment, the two authors argue that 'the same dynamics might be replicated in the European Union'.

The essay by Matteo Oreglia analyses the current state of the relations between the EU and the African, Caribbean and Pacific Group of States (ACP). The Cotonou Partnership Agreement was due to expire in February 2020 but has been extended until 30 November 2021. Meanwhile, the two parties have entered into negotiations for a 'post-Cotonou' agreement. The new agreement should lay down common principles and cover six priority areas: democracy and human rights, sustainable economic growth and development, climate

change, human and social development, peace and security, and migration and mobility. Against this background, Oreglia considers the main issues to be solved during the negotiating process.

Finally, Roberto Talenti looks at the international law regulation of the sector of agriculture, forestry and other land use (AFOLU) in the framework of the fight against climate change. Does the regulation of the AFOLU sector address this challenge? If this is the case, does it live up to the aim of reducing emissions? In answering these research questions, Talenti makes some points on the significance of international cooperation in the climate crisis.

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CENTRO STUDI SUL FEDERALISMO
PERSPECTIVES ON FEDERALISM

ISSN: 2036-5438

Self-rule vs. Shared Rule: The Design and Evolution of Federal Institutions in Colombia.

by

Kent Eaton*

Perspectives on Federalism, Vol. 12, issue 3, 2020

Abstract

In 1991, Colombia shifted from a territorial regime that combined shared rule with limited self-rule to the opposite configuration: extensive self-rule without shared rule. The radical shift between these two hybrid configurations generates two distinct but related theoretical puzzles. First, why did the 1991 constitution simultaneously empower Colombia's constituent units with self-rule only to disempower them by eliminating their representation in the Senate? I argue that the same democratizing forces that sought to strengthen territorial units via self-rule also had the effect of undermining shared rule by transforming the Senate into a body that would be elected in a single nationwide district. Second, what explains the instability of self-rule without shared rule in the years after 1991 when the opposite configuration had achieved such stability in the century before 1991? This paper shows how, once they lost their representation in the Senate, regional actors had few institutional levers at the national level they could use to veto recentralization and defend their newfound self-rule.

Key-words

federalism, self-rule, shared rule, decentralization, democratization, Colombia

1. Introduction

Daniel Elazar argued that federalism can be 'understood in the broadest political sense as a genus involving combinations of self-rule and shared rule' (1995, 7); while self-rule refers to exclusive prerogatives under the control of substate authorities, shared rule relates to the ability of substate units to participate in the joint governance of the state, typically though not exclusively through their representation in a statewide legislative chamber. More recently, Liesbet Hooghe and Gary Marks along with their collaborators (2016) have argued that the authority of substate regions around the world (in both federal and unitary systems alike) is best conceptualized as the aggregate of ten indicators of either self-rule or shared rule. Systematically measuring countries on both dimensions, and not just in formal federations, has opened up new terrain vis-a-vis the generation and evaluation of theories about the complex relationships that connect self-rule and shared rule.

Because levels of self-rule and shared rule can vary independently of one another, myriad combinations of the two forms of rule are possible and, as Elazar suggested, these different combinations might hold important clues as to how federal systems function in practice.[1] Simplifying matters somewhat, it can be useful for heuristic purposes to compare cases with four different possible combinations. High levels of both kinds of rule (self and shared) together could be said to make a federal system more federal, and one can identify several mechanisms through which self-rule should enhance shared rule. As McEwen and Schakel (2017) argue, 'the complexities of modern government suggest that higher levels of regional competence may heighten the need for closer cooperation with central government'. Another quite stable pattern is the opposite: countries that limit the authority of substate regions to govern either themselves or the state as a whole in an institutional dynamic that is characteristic of traditional unitary designs.

While there are sound reasons to expect stability from these first two combinations, the third and fourth combinations are intermediate possibilities or hybrid configurations subject to potentially greater volatility and unpredictability. In countries with high levels of shared rule but low levels of self-rule, representatives of territorial units at the center can face intense pressure 'from below' to use their national leverage to enact changes that expand self-rule, but may also feel personally threatened by such changes if they challenge

their roles as brokers of national largesse. In the obverse cases with high levels of self-rule but low levels of shared rule, substate officials may experience equally intense insecurity about the sustainability of self-rule without shared rule to protect it, but benefit personally from the absence of potential territorial rivals in upper legislative chambers. Not only do these hybrid configurations hold out special theoretical interest due precisely to their indeterminate nature, but they are also likely to be of greater relevance in the world today given how many formally unitary countries have initiated -- but not completed -- concerted movements toward federalism by altering either self-rule or shared rule (Breen 2018, Erk 2014, Mueller 2017).[II]

Toward the goal of better understanding these two hybrid configurations, this paper focuses in depth on one country -- Colombia -- that made the radical decision three decades ago to shift abruptly from one of these hybrid configurations to the other.[III] Specifically, between 1886 and 1991, Colombia was governed by a constitution in which all intermediate-level governments (i.e. departments) sent equal numbers of representatives to the Senate (a form of shared rule), but which denied territorial units (both departments and municipalities) any meaningful form of self-rule, including the right to elect their own governors and mayors. While this constitutional arrangement proved to be remarkably resilient (especially in a region where very few constitutions last over a hundred years), pressures eventually emerged to increase the governing authority of territorial units, and extensive measures to expand self-rule were endorsed by the Constituent Assembly that met in 1991 to draft a new constitution. However, while this new constitution introduced significant new institutional designs to enhance self-rule, it at the same time curtailed shared rule through electoral reforms that reconfigured the Senate. Rather than elect senators in departmental districts, the country's 100 senators are now elected in a single nationwide district.[IV] Why in its 1991 Constitution did Colombia simultaneously move to empower subnational regions by giving them far greater resources and responsibilities (i.e. self-rule) while also disempowering them by eliminating their representation in the Colombian Senate (i.e. shared rule)?

I argue that this puzzling outcome, which is clearly inconsistent vis-a-vis the federal ideal of self-rule combined with shared rule, only makes sense when looked at through the lens of democratization. The very same democratizing impulses that focused on decentralization as a means of strengthening subnational governments also fueled the

transformation of the Senate into a body that would be elected in a single nationwide district rather than in territorial districts. These two reforms were technically distinct and contradictory in terms of the logic of their impact on Colombia's constituent units. Nevertheless, both sets of reforms stemmed from a common diagnosis, namely that the best way to deepen democracy in Colombia was to empower a whole series of previously excluded and marginalized actors, including non-traditional parties, who had struggled to wield political power in the country's stable but elite-dominated democracy. The decidedly mixed results for federalism of the burst of democratizing energy that Colombia experienced in the late 1980s and early 1990s challenges assumptions about the presumed synergies between federalism and democracy; in this case, democratization has undermined federalization.[V]

But the Colombian experience poses a second theoretical puzzle in addition to the content of its shift in 1991 from shared rule without self-rule to the exact opposite configuration. This second puzzle stems from the fact that the new dispensation of self-rule without shared rule that was enshrined in the 1991 Constitution has proved to be highly unstable and ultimately unsustainable -- in sharp contrast to the prior dispensation of shared rule without self-rule, which had survived for over a century. A few short years after the ratification of the new Constitution in 1991, and in a process of recentralization that then gained steamed over the last two decades, Colombia experienced a disparate set of changes that have directly and indirectly undermined self-rule and hollowed out subnational governments. What explains the remarkable resilience of the first hybrid configuration endorsed in the 1886 Constitution and the instability of the opposite hybrid configuration that replaced it in the 1991 Constitution? In other words, why was shared rule without self-rule so much more stable than self-rule without shared rule?

This paper contends that the previous configuration, which came to an end due to exogenous rather than endogenous factors, benefited from important self-enforcing mechanisms (Filippov, Ordeshook and Shvetsova 2004). These mechanisms kept the institutional game in play despite the major transformations that Colombia experienced over the course of the 20th century, including urbanization and modernization on the one hand, and an intractable internal armed conflict on the other. In contrast, Colombia's more recent configuration was inherently less robust because the decision to dramatically increase self-rule while simultaneously curtailing shared rule made self-rule itself vulnerable

to attack by its opponents. When the intensity of the democratizing impulse that produced the 1991 Constitution abated, powerful actors at the national level in the context of a worsening economy and a growing guerrilla threat proposed to reverse the decentralizing reforms that had only recently sought to strengthen substate governments. Having lost their perch in the Senate, regional opponents of these recentralizing moves had few institutional levers at the national level they could use to veto recentralization and thereby defend self-rule.[VI] The specific design choices Colombia made in 1991 would have fateful consequences for the institutional evolution of its quasi-federal system in the three decades since their adoption.

Holding the country case constant in order to examine institutional performance over an extensive period of time, this article proceeds as follows. The next section introduces the Colombian case and briefly describes the federal model it adopted in the second half of the 19th century (1863-1886) -- one of the boldest experiments with federalism anywhere in Latin America (Mazzuca and Robinson 2009) and one that has cast a long shadow on all subsequent moments of territorial (re)design in Colombia. The third section briefly describes the stability of the country's lengthy experience in the 20th century with shared rule in the absence of self-rule (1886-1991), followed by a section that examines the exogenous factors that led to the replacement of this hybrid configuration with its opposite in 1991. Section five turns to several key episodes over the last two decades that illustrate the erosion of self-rule without shared rule to help defend it, including fiscal recentralization, control over natural resource rents, and the design of enabling legislation called for in the new constitution. This instability of institutional designs that grant self-rule without shared rule serves as a cautionary tale for the many unitary countries around the world that have adopted decentralizing reforms in recent years to boost self-rule while stopping short of constitutional reforms that would establish shared rule.

2. Colombia and the Conflict over Federalism

Colombia does not appear on the list of established federations in Latin America, which includes Argentina, Brazil, Mexico and Venezuela -- a set that has not changed in over a century despite the major decentralizing reforms introduced across the region. The absence of Colombia on this list is surprising, both in terms of its population size as the

third largest country in Latin America (only Brazil and Mexico are larger) and in terms of its land mass as the fourth most territorially extensive country in the region. Nevertheless, struggles over federalism and the contested design of federal institutions have played a central role in the country's political history.

Proponents of federalism in Colombia can point toward several important reasons why federal solutions would make even greater sense here than in some of the other countries in the region that have formally federalized. Consider Colombia's extreme topography. Running up the western edge of the continent, the Andean mountain range splits when it enters Colombian territory into three separate chains and two separate river valley systems in a geography that significantly raised communication and transport costs across the national territory. According to Sebasian Mazzuca (forthcoming, 248), 'in no other country of the Americas was it so expensive to build passage between the main cities and the main waterways'. Physical separation led to the formation of distinct cultural practices attached to rival regional identities (Fals 1997). Deviating from the high levels of urban primacy that are characteristic of Latin America, Colombia can be described as a 'mosaic of regions' (Palacios 2006, 5), each of which 'had distinct political economies and were economically self-sufficient' (Soiffer 2015, 42). Despite their mobilization into rival political parties (Liberals and Conservatives), economic elites in different regions shared a disinterest in reforms that would strengthen the center and privileged instead the development of regional economies. All of these factors (structural and ideational) would appear to point toward federalism as the country's preferred institutional structure.

For the opponents of federalism, however, these centrifugal dynamics speak to the dangers of federal designs and the need to avoid a repeat of the country's tumultuous experience with a formally federal system between 1863 and 1886. In 1860, governors belonging to the Liberal party successfully rebelled against the Conservative-dominated national government, leading not just to the promulgation of a new federal constitution in 1863 but to a new name for the country: the United States of Colombia. This 1863 constitution identified Colombia's nine regions as 'sovereign states' (*Estados Soberanos*) and sharply curtailed the power of the national government based in Bogotá. The new constitution introduced the popular election of governors and enabled states to write their own laws, design their own judicial systems, structure their own municipal regimes, and even create their own armies (Cruz 2011). In addition to guaranteeing shared rule through

the Senate as a territorial check on the federal government, article 20 protected self-rule by mandating that any federal functionaries sent to the states would 'operate under the control of state governments' (Morelli 1997, 116). All powers not expressly delegated to the federal government were reserved for the states.[VII]

In two key dimensions, the perceived excesses of the 1863 Constitution have tarnished the reputation of federalism up to the present day in Colombia. First, the devolution of authority over infrastructure that was so central to the meaning of self-rule in the 19th century led to sub-optimal economic outcomes. Regional economic booms encouraged regional elites to invest in regionally-specific public works projects that were implemented in a highly disconnected fashion (Safford and Palacios 2002). As Soiffer argues (2015, 45), 'the starkest evidence of this absence of unification was the failure to coordinate track widths across regions; even where multiple train lines intersected, goods could not easily pass from one region to another'. Second, Colombia's 1863 constitution is also associated with worsening violence in a country where the state continued to face threats to its monopolization of the use of force all the way into the 21st century. Taking advantage of devolution and the right to import arms to construct their own coercive apparatuses, three states (Antioquia, Cauca, and Cundinamarca) built armies larger than the federal government's (Mazzuca forthcoming, 251). By the start of the 1880s, Colombia's radical experiment with federalism had devolved into 'organized anarchy' (Park 1985, 207).

3. The Stability of Shared Rule without Self-Rule (1886-1991)

Colombia's volatile 19th century experience with federalism generated a highly centralizing backlash in the form of the 1886 Constitution, which preserved shared rule but eliminated self-rule in a stable configuration that survived for over a century. Renaming the country the 'Republic of Colombia' rather than the 'United States of Colombia', the new Constitution converted sovereign states into mere departments, which lost their ability to act independently of the national government. The most obvious assault on self-rule was the cancellation of elections for substate chief executives. Under the new system of upward accountability, the president appointed all governors, and governors in turn appointed all mayors in their departments.[VIII] While municipal councils and departmental assemblies were still elected, these bodies failed to check the power of substate executives who served

at the pleasure of higher levels of government (Léal and Dávila 2010). Despite the slogan attached to the 1886 Constitution of 'political centralization with administrative decentralization', the reality is that capacity deficits in the departments resulted in a dynamic of administrative deconcentration, which became even more pronounced with the onset of developmentalist models in the mid-20th century that expanded the roles of the center (Restrepo 2015). Mirroring political and administrative centralization, the new fiscal system undermined self-rule by denying territorial units any significant tax authority; instead these units came to depend for their revenues on congressional assistance funds negotiated in Bogotá (Archer and Shugart 1997).

Although the 1886 Constitution eviscerated self-rule, it guaranteed shared rule through the election of an equal number of senators (three) to represent each department in the upper chamber. The preservation of the departments' ability to participate in national-level decisions was critical precisely because the increase in the formal authority of the national government had taken place at the expense of departmental authority. Elected for a period of six years and eligible (unlike the president) for indefinite reelection, senators were selected by departmental assemblies using a majoritarian electoral rule. For the first twenty years of the constitution, this majoritarianism generated significant instability by over-representing the dominant Conservative party and under-representing Liberals, who took up arms against the arrangement in the deadly Thousand Days War (1899-1902). The shift to a form of proportional representation in 1905, which guaranteed that one of the three Senate seats in each department would go to the minority party, finally pacified the country (Mazzuca and Robinson 2009). After pacification, Senators as the chief agents of shared rule increased in number when existing departments were subdivided to form new departments.[IX]

Despite this increase in the size of the Senate over time, what did not change under the 1886 Constitution was the pivotal role played by individual senators as regional party brokers whose behaviors served to re-enforce the equilibrium of shared rule without self-rule. The structure of Colombia's two traditional political parties (Conservatives and Liberals) holds the clues to understand how the Senate functioned as a self-enforcing mechanism across this long century (1886-1991). Despite the fact that these two parties had previously gone to war in the attempt to impose or resist federal designs, the reality is that *both* parties operated as loose federations of regional economic elites who enjoyed

significant autonomy relative to national party leaders (Léal and Dávila 2010). In the Conservative party no less than in the Liberal party (i.e. the nominal defender of federal principles), senators operated as regional power brokers who sat atop departmentally-specific networks of clientelism and who exerted hegemonic control over the party lists that determined access to political power. Although formally speaking the president appointed governors who in turn appointed mayors, appointments were actually made according to the informal but widespread logic of patronage: presidents let senators decide who would be appointed as governors and mayors in their departments in exchange for supporting the presidential agenda (Restrepo 2015).

Shared rule in the absence of self-rule proved to be a stable arrangement because it exactly suited the political and economic interests of senators as the lynchpins of regional power. Consider the case of land reform. Despite the post-WWII strengthening of progressive forces in favor of agrarian reform, and ambitious land redistribution proposals by Liberal Presidents Alberto Lleras Camargo (1958-62) and Carlos Lleras Restrepo (1966-70), the Senate steadfastly defended landowning elites in the departments by either refusing to endorse or by gutting major land reform legislation (Hirschman 1963). This was a highly reactionary and 'demos-constraining' form of shared rule (Stepan 2004), but shared rule nonetheless. Although Senators used shared rule to block existential threats to their class interests, they were willing to support other reforms that insulated macroeconomic policy making in the national bureaucracy in exchange for the institutionalization of access to pork barrel funds (Archer and Shugart 1997, Dargent 2014). The elimination of fiscal self-rule in the 1886 Constitution meant that departments were dependent for their revenues on the discretionary transfers individually brokered by senators, who simultaneously controlled the careers of the governors presiding over those departments. According to the relevant counterfactual here, higher levels of self-rule would have threatened both the brokerage roles played by senators and their ability to block the kinds of equity-enhancing reforms (like land reform) that would have been championed by at least some directly elected mayors and governors.

4. Democratization and the 1991 Constitution: Self-rule without Shared Rule

While senators were able to defend shared rule without self-rule by vetoing efforts to reform the 1886 Constitution for much of the 20th century, eventually a series of forces exogenous to the established institutional game converged to challenge its logic. For different reasons and toward different goals, these disparate forces converged around demands for institutional reforms that would open up the country's closed and centralized political system and thereby deepen democracy. The result was a radical shift from shared rule without self-rule to its mirror image.

Democratizing forces in Colombia were galvanized by growing frustration with the country's National Front experience, a power-sharing arrangement between the two main parties designed to end the partisan violence that had killed upwards of 250,000 Colombians in the decade after 1948. During the National Front (1958-74), the two parties agreed to rotate in and out of the presidency, hold equal numbers of seats in the two legislative chambers, appoint similar numbers of mayors and governors, and enjoy parity vis-à-vis bureaucratic spoils (Hartlyn 1988). Although the National Front 'worked' in the sense that it ended inter-party violence, it also provoked new types of violence with the emergence of guerrilla insurgencies against the establishment in the 1960s. By monopolizing all national institutions along with the power to appoint all substate executives, Liberals and Conservatives monopolized a political system that offered no meaningful avenues of participation or representation for actors not affiliated with the two main parties (Bejarano and Pizarro 2005). Combined with high levels of inequality in land ownership, the National Front proved to be the perfect institutional recipe for the strengthening of Marxist-Leninist insurgencies whose war against the state produced the deadliest and lengthiest internal armed conflict in Latin America.

The highly centralized and closed political system that Colombia inherited as the joint institutional legacy of the 1886 Constitution and the National Front ultimately came under greater stress as a range of subaltern actors began to demand greater forms of self-rule. The most significant development was the emergence of over 200 'civic strikes' (*paros cívicos*) between 1970 and 1986, which were 'organized by local citizens' groups protesting poor service provision and the concentration of government expenditure in the largest cities'

(Nickson 1995, 146). According to Falleti, poor quality and unevenness in service delivery by parastatal institutions that were 'attached to central agencies and ministries' generated a widespread demand for the direct election of mayors rather than their appointment by higher-level patrons, a system that had created high turnover, pervasive corruption, and so-called 'professional mayors' who would travel around all the municipalities of one department until they were discredited in all of them' (2010, 131, 132). A parallel demand for self-rule came in the form of pressures from insurgent organizations for the direct election of majors, the introduction of which would enable guerrilla leaders to come to power not just through armed struggle but also 'through the ballot box' (Eaton 2006).

While exogenous demands from below for greater self-rule became harder to ignore for politicians at the top by the 1980s, these legislators still controlled any decision to grant self-rule, either in the form of ordinary decentralizing legislation or in the form of a new constitution. Legislators' veto power only began to unravel in 1982 with the unexpected election as president of Conservative party candidate Belisario Betancur after a split in the Liberal party divided the Liberal vote between two Liberal candidates (O'Neill 2005). The Liberal party had dominated the Colombian presidency since the end of the National Front with presidential victories in 1974 and 1978 (and it subsequently reclaimed its dominant position with victories in the three subsequent elections of 1986, 1990, and 1994). O'Neill argues that the organizational strength of the Conservative party in the countryside and at the subnational level, combined with its weakening position in presidential campaigns, encouraged it to use its likely temporary control of the presidency (1982-86) to push through decentralizing measures, including direct elections for mayors. Beyond electoral calculations, another key development at the top of Colombia's political system was growing support among reformers for a 'pacification through decentralization' strategy most associated with Liberal party politician Jaime Castro, who served as Betancur's Minister of Government. As the country's multiple insurgent groups ballooned in size and extended their territorial reach in the 1980s -- fueled in part by access to growing revenues from drug trafficking -- politicians in both parties came to accept the idea that self-rule could help end the war by creating space for the non-violent local expression of political preferences (Castro 1998).

In the face of intensifying pressures for self-rule, thorough-going reform would require re-writing the Constitution itself and not just passing decentralization bills. The obstacle

here was that, unique among presidential systems, the 1886 Constitution endowed Congress with the exclusive authority to alter the constitution, with no role for referenda or ratification mechanisms (Nielson and Shugart 1999, 321). In exceptional circumstances, members of Congress from the two traditional parties were willing to support one-off decentralizing measures, but not re-writing the Constitution itself. Confronted with steadfast congressional opposition and allied with a student movement that saw constitutional reform as the key to democratizing Colombia, President Virgilio Barco ultimately succeeded in circumventing the legislature by encouraging voters to deposit unofficial slips of paper (the so-called '*séptima papeleta*') calling for a constituent assembly into their ballot envelopes in the 1990 election (Nielson and Shugart 1999). Though technically unconstitutional, the Supreme Court then upheld the decree (927) Barco issued to formalize the convening of a Constituent Assembly to re-write the constitution. Just as critical as this unconstitutional decree was a subsequent decree (1926) stipulating that this Assembly would not be elected in the normal electoral districts used to elect legislators (Hernández 2013). Instead, members of the Assembly were elected in a single nationwide district, which led to the sizable representation of non-traditional parties, including demobilized guerrilla leaders, whose primary goal was to open up the political system.

The new Constitution introduced many novel changes designed to deepen democracy, but no change was as dramatic as the radical shift that took place with respect to self-rule and shared rule. Perhaps the most symbolically significant change with respect to the former was the reintroduction of direct elections for governors, which were held in 1994 for the first time since before 1886. In addition to political decentralization, the Constitution also advanced self-rule through generous fiscal and administrative measures. Specifically, the 1991 Constitution increased automatic revenue transfers to departments (in the *situado fiscal*) and municipalities (via *participaciones*); while the former were tied to expenditures in health and education, the latter were unearmarked (Restrepo 2015). Just as important was an expansion in the size of the pool of resources subject to revenue sharing, which shifted from tax revenues alone to include all tax and nontax revenue income (Falleti 2010, 141). While fiscal changes were in some ways more generous to municipalities than departments, administrative measures mandated departmental supervision over municipal governments with fewer than 100,000 residents (which represent over 90% of the total). Altogether, greater self-rule worked as a democratizing measure in the sense that it boosted

political pluralism by empowering new political actors from outside the established parties, including the innovative mayors elected to govern large cities like Bogotá, Cali, and Medellin in recent years (Pasotti 2009).

The same democratizing impulse that led to support for self-rule, however, had sharply negative consequences for shared rule in the 1991 Constitution. On the one hand, the new Constitution elevated and strengthened the Senate relative to the 1886 Constitution and increased its size to 100 senators. For example, although the Senate was endowed with significant legislative authority in the earlier Constitution, only the lower chamber could introduce taxes, unlike the 1991 Constitution which gives the Senate co-authority over taxes and budgets (Hooghe et al 2016, 243). The new Constitution also requires Senate approval for the president to extend a state of internal disturbance, an important attribute in a country with an internal armed conflict (Nielson and Shugart 1999, 333).[X] More importantly, however, even as the powers of the Senate were increased, its regional composition was discarded. This is because the members of the Constituent Assembly decided to use the same one-off electoral rule that had been applied to their own election in a single nationwide district to select the new Senate. Senators henceforth would have a national rather than regional constituency. In losing their own senators, departments lost one of the most important channels through which they could influence national legislation affecting their territory (Hooghe et al 2016, 243).

Given their full-throated support for self-rule, the opposition to shared rule by members of the Constituent Assembly would appear to be contradictory, but was in fact driven by the same democratizing preferences. The overarching objective animating constitutional reformers was to diversify the internal composition of the Senate beyond traditional politicians. For reformers seeking to reverse the rural bias that had prevented progressive policy changes for many decades (like land reform), the hope was that a nationwide constituency would create 'opportunities for candidates appealing across the boundaries of the traditional departmental district, making the upper chamber much more responsive to urban policy demands' (Nielson and Shugart 1999, 329). Whereas successful Senate candidates in the past by definition had to pursue concentrated strategies focused only on their home departments, to win a seat in the new Senate candidates can adopt a dispersal strategy, 'garnering small shares of the votes in multiple departments that aggregate across departmental boundaries to reach the number of votes needed to win the

election' (Nielson and Shugart 1999, 330). A nationwide district made it possible for smaller parties to win a seat that never would have succeeded in the traditional regional districts. In the first elections held under the new rule in 1994, while the Liberals and Conservatives still won 75% of the seats, a number of small parties ranging from Christians to Communists were able to elect one or two senators. Indigenous parties also won seats in addition to the two guaranteed seats granted by the Constitution. In contrast to this increase in political pluralism, many departments lost representation in the Senate. As of 2016, nearly half of all departments (15 of 32) do not have senators who hail from those departments (Restrepo 2016, 152). Over the thirty-year life of the new Constitution many senators have continued to deploy territorially-concentrated and highly clientelistic strategies (Flórez 2008), but it is also clear that diffuse national interests are now better represented in the Senate.[XI]

If the loss of a territorially-structured Senate represented the most important blow to shared rule in the 1991 Constitution, it is important to also note the absence of other institutional mechanisms that could have enacted shared rule in its place, starting with Colombia's lower legislative chamber. Given that representatives to the House of Representatives continue to be elected in departmental districts, why haven't these representatives been able to defend self-rule since 1991? After all, while Senators now face some incentives to respond to latent or diffuse national constituencies, Representatives still have home departments. A number of factors, however, have kept them from playing this role, including the lack of any constitutionally-embedded mandate to do so. Although each department is guaranteed at least two Representatives, article 176 of the Constitution clarifies that they represent the people rather than any territorial unit, and that population determines the number of representatives elected in each district (which ranges from 2 to 18). Furthermore, in the critical area of taxation, the 1991 Constitution reduced the prerogatives of the lower chamber by elevating those of the upper chamber; prior to 1991 the Representatives would have had greater power to resist the kinds of fiscal changes that have weakened subnational governments in recent decades. A final factor was an electoral reform in 2002 that strengthened political parties by requiring them to put forward a single list in legislative elections in each district (Moreno and Escobar-Lemmon 2008). Whereas multiple lists within the same party previously incentivized intra-party competition, the

2002 reform strengthened party leaders and reinforced partisan (as opposed to territorial) identities as the main axis of competition in the lower chamber.

In addition to the inability of Colombia's lower house to defend shared rule, regional participation in national-level decision making was also undermined by the weakness of other mechanisms created in the 1991 Constitution. Consider, for example, the participatory planning institutions that democratic reformers also inserted into the new Constitution, including the National Planning Council, which includes reserved seats for departmental and municipal governments in addition to civil society actors. Because the stated purpose of the NPC is to influence planning by the national government across the national territory, it could technically be considered a form of shared rule. However, as Mayka argues, planning councils in Colombia 'are characterized by a weak institutional design, with only a consultative role in policymaking, considerable ambiguity about how they are to contribute to the planning process, and no clear enforcement mechanism' (2019, 185). In the three decades since its creation, the NPC has not functioned as anything like a functional substitute for the Senate in terms of shared rule. Nor have any reliable informal mechanisms emerged to sustain shared rule.[XII]

5. The Unsustainability of Self-Rule in the Absence of Shared Rule

Despite the intellectual coherence of the democratizing changes inserted into Colombia's new Constitution – including the dual decisions to decentralize and to elect senators in a single national district – the combination of self-rule in the absence of shared rule would prove to be unsustainable. Specifically, the significant extension of self-rule that took place in the 1980s and 1990s became highly vulnerable in the decades that followed the Constituent Assembly once this unusual reform window shut (Hernández 2013) and numerous pressures for recentralization emerged in the aftermath of the new Constitution. Already by 1998, fears crystalized among technocrats that the expansion of fiscal transfers was threatening Colombia's famed macroeconomic stability as one of the few countries in the region that had escaped the plague of hyperinflation (López 2017). Also by the late 1990s, the rapid expansion in the territorial reach of the country's main guerrilla organization (*Fuerzas Armadas Revolucionarias de Colombia* or FARC) led many to conclude that decentralization as a pacification strategy had failed. The FARC had indeed won

municipal elections, as hoped, but this also unleashed paramilitary violence against the party it created to contest these elections in a spiral of violence that worsened the conflict (Eaton 2006). In a more prosaic fashion, numerous local and departmental governments struggled to perform the new roles assigned to them by self-rule, capacity deficits that became more glaring once the central state experienced important episodes of capacity building under the administration of President Alvaro Uribe (Flores-Macias 2013).

Against the onslaught of these pressures, and once national leaders decided that it was time to claw back resources and authority, substate governments were relatively powerless to coordinate in defense of self-rule. While a territorial Senate would not have guaranteed the survival of the decentralizing vision endorsed in the 1991 Constitution, the attempt to defend self-rule suffered from the absence of a powerful national institution that could have served as a veto player vis-à-vis recentralization. The associations of mayors and governors that had been created in the throes of decentralization (e.g. Colombian Federation of Municipalities in 1988, National Federation of Departments in 1994) were simply eclipsed by the push to recentralize power, which instead was mediated and shaped exclusively by national actors in an institutional landscape that overwhelmingly favored opponents of decentralization.

More specifically, in the aftermath of the disappearance of the territorial Senate in 1991, those who would seek to defend self-rule had to confront the juggernaut of Colombia's powerful economic technocracy, situated in three key institutions: the Ministry of Finance, the National Planning Department, and the Central Bank (*Banco de la República*). According to Dargent, one of the key consequences of the bipartisan National Front period discussed above was the delegation of macroeconomic policymaking to politically insulated and technically astute bureaucrats (2014). Political parity reduced the need to use financial and economic agencies for patronage purposes, creating technocratic 'islands of competence' (Geddes 1994). As Dargent argues, many technocrats began their careers in the private sector think tank FEDESARROLLO, whose focus in the 1990s 'turned to the new institutions adopted in the 1991 Constitution and their problematic effects on long-term economic stability' (2014, 258). Chief among these institutions were those of fiscal self-rule, which technocrats saw as incompatible with economic stability. Although the Constitution Court, which was also created by the 1991 Constitution, has emerged as a surprisingly powerful defender of the democratizing ethos of the new constitution, it did

not do much to forestall recentralization or defend self-rule, though on occasion it has defended the prerogatives of substate governments in conflicts over extraction.[XIII]

If the institutional balance of power among national stakeholders was stacked against self-rule, the autonomy of territorial units emphasized in Article 1 of the new Constitution also eroded due to specific governing strategies adopted by the most powerful president of recent times: Alvaro Uribe (2002-2010). Elected at a time when the FARC was at its zenith, Uribe's aggressive attempts to defeat the guerrillas militarily rather than negotiate with them succeeded in restoring a modicum of stability to the country and garnered the president enough popularity to change the constitution to allow his reelection in 2006. Uribe's highly personalistic style of rule included the formation of what he called 'communal councils' (*consejos comunales*). Every weekend during his presidency, Uribe would travel to local governments along with select ministers to directly receive, debate, and act on their requests for nationally-mediated support.[XIV] Ostensibly occasions where local actors could give national officials feedback and input vis-à-vis national policies and programs (e.g. shared rule), the mobile cabinets more frequently represented the encroachment of national officials into decisions that had been formally decentralized by the 1991 Constitution.[XV] The norms of self-rule clashed directly with this novel decision to territorially displace meetings of the national executive cabinet by holding them across the country.

The fundamental vulnerability of self-rule without shared rule can be clearly observed in the following three key episodes, beginning most obviously with the case of fiscal recentralization. The process began under the administration of Ernesto Samper (1994-98), which introduced new restrictions on borrowing by substate governments. In response to the worst economic crisis since the 1930s, his successor Andrés Pastrana (1998-2002) subsequently proposed addressing the country's fiscal deficit through temporary changes in the system of fiscal transfers, which then became permanent under Uribe. In interviews with Uribe's Ministers of Finance and Interior, Julian López (2017) documents the marginal role played by the Senate in the debate over these measures. In the absence of a Senate that would prioritize regional over national objectives, individual governors were left to resist recentralization on their own and in an isolated fashion, including the Governor of Atlántico (Carlos Rodado) who complained that when he went to the Senate in 2007 to debate the reform not even senators from his own department supported his

efforts (López 2017, 151). With a Senate that would no longer prioritize regional interests, Colombia shifted from percentage-based revenue sharing to fixed-sum transfers that had the effect of cutting subnational revenues as a share of total revenues from 46.5% to 37.2% by 2005 (Dickovick and Eaton 2013). As noted by Hooghe et. al. (2016), Colombia's national parliament approved the fiscal responsibility laws 'without subnational input' (2016, 243).

Self-rule also took a major hit in the 2011 reform of the system through which rents from Colombia's natural resources are shared with territorial governments. In a major boon to these governments, the 1991 Constitution established that 80% of royalties from oil and mining would be shared with producer regions in an unearmarked fashion. Four of Colombia's least development departments – Arauca, Casanare, Guajira and Meta – received the bulk of these royalties, which amounted to $32.7 billion by 2009 according to the Ministry of Hacienda (Benítez 2013). When these departments continued to experience poor outcomes in terms of social services despite the transfers, technocrats in the national government proposed changes that culminated in a new General System of Royalties (*Sistema General de Regalías* or SGR). What's important is that the new system dramatically increased the oversight of the national government by reassigning 50% of royalties to nationally-controlled development funds and by requiring that all substate governments enter favored projects into a 'project bank' controlled by the National Planning Department before they could be funded by royalties.[XVI] Although the Senate signed off on this recentralizing change, one senator (Juan Lozano) argued that the veto power given to the national government in the SGR was unconstitutional, and the Constitutional Court agreed by suspending one particular article (31 of law 1606) of the enabling legislation (Benítez 2013). Here the Court played a role that the Senate might have taken up more vigorously if it had maintained its territorial identity, but the key point is that neither actor could prevent this massive setback for self-rule.[XVII]

Whereas the two examples discussed in the paragraphs above illustrate how the absence of shared rule rendered territorial units powerless to oppose recentralizing changes, this same powerlessness can also be seen in their inability to force the national government to act in ways actively desired by these units. It is difficult to observe a non-event (as opposed to the visible acts of recentralization that substate governments could not stop), but the weakness of the advocates of self-rule can nevertheless be seen in the

two decades they had to wait for the adoption of enabling legislation vis-à-vis decentralization that had been called for in the 1991 Constitution (but that was only passed by Congress in 2011 with the *Ley Orgánica de Ordenamiento Territorial* or LOOT).[XVIII] When the LOOT was finally passed, rather than provide juridical clarity about self-rule in the form of departmental prerogatives, the law focused on the formation of regional planning bodies that would incorporate two or more departments and that would operate under the direction of the national government (Duque 2012). No longer tasked with the job of representing departments, the Senate also signed off on further legislation in 2019 (the so-called 'Law of the Regions') which likewise reflects a preference for the strengthening of supra-departmental Administrative and Planning Regions (RAPs) rather than actual departmental governments.[XIX] Importantly, the 2019 law stipulates that funding for the RAPs will come out of existing departmental resources.[XX]

6. Conclusion: Lessons from Colombia

The Colombian case holds out important lessons for other formally unitary countries that are likewise debating the relationship between shared rule and self-rule but that, unlike Colombia, do not have a lengthy history of experimenting with different combinations of these two distinct forms of rule. Since becoming an independent country over two hundred years ago, Colombia has shifted from high levels of shared and self-rule during its radical 19th century experiment with federalism to a long period of shared rule without self-rule that lasted for most of the 20th century, and finally to an ill-fated attempt to enhance self-rule while curtailing shared rule over the last three decades. Most unitary countries in the world today do not have prior experiences with federalism to draw upon as they consider how federal solutions might help address the various problems they face, from ethno-territorial divisions to sluggish economic growth. Never having allowed much in the way of either self-rule or shared rule, most unitary countries begin their experimentation with federal principles by focusing their attention on the former rather than the latter. As a result, while scores of countries have participated in the global wave of decentralization that has swept the world in recent decades, far fewer have actually re-written their constitutions to allow shared rule. Politicians at the center who monopolize the design of federal institutions appear to be far more likely to countenance changes that let regions

govern themselves than changes that actually give regions the power to govern the country as a whole (Liesbet and Hooghe 2016, Mueller 2017).

Against this backdrop, the Colombian experience suggests that the decision to grant self-rule but not shared rule may actually end up preventing a country from getting very far down the road toward federalism. In Colombia, this particular decision generated a distinct 'one step forward, one step back' kind of dynamic. Colombia's failure to stably combine high levels of self-rule with low levels of shared rule is especially noteworthy because of the powerful confluence of actors who, for their own reasons, came together to advocate for self-rule three decades ago, including civic leaders and guerrilla organizations but also reformist politicians, government ministers, and members of the constituent assembly who were given free rein to re-write the Constitution. Circa 1991 this shift toward self-rule appeared to be inexorable and irreversible, a part of the global zeitgeist of decentralization, and a change that was here to stay. However, when recentralizing pressures emerged just a few years after the ratification of the new constitution, Colombia's constituent units were almost entirely powerless to defend their newfound prerogatives. As a check on recentralization, the constitution's other new innovation -- the Constitutional Court -- proved to be a poor substitute for the disappearance of the territorial senate. The Colombian case suggests that extreme movement on the continuum toward self-rule in the absence of any concessions vis-a-vis the granting of shared rule may constitute a less reliable pathway toward federalism than modest but simultaneous movements toward both forms of rule.

The lesson to be derived from the Colombian case is not that senators elected in territorial districts (i.e. shared rule) prefer self-rule. Indeed, left to their own devices, Colombian senators would never have endorsed the shift to self-rule. The absence of self-rule in the 1886 Constitution enabled senators to monopolize the distribution of resources to their home departments on a discretionary and clientelistic basis which redounded to their direct electoral benefit. The shift to self-rule in Colombia only came about exogenously due to extra-constitutional maneuvering that circumvented the legislature as a veto player vis-a-vis constitutional reform. However, if the new Constitution in 1991 had endorsed self-rule while preserving shared rule in the form of the territorial Senate, senators subsequently would have had to think twice before agreeing to pass the myriad recentralizing measures that presidents have proposed since the late 1990s. Armed with the

democratic legitimacy they now enjoy thanks to their direct election, governors (and mayors) could have compelled senators in their departments to defend territorial prerogatives if the defense of territorial prerogatives had remained the Senate's core constitutional function. At a minimum, signing off on the reversal of self-rule would have generated political costs and electoral exposure for senators if they had still needed to seek their (re)election in departmental districts.

Finally, the Colombian case also offers up a sobering lesson vis-a-vis the relationship between federalism as a territorial regime and democracy as a political regime. From the *Federalist Papers* to the present, the literature on this relationship has documented important synergies between federalism on the one hand and democracy on the other. More recently, however, scholars have come to less sanguine conclusions. Alfred Stepan (2004), for example, has argued that 'demos-constraining' forms of federalism can have highly negative consequences for majority rule as the centerpiece of democratic action. Likewise, the literature on subnational authoritarianism has demonstrated how federalism in cases like Argentina, Brazil and Mexico can undermine the democratic quality of national political regimes (Giraudy 2015). If federalism can undermine democracy, as this emerging literature suggests, this paper has shown that the reverse is also true: democratization can threaten federalization. In Colombia, reformers seeking to open up and democratize the political system saw shared rule as an obstacle to democracy because it had reinforced the power of entrenched regional elites. In response, and as a way to promote political pluralism, they advocated the replacement of the country's territorial upper chamber with one elected in a single nationwide district. Opposing shared rule while supporting self-rule made good sense to democratic reformers thirty years ago, but the past three decades have demonstrated that this configuration is not a promising one for those reformers who had simultaneously hoped to put the country on a federal trajectory.

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I Different combinations of shared and self-rule affect a variety of outcomes, including corruption (Neudorfer and Neudorfer 2015), efficiency (Braun 2009), and peace (Steytler and Mettler 2001).

II According to a pattern observed by Sean Mueller (2017), 'shared rule is more often withheld and self-rule more readily granted'.

III The current Constitution does not identify Colombia as federal and federalism as a label was explicitly discussed and rejected in the 1991 Constituent Assembly. Instead, article 1 of the Constitution identifies Colombia as a 'decentralized unitary republic with autonomy of its territorial units'. Nevertheless, Colombia would indeed be considered federal according to definitions that simply require the constitutional recognition of autonomous powers for constituent units (Watts 1999, Riker 1964) -- in contrast to definitions that require

the representation of these units in the center (Morelli 1997, Wibbels 2005 Ziblatt 2006). Colombia could also be considered federal using definitions that simply emphasize direct elections for each level of government (Filippov, Ordeshook and Shvetsova 2004, Diaz-Cayeros 2006).

[IV] Two additional seats are reserved for indigenous communities.

[V] For a review of sanguine perspectives about the relationship between democracy and federalism, see Burgess and Gagnon 2010. For work that has exposed tensions in this relationship, see Benz and Sonnicksen 2017, Gibson 2012, Giraudy 2015, and Stepan 2004.

[VI] When bicameralism features a territorial second chamber, as it did in Colombia before 1991, scholars have maintained that this institutional design does not necessarily guarantee the defense of regional interests. As Gamper (2018, 126) notes, majoritarian decision-making in these second chambers means that 'a single component unit will not be able to enforce its will even in federal second chambers where the component units are represented symmetrically'. Palermo (2018, 64) likewise questions the ability of second chambers to defend territorial interests 'due to the prevalence of the political-parliamentary logic over the territorial one'. Nevertheless, when the legislation in question is a set of recentralizing measures that disadvantage all territorial units relative to the national government, a chamber mandated to defend those interests should serve as more of a check than would a non-territorial chamber. For more on bicamerialism as a safeguard for self-rule see Benz (2018).

[VII] As the product of a radically liberal vision, the new constitution also included anti-clerical and pro-free trade positions (Hernández 1997).

[VIII] The one exception was the mayor of Bogotá who was hand-selected by the president himself.

[IX] The number of departments tripled between 1905 and 1909, followed by a further round of proliferation in the 1940s and 1960s. A constitutional reform in 1968 was introduced to prevent further fragmentation (Vidal 1997).

[X] The Constitution also transformed territorial units governed by the national government as 'dependencies' (*dependencias*) into their own departments, which was a significant move toward federalism given the mechanisms of self-rule discussed above (Hooghe et al 2016, 237).

[XI] According to Crisp and Ingall, 'bills targeted at the national level increased dramatically after reform' (2002, 742), even if many senators continued to emphasize pork barrel politics.

[XII] As Mueller (2014) argues, robust informal mechanisms can often substitute for the lack of formal mechanisms of shared rule.

[XIII] See, for example, 'Claves del fallo sobre consultas para frenar actividades extractivas', *El Tiempo*, October 12, 2018.

[XIV] 'Los consejos comunales, la major vitrine que tuvo Uribe', *El País*, July 4, 2010.

[XV] For an example of this dynamic, see Secretaría de Prensa de la República de Colombia, 'Consejos comunales le han asignado 3,660 tareas al Gobierno Nacional', http://web.presidencia.gov.co/sp/2008/mayo/31/02312008.html.

[XVI] 'Duro llamado de los gobernadores a Santos', *El Tiempo*, May 12, 2017.

[XVII] Ariel Avila, 'La recentralización que pretende el gobierno de Iván Duque', *Semana*, February 27, 2019.

[XVIII] 18 bills died in the Senate between 1991 and 2010. 'Las reformas del gobierno son un juego a tres bandas', *El Tiempo*, October 13, 2010.

[XIX] 'Los 5 cambios que trae la nueva Ley de Regiones', *Dinero*, April 14, 2019.

[XX] See Jairo Parada, 'La descentralización en vilo', *La Silla Vacilla*, May 26, 2019.

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CENTRO STUDI SUL FEDERALISMO
PERSPECTIVES ON FEDERALISM

ISSN: 2036-5438

Centre-state Relations: A Kerala Experience

by

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Perspectives on Federalism, Vol. 12, issue 3, 2020

Abstract

Immediately after the formation of the state of Kerala, general election was held to the Kerala State Legislative Assembly. In this election, the communists came to power in Kerala. This was the first instance of the formation of a government through ballot by the communists in Asiatic region. The congress party was in power in Centre and in all other states when Kerala became the lone communist state. Thus, the co-operative federal experience of India gave way to competitive federalism. Since then, the congress party had been looking for an opportunity to dismantle the first communist ministry in Kerala. This opportunity was provided with the introduction of educational and agrarian reforms by the communist government to wipe out inequalities existing in these two sectors. The educational reforms attracted the ire of the Catholic community while the agrarian reforms that of the Nair community since the former managed the largest number of schools while the latter formed the main landowning community. Thus, these two path breaking reforms made two most influential communities in Kerala against the government. The congress party made better use of the situation with the support of the Central government and joined the liberation struggle started by the Nair Service Society, a local organization of Nair community, in collaboration with the Catholic congress representing Catholic community to topple the government. The liberation struggle was blessed by the congress government at Centre with the dismissal of the ministry which was unconstitutional from any angle. It was found the dismissal of the first Communist ministry in Kerala was unconstitutional from any angle.

Key-words

Kerala, government, communist, Centre, State

1. Introduction

Kerala was divided into three administrative units before its formation-Travancore, Cochin and Malabar. Travancore and Cochin were princely states whilst Malabar was under the direct British rule. Travancore and Cochin joined together in 1949 to form Travancore-Cochin and it finally amalgamated with Malabar on linguistic lines to create the State of Kerala on 1 November 1956. Kerala was under President's rule during its formation. The first general election was held to the Kerala State Legislative Assembly and communists came out as majority party and formed government. The creation of the government by the communists in Kerala was a unique event because in all other States and at Centre the congress Party had been well entrenched as a ruling party. The communist government was presented with a number of issues which the previous regimes had failed to resolve because of the continuous instability of the previous governments or stiff opposition from the vested interests. The comprehensive legislations on education and land were the most important among them. It attracted the ire of the Christians and Nair communities in Kerala. It was seen an opportunity by the Congress Party to dismantle the Communist government. The present study analyses how the Congress Party, the ruling party at Centre and the remaining States, toppled the Communist government and whether the dismissal of the ministry was constitutional.

2. Trajectory to the Dismissal of the Ministry

The communist government formed when the congress Party was ruling in remaining fourteen states and at the Centre. The 1957 election convinced the congress party that its dissensions, corruption and policies made people of Kerala disgusted and they turned towards the communists. Shriman Narayanan, the congress General Secretary, visited Kerala and announced that law and order in Kerala was danger within three days of the formation of the ministry[1]. Immediately after the assumption of power, the communist government concentrated on educational and land reforms. The previous congress governments had tried to bring these reforms but failed to do so. The communist government attempted only to implement the congress programs, the same land and

educational reforms. The Kerala Education Bill piloted in the state legislature aimed to bring private schools under the control of the government from the private managers. It irked the Catholic Church because most of the schools were owned by them. The Kerala Agrarian Relations Bill aiming the prevention of the concentration of lands in the hands of a few and equal distribution of land among the landless irritated the Nair Service Society which represented the Nair community since they were the major land owning community in Kerala. Hence, with the passage of the two bills, the two major communities became the staunch enemies of the communist government and it was fully exploited by the opposition political parties to overthrow the government.

The toppling of the government alarmed momentum with Andra rice deal issue. Kerala has had no major scandal under the Communists which the opposition could effectively exploit. The one partial exception to this was the famous rice deal in which the Kerala government purchased rice from a Madras company at a price higher than that generally prevailing in order to deal with the extraordinary insufficiency of food in Kerala and for the speedy supply of rice in the state market[II]. Even, here, however, an impartial investigation disclosed error of judgment, rather than criminal conduct[III]. The enquiry commission found that the deal caused an avoidable loss of 100000 rupees[IV]. The opposition parties demanded the resignation of the government over Andhra rice deal[V]. This demand was raised by the congress party when congress ruled states were marred with corruption and nepotism. No action was taken against the congress government in West Bengal when the enquiry committee reported corruption in the supply of rice in the market[VI]. The report of the commission was finally submitted in August 1958. The Comptroller and Auditor General found scandal to the tune of two crore rupees in the six years functioning of the congress government in Rajasthan[VII]. The Chandy Commission indicted former congress minister of Punjab Sardar Ujjal Singh in the land transaction and the commission reported corruption of crores of rupees[VIII]. The Das Commission found the Home Minister of congress government in Bihar guilty in police firing on students in Patna in 1955[IX]. But no action was taken against the accused congress ministers in these states. Likewise the Vanchu Committee enquired the police firing on students in 1953 met the same fate[X]. Under the chairmanship of Balwantri G. Mehta found financial irregularities in the starting of iron factories in India and it caused loss of crores of rupees to the state exchequer. But no action was taken on this report[XI]. The postal department caused a loss of 1,03,250

rupees to the government due to the extraordinary delay in buying steel stand[XII]. The Public Accounts Committee of the Union Parliament appointed to enquire the purchase of cloth from Japan found a heavy loss of 5500000 rupees to the government. However, the sub committee recommended judicial enquiry, no action was taken in this regard[XIII]. The Public Accounts Committee Report found that the government of India caused a loss of 267000 rupees due to the purchase of rice from a company in Bombay[XIV]. The loss would have avoided had it been purchased from Madras company.

When the agitation against the Andhra rice deal did not produce any desired result, Panampilli Govinda Menon, former chief minister and member of All India Congress Committees expressed that time had come for a freedom fight and called for a liberation struggle against the communists[XV]. He expressed that the liberation struggle would liberate India and most probably the whole of Asia, from communism[XVI]. He also warned the members of the all India services revenge for the commission of acts at the behest of the communist government when the congress party returned to power or at the hands of the central government manned by the congress party[XVII]. On 1 May 1959, a meeting of the leaders of the congress party, Catholic congress and the Nair Service Society was held at Changanacherry. The meeting was presided over by Mannath Padmanabhan, the NSS leader, and the Commander-in-chief of the liberation struggle. The meeting passed two important resolutions. One pledged full support to school closure agitation against the Kerala Education Bill. This resolution was moved by Kalathil Velayudhan Nair, Member of the Kerala Pradesh Congress Committee and seconded by P.S. George, KPCC Treasurer. The second resolution was moved by Kumbalath Sanku Pillai and seconded by Cheriyan Kappan, another congress leader. This resolution called upon the people of Kerala to overthrow the government and liberate Kerala from communism, by all means in their power[XVIII]. An action council to lead this liberation struggle was also constituted with NSS leader Mannath Padmanabhan as President, and included PSP leader Kumbalath Sanku Pillai, former congress MLA and a prominent congress leader K.M. Chandy, former congress minister and KPCC member Kalathil Velayudhan Nair and former congress MLA and congress Municipal Chairman of Palai Cheriya Kappan. Later, the Indian Union Muslim League joined with them even though they had not even a single grievance against the government. The congress President Indira Gandhi pronounced the verdict that whatever might be the character of AIML, the Kerala branch of the League was a

democratic organization[XIX]. Thus the Kerala Muslim League ranged itself with the opposition on an assurance from the congress that it would be treated as a democratic party.

The KPCC executive considered that it was absolutely necessary to carry forward vigorously the campaign for the ending of the misrule of the communist government, protesting against Education Act and getting the Rice Deal Enquiry Report accepted by the government in the interest of safeguarding democracy. P.S. George, KPCC Treasurer expressed the congress party had aimed to pull down the government rather than protesting against the Education Act or get it withdrawn[XX]. C.M. Stephen, member of the AICC and the president of Kollam District congress Committee declared that the Education Act was not an issue but only one of the means to topple the government[XXI]. Liberation struggle was started with the blessing of congress High Command[XXII]. In early 1959, R. Sankar became the President of KPCC and he organized congress organization against the communist government in collaboration Indira Gandhi[XXIII]. The congress leaders, Madhava Menon, Moidu Maulavi, A.V. Kuttimalu Amma, C.K. Govindan Nair and P.P. Ummer Koya provided leadership to the liberation struggle in Calicut and all of them were arrested[XXIV].

Nehru opposed any kind of struggle against the communist government[XXV]. There was a conference at Udhagamandalam where the KPCC members met Nehru, Indira Gandhi and U.N. Dhebar and got permission to start only a token strike to mark the protest against the activities of the communist government. Nehru expressed many reservations regarding the struggle against the communist government. The token strike was started on 12 June 1959 before the District Collector's offices in the state. U.N. Dhebar who had come down to report on the situation was feeling that the congress party had gone far beyond the permission given by Nehru to launch a token strike movement and he opined to stop it. But R. Sankar convinced U.N. Dhebhar that this was the only way for the congress party to survive[XXVI]. Then, Sadiq Ali, General Secretary of the congress party, came. At last Nehru himself came at the instance of Chief Minister Namboodiripad. He was received by the slogan that communist government would go. Nehru observed that the liberation struggle in Kerala as mass upsurge. Nehru stated that the people had the right to rebel in a democracy[XXVII]. He said that they had brought the communist government and, hence, they enjoyed the right to demand its termination. However, he declined to intervene

but advised the Kerala government to resign and seek fresh mandate of the people[XXVIII]. But there was no national convention or there was no provision for right to recall. But the central government ruled out this provision in other congress ruled states. The Congress Parliamentary Board, the Congress Working Committee and Nehru did not denounce the anti-social activities like wanton attack on person and property, on schools and transport buses[XXIX]. The visit of Nehru gave much enthusiasm and fillip to the liberators rather than bringing the law and order problem in Kerala come down.

Actually the insecurity was created in the state by the congress Party and its supporters. They burned buses and schools and marched to government offices. Further the opposition parties turned down the invitation by the government for a round table conference for the restoration of rule of law. Was this democratic? The opponents dropped the whole idea of negotiation when it was a question of Kerala ministry because they wanted to dismiss it anyhow. S.A. Dange expressed that the congress conspiracy in Kerala was not just an attack on the communist party but an onslaught against democracy, and the healthy democratic conventions being evolved in our country[XXX]

The first communist ministry enjoyed majority support on the floor of the house. However, the opposition alleged that it enjoyed only minority votes and hence, the ministry be dismissed. No doubt, the first communist ministry got 41 percent of the votes. But this test was applied to Kerala, the same would also applicable to Orissa and Bihar where the congress party enjoyed only minority votes[XXXI]. When the Samyukta Maharashtra Samiti got 600000 votes more than the congress in Maharashtra, the congress party claimed that it had got the majority votes of the people. Pursuant to this, the Samyukta Maharashtra Samiti organized mass upsurge against the congress government. Responding to this, the Union Home Minister had said that direct action and strike were not allowed in Swaraj and before independence, against the British, it was holy and right, and after independence, direct action and strike was wrong[XXXII]. But the Union government compromised this observation when the opposition parties and community organizations started liberation struggle and direct action against communist government in Kerala. Another allegation leveled against the government was that those who had voted Communists into power shifted their allegiance. But the victory of the communist party in the Deviculam by-elections and to the local bodies proved against this[XXXIII].

The KPCC, under the leadership of R. Sankar, prepared a memorandum embodying all the mistakes committed by the communist government with the blessing of the congress high command and submitted it to the President of India[XXXIV]. Before the submission of charge sheet to the President of the Union of India R. Sankar had consulted it with congress President Indira Gandhi, U.N. Dheber, former president of congress, and Mr. Sadiq Ali, General Secretary of the congress party[XXXV]. A copy of which was also given to the Governor of Kerala, Ramakrishna Rao by P.T. Chako, leader of the congress opposition in the Kerala State Legislative Assembly and Sankar recommended him to send it to the government of India[XXXVI]. But he was reluctant to do so because he knew that the central government would not dismiss the government. Nehru opposed the dismissal of the government several times on the ground that it would create a bad precedent the dismissal of a duly elected government. But Indira Gandhi helped the KPCC in their endeavor.

Prominent Congressmen including ex-ministers were in the action committee of liberation struggle. Most of the congress leaders at central and state levels and their supporters took participation in the liberation struggle to oust the communist government. Udayabhanu, the congress M.P. was arrested in the three week old agitation to end the communist rule in Kerala at Ernakulam collectorate and sentenced to five days simple imprisonment[XXXVII]. Praja socialist party leaders, K.B. Menon and Amul Desai were also arrested for picketing government offices[XXXVIII]. The Congress Parliamentary Board met in 5 July 1959 presided over by Indira Gandhi, the Congress President, at the house of G.B. Pant, the Home Minister attended by Nehru suggested people had the right to unseat a constitutionally elected government before its term by peaceful direct action in case it forfeited the confidence of the people[XXXIX].

B.T. Ranadive, Member of the Politburo of the Communist Party of India and A.K. Gopalan, communist member of Parliament, said the Congress Parliamentary Board and the congress high command should shoulder the full responsibility for all the violent activities in Kerala because in spite of the instructions to congressmen in Kerala not to picket schools and transport buses but to have symbolic picketing, R. Sankar, President of the KPCC had issued a statement after his return from Delhi saying that Centre would surely intervene and called for the intensification of agitation leading violent activities[XL].

E.M.S. Namboodiripad met the President of India, Pandit Pant, V.K. Krishna Menon, Morarji Desai, Lal Bahadur Sastri and Hafiz Mohammed Ibrahim and apprised of the situation in Kerala[XLI]. Nambudiripad met Prime Minister, Nehru, at Shimla on 11 July 1959 to evolve a situation leading to ease the situation in Kerala. Nambudiripad met every minister individually to appraise the situation in Kerala[XLII]. The anti-bilingual movement in Bombay was much more serious than the Kerala agitation[XLIII]. But the union government was a mute spectator on this.

R. Sankar, the President of KPCC, said that he impressed the President of the Union of India and central ministry that the time was ripe in Kerala for central intervention. He made it clear that to the President and other central cabinet ministers whom they had met that they were definitely opposed to the continuation of the communist ministry in Kerala as a care taker government pending general elections. They were clear that a ministry, which was flouting all canons of democratic administration, would not be allowed to continue in any capacity when a truly democratic process at general election was sought to be used to settle the issue[XLIV]. The Kerala government was forced to have elections under the double threat of direct action from below and intervention from above[XLV]. Mr. Chacko, leader of the opposition in Kerala, declared that the opposition in Kerala would continue the struggle if the Communists come to power again[XLVI]. Morarji Desai, the Union Minister, expressed the view that elections were the only way out for solving the problem facing Kerala[XLVII]. He stated that the people of Kerala had become desperate due to the partisan attitude of the communist government and it was wrong to say that central intervention would be unconstitutional[XLVIII].

The National Council of the Communist Party of India stated that the present agitation in Kerala was unjustified and the struggle in Kerala was that of vested interests and not the real people of the state[XLIX]. It rejected the mid-term election proposed by the Congress Parliamentary Board[L]. The Central government encouraged the lawlessness and used it as a pretext for central intervention and the dismissal of the ministry[LI]. The National Council of the Communist Party observed that the offensive was launched precisely at a time when the Education Act was about to be enforced, the Agrarian Relations Bill had been passed by the state legislature, the Local Body and District Councils Bill were in the state committee stage and the Industrial Relations Bill had been introduced in the state assembly[LII]. All these measures when implemented, would improve the economic

conditions of the people and lead to a great extension of democracy on the one hand and weaken the power of the vested interests on the other[LIII].

On 18 July 1959, Pattom Thanu Pillai met the President of the Union of India and appraised him of the situation in Kerala and demanded the immediate end of the communist rule in Kerala[LIV]. The K.P.C.C. unequivocally stated that it would continue its agitation till the communist ministry dismissed[LV]. Mrs. Sucheta Kripalani was deputed by congress high command to a fact-finding committee to study on Kerala situation and report to the congress high command[LVI]. Following which, the central government and the congress high command expressed mid-term election as the only way out of current agitation. The congress High Command and the central government provided moral and political support to the agitation in Kerala, otherwise it would have been collapsed soon. Much bigger movements than one in Kerala were launched by opposition parties in other states, including Bombay and Punjab, but the government of those states were never asked to resign and hold mid-term elections.

Indira Gandhi called immediate action to end impasse in Kerala. She said that there was no constitutional impropriety in the central government intervening in Kerala[LVII]. She commented that the constitution was for the people and not the other way and observed that if the constitution would not ensure the welfare of not more than eighty percent of the people of the state who had risen against the communist government, what was the good of having such a constitution and summed up that the communist government as a danger to parliamentary democracy if it was continued[LVIII]. N. Lekshmi Menon, Union Deputy Minister for Educational Affairs, demanded that considering the situation prevailing in Kerala, the Union government should suspend the constitution and see that constitution did not stand in the way of safeguarding the freedom and welfare of the people of state[LIX]. She said that the constitution had given the government powers to protect the people and safeguard their rights and freedom and if there was any government which did respect that governance, the people would look to the Centre to see that the constitution was suspended and this the least the union government should do[LX]. K.P. Kuttikrishnan Nair, congress M.P. and former Madras minister was arrested while picketing Huzur office at Calicut on 27 July 1959. After a public meeting held at the Town Hall which was addressed by Mrs. Sucheta Kripalani, a big procession led by Mr. Kuttikrishnan Nair started from the

Town Hall to the Huzur gate[LXI]. Children were compulsorily prevented from attending schools. Farmers were asked not to sow crops. Transport buses were smashed[LXII].

The Kerala Governor, Dr. B. Ramakrishna Rao, forwarded to Delhi his report and his comments on the Kerala government's reply to the memorandum submitted to the President, earlier this month by the KPCC president[LXIII]. The report of the Governor of Kerala with his comments reached Delhi on 29 July1959. The Union cabinet agreed on the principle of central intervention in Kerala[LXIV]. The Union cabinet advised the President of India to take over the administration of Kerala state under powers vested in him by Article 356 of the constitution of India to end the impasse in the state[LXV].

Even the opponents had the belief that Nehru would act impartially and he was held in high esteem. But with the dismissal of the first communist ministry in Kerala he lost that status. Even the liberators expressed that the dismissal of the ministry was not constitutional later[LXVI]. The central government was bound to protect the state from any internal or external aggression. The central government could intervene only when there was a breakdown of constitutional machinery. It became clear that the congress wanted to establish its one party rule everywhere and would resort to any means to do it. R. Sankar had close relations with Indira Gandhi since the days of liberation struggle. R. Sankar expressed that without her support and backing it would not have been possible to topple the first communist government[LXVII].

3. Constitutionality of the Dismissal of the Ministry

The President of India issued a proclamation on 31 July 1959 assuming to himself all functions of the Government of Kerala, dismissing the ministry under article 356 of the Constitution of India based on the report of the Governor of Kerala and other information[LXVIII]. It terminated the twenty-seven months old first Communist Government in Kerala and dissolved the State Legislative Assembly. It was for the first time in the history of Indian Republic that a democratically elected state government enjoying majority support in the assembly was dismissed. In the President's proclamation no charge was levelled against the Kerala Government nor did a word as to how the Communist Government violated the provisions of the constitution[LXIX].

Even after repeated requests from the Communist members in the Parliament, the Government of India did not table the report of the Governor of Kerala recommending the dismissal of the Communist ministry. Instead a summary of the report prepared by the Governor Ramakrishna Rao himself was tabled in Lok Sabha on 17 August 1959 and Rajya Sabha on 24 August 1959 amid pandemonium from Communist members. The major allegations levelled by the Governor in his report against the Government were mass release of prisoners, interference of party men in administration and police, promotion of Communist trade unions at the cost of others, use of public funded cooperatives to promote party interests, non-interference of police in labour disputes and the enactment of the unpopular Education Act regulating private schools[LXX]. The Governor himself expressed that such isolated instances of irregularities and partialities could also be found in other states. But he stated that in these Congress governed states; the ministries functioned independently of the party and did not closely follow the party directive. He echoed, therefore, that Central intervention in Congress ruled states would be unconstitutional whatever might be the intensity of the opposition of the people to the government and whatever the magnitude of such opposition.

The Governor contended that the first Communist ministry had lost the support of the overwhelming majority of the people. He opined that even when the ministry was formed it enjoyed only a meagre majority and there was no doubt that there had been a tremendous shift in the mind and the feeling of the people and this public opinion could not be ignored and the only solution available was to exercise of power under Article 356 of the Constitution of India[LXXI]. But the Governor did not take into account that in Congress ruled states of Madras, Bombay and Uttar Pradesh the party enjoyed only a simple majority[LXXII]. The Governor held the view that the present agitation was not the result of one or two particular legislative or administrative act of the Government but the cumulative effect of many acts of omission and commission of the Government for the last twenty eight months. The Governor complained that the main attention of the communist government throughout its rule was the consolidation of party position and it reflected in all its administrative and legislative actions[LXXIII]. But in fact the major legislations of the first communist ministry like the Education Act, Kerala Agrarian Relations Bill or the local body act were not introduced to consolidate party position as observed by the Governor. He expressed the belief that if the situation were left

uncorrected, serious consequences would follow, and concluded that the administration of the state could no longer be carried on in accordance with the Constitution of India.

Generally a scrutiny of the summary of the report of the Governor would make it clear that it had been borrowed from the memorandum submitted by the Kerala Pradesh Congress Committee to the President of India[LXXIV]. The Governor acted as a congressman par excellence. If not, he would have consulted his council of ministers earlier and sorted out each issue. But, in fact, the Governor had not complained even once to the Chief Minister or other ministers about any fault of the government[LXXV]. The report was fully one sided accusing the communist government and not even a single word was used against the opposition parties and community organizations that were actually the pillars of all troubles in the state. Further Article 163 (1) of the Constitution of India obliges the Governor to act according to the advice tendered by his Council of Ministers except the discretionary powers specifically mentioned in the constitution. The submission of a report under Article 356(1) is not a function to be exercised by the Governor in his discretion. B. Ramakrishna Rao, the Governor of Kerala during the period of first Communist regime, sent the report to the Ministry of Home Affairs of the Government of India without consulting the Council of Ministers headed by the Chief Minister[LXXVI]. As the Governor was a veteran Congress leader hailing from Andhra Pradesh and an ant-Communist, his loyalties were left with the congress party and the Union government.

Jawaharlal Nehru, the Prime Minister of India, expressed that the communists could not adapt themselves to the Indian context of democratic structure[LXXVII]. He further defended the central intervention in Kerala and said that there was no other alternative[LXXVIII]. G.B. Pant, the Union Home Minister, expressed in the Rajya Sabha that there was no way out other than the dismissal of the ministry to overcome the impasse in Kerala[LXXIX]. Acharya Kripalani of the PSP eloquently urged that democracy had, in fact, been saved by the intervention[LXXX]. While the Central Executive Committee of the Communist Party of India passed a resolution in New Delhi on 8 August 1959 condemning the central intervention in Kerala as a partisan and deliberate act[LXXXI]. S.A. Dange, the Communist leader, dubbed the dismissal of the ministry as congress conspiracy[LXXXII].

The central intervention was approved by the Lok Sabha on 20 August 1959 by 270 votes to 38 and by the Rajya Sabha on 25 August 1959 by 114 votes to 12. Even the first

Communist ministry was not allowed to remain in office as a care taker government till the next general election as did elsewhere. On 17 September 1959 the Government of India appointed P.V.R. Rao, Chief Secretary of Mysore, as advisor in Kerala during President's rule in the State[LXXXIII].

Considering the emergency provisions relating to the intervention of the Union government in States, Article 352 of the Constitution of India states that a proclamation of emergency may be made by the President of India at any time when he is satisfied that the security of India or any part thereof has been threatened by war, external aggression or armed rebellion[LXXXIV]. The word armed rebellion was inserted into the constitution only in 1978 replacing the original word internal rebellion through the Forty-fourth Constitutional Amendment Act[LXXXV]. The Article may be used even before the actual occurrence of the disturbance[LXXXVI]. So the Union Government had the option to declare emergency under article 352 arised out of internal disturbance without dismissing the first Communist ministry in Kerala and dissolving the State legislature.

Article 355 of the Constitution of India reads that it shall be the duty of the union to protect every State against external aggression and internal disturbance and to ensure that the government of every State is carried on in accordance with the provisions of the constitution[LXXXVII]. The framers pointed out in the Constituent Assembly that Article 355 was based on the principle underlying Article IV, Section 4 of the Constitution of the USA[LXXXVIII]. It provides that the United States shall guarantee to every State in this Union a republican form of government, and shall protect each of them against invasion, and on application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic violence[LXXXIX]. The first part of Article IV of the US constitution conforms to the second part of Article 355 of the Constitution of India while the second part of the Article IV of the US constitution conforms to the first part of Article 355 of the constitution of India[XC]. Thus Article 355 imposes on the Union government the obligation of protection of states from internal disturbance and external aggregation. But in USA the federal government can act only at the instance of provincial government. While there is no such pre condition under Article 355, the Union government can interfere even without state's request[XCI]. The Union government can deploy forces under its control to suppress an internal disturbance when the State government alone suppresses it.

The President and the Ministers of the Union Government are bound to uphold the constitution. Members of the Union cabinet individually and collectively may be guilty of the grave dereliction of duty if they fail to protect the States and its governments from internal disturbance[XCII]. They are not permitted to remain passive spectators of act of violence against the States. But the intervention of the Union in a State should not be wanton, arbitrary and unauthorized by law[XCIII].

So the Union government was constitutionally bound to protect the first communist government against the liberation struggle. The Union government ought to have held discussions with the liberators and reprimanded the state congress leaders for their association with liberation struggle and the consequent law and order problem. If it did not yield desired result, the Union government could have sent the central forces to suppress the liberation struggle and to maintain law and order. But in practice the Union government acted on opposite side. It meant that the congress government at Centre had no interest to protect a government run by the communists. This was a gross violation of the provisions enshrined in the Constitution of India by the Union for political purposes.

If only all acts and means applicable under Article 355 of the Constitution of India cannot save the situation in the State, the Union government can use Article 356 of the constitution[XCIV]. Article 356 (1) of the Constitution of India empowers the President to declare a proclamation assuming to himself the administration of the State government based on the report of the State Governor or otherwise that a situation has arisen in which the Government of the State cannot be carried on in accordance with the provisions of the constitution[XCV]. The words 'or otherwise' indicate that the President may act under Article 356 (1) on information received from sources other than the report of the Governor. It may include the report of the Union Ministers or the advice of the Union Council of Ministers. Whether the President has received the report of the Governor or not is not a matter of concern but the President has to act in accordance with the advice tendered by the Prime Minister and if the latter so advise, the President cannot but issue a proclamation under Article 356(1) in respect of the State concerned[XCVI].

Article 356 of the Constitution of India was borrowed from Section 93 of the Government of India Act 1935[XCVII]. It provided that if the Governor of a Province was satisfied that a situation had arisen in which the government of a Province could not be carried on in accordance with the provisions of this Act, he might by proclamation assume

to himself all or any of the powers vested in or exercisable by a provincial body or authority, including the ministry and the legislature, and to discharge the functions thus assumed in his discretion[XCVIII]. The only exception was that he could not encroach upon the powers of the High Court. The analysis of the constitutional history thereof made it clear that the object of this provision was to avoid a political deadlock[XCIX]. Only extraordinary circumstances could justify the exercise of this extraordinary constitutional power[C].

The framers of the constitution had discussed at length this provision of the constitution. While dealing with this article, Dr. B.R. Ambedkar, Chairman of the Drafting Committee, expressed that there was a possibility of this article being misused or employed for political purposes and it was expected that this article would never be called into operation and it would remain a dead letter[CI]. He hoped that the first thing was to issue a mere warning by the President to a province that had erred, that things were not happening in the way in which they were intended to happen in the constitution[CII]. He stated that if it did not yield the desired result the President would do the second thing of ordering an election allowing the people of the Province to settle matters themselves and only when these two remedies failed the President would resort to this article. He further stated that as the constitution made the States sovereign and gave powers to make laws for the peace and good government, the unauthorized intervention of the Centre must be barred because that would be an invasion of the sovereign authority of the Province[CIII].

H.L. Saxena, Member of the Constituent Assembly, observed that the drastic powers invested with the Centre under emergency provisions would reduce provincial autonomy[CIV]. Another Member of the Constituent Assembly, H.V. Kammath, expressed that it would not be proper to invoke this article for resolving ministerial crisis nor for ending maladministration in a State[CV]. Kazi Syed Karimudin, Member of the Constituent Assembly, heavily criticized the inclusion of this article because of the possibility of its misuse for the protection of the interests of the ruling party at Centre[CVI]. Naziruddin Ahmed, another Member of the Constituent Assembly, stated that it might enable the Centre to interfere in States on the slightest pretext or to refuse to interference on the gravest occasion according to the parties ruling at Centre and States[CVII].

The Constitution-framers recognized that the provision of Article 356 was necessary to meet the exceptional situation of the break-down of the constitutional machinery in a

State[CVIII]. At the same time, they hoped for the growth of healthy conventions which would ensure that these extraordinary powers were used most sparingly, in extreme cases, for the legitimate purposes for which they were intended[CIX]. An important point made during debates in the Assembly was that mere mal-administration by a duly constituted government in a State was not a good ground for invoking Article 356[CX].

4. Conclusion

It was for the first time a non-congress party got majority support and formed government in a State. It surprised the congress party and blew to the monopoly of the congress party. Further, the communist government provided stability as never before. The previous congress and PSP governments were the result of instability. The stability of the communist government denied opportunity to the congress and PSP to come to power again. When all parliamentary methods to oust the communist government ended in failure, they resorted to extra parliamentary method of liberation struggle to oust the government. The liberation struggle was directed not against the Kerala Agrarian Relations Bill or Kerala Education Act but purportedly to topple the government. The reaction against the Kerala Education Act could be considered not only against the state government but also against the Union government because the Act was passed with the consent of the President. The Kerala Education Act was examined by the Supreme Court of India and assented to by the President. Considering the above views, opposition against the Education Act and the agrarian reforms registered through demonstrations, picketing of schools and public offices, stone throwing and setting fire to state transport buses and the enrichment of the party position could not be considered as a failure of constitutional machinery as contemplated in Article 356 of the Constitution of India. The failure of the constitutional machinery ought to have been due to the breakdown of executive, legislative or judicial functions in the State. But no such failures happened under the first Communist regime in Kerala. However the ministry was dismissed without exploring all possible measures to contain the situation by the Union Government. Hence, the dismissal of the first Communist ministry in Kerala was unconstitutional.

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CENTRO STUDI SUL FEDERALISMO
PERSPECTIVES ON FEDERALISM

ISSN: 2036-5438

European Taxes and Fiscal Justice: Citizens' Support and Lessons from the US*

by

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Perspectives on Federalism, Vol. 12, issue 3, 2020

Abstract

By demonstrating the importance of the own source of EU revenue, rather than focusing solely on the size of its budget, we can understand that financing the EU is not a 'zero-sum' game. Therefore, we use the term 'fiscalization'[I] which implies the power to tax, rather than ambiguous terms such as 'Eurozone budget'. History of federations, such as the US, teaches us that some types of taxes can only be effectively - and justly - levied by the highest level of government, the revenue from which could then be used for the common goods. Importantly, our data, based on YouGov survey conducted in 11 European countries, shows that the citizens support the introduction of European taxes, such a tax on large internet companies, which could reinstall the tax justice, provide more revenues for delivering EU-wide common goods and to make the Economic and Monetary Union more resilient.

Key-words

comparative federalism; Riker; fiscal union; EU taxation; US-EU comparison; fiscal justice

1. Introduction

Despite many reforms undertaken in the last decade and calls to establish some kind of a fiscal union[II], the EU is yet to come up with a solution to permanently address the weaknesses of Eurozone, i.e. the lack of resilience of the Economic and Monetary Union (EMU). One of the perceived flaws is its weak fiscal power or budget capacity. This is, however, as much an economic and monetary flaw as a political flaw. The gap between the expectations the EU creates and the means it has to address them undermines its social legitimacy. In addition, the way the EU collects the revenues that support its budget capacity promotes a perverse zero sum understanding of European integration, instead of highlighting its added value.

In this context, it is perhaps worth to take a closer look both at how another fiscal union was created, which emerged as a result of a sovereign debt crisis of its states and at what exactly EU citizens think of how the European Union funds (and ought to fund) itself. In order to do that, we will briefly present the fiscal history of the early US, followed by the analysis of a survey data on the citizens' preferences towards European budget capacity and power to tax, and the lessons for the EU. The lessons to be taken from both will be particularly important in the context of the current plans to introduce new own resources necessary to support the pandemic EU recovery package.

Let us start with a quotation from Alexander Hamilton, one of the Framers of the US Constitution and the father of the American fiscal union: *"Sir, if we have national objects to pursue, we must have national revenues."*[III] We argue that in a similar vein, if we have European objectives, we should have European revenues. The federal power to tax was the most important feature of the US Constitution[IV] and the lack of such a tax power, that is - the ability of a federal government to raise revenues from its own sources - was the main factor threatening the viability of the American Union and is now EU's "institutional weakness" (Moravcsik 2001, p. 169).

In a classical fiscal union, the federal government has the power to tax, but not the power to influence the budget of the states, as is the case with the EU since 2011. A usual explanation (and argument for many) for the current limits on the EU powers to tax is to prevent it from becoming a genuine federal union. But the paradox is that the current

situation leads, in a significant way, to impose stronger limits on the fiscal sovereignty of its member states than it would be possible in the US. For instance, the European Semester - a name for an annual cycle of EU budgetary and economic surveillance - obliges the governments of the Euro Area member states to submit their budgets for the European Commission's approval every year in October, even before they are sent to their national parliaments. By not agreeing to give the EU tax sovereignty, member states have deprived the EU from the automatic financial stabilisers necessary to smooth asymmetric shocks within the EMU and have, instead, given it a substantial (even if, doubtfully, really effective) impact on the national budgets, significantly limiting their own budgetary sovereignty (cf. Miklin et al. 2021).

2. The American example

The US is a multilevel political system to which the EU is often compared (see, e.g., Egan 2015; Elazar 2001; Fabbrini 2007, 2017; Freudlsperger 2020; Gaspar 2015; Genschel and Jachtenfuchs 2011; Hallerberg 2006, 2013; Henning and Kessler 2012; Hinarejos 2013; Schelkle 2017; Wozniakowski 2018). The point of comparison is not to say that the destiny of Europe is a federation. Rather, it is to analyse how mechanisms of economic and political integration played out between the American states, because their multi-level nature and degree of interdependence was in principle similar to the nature of mechanisms governing economic and social integration in Europe. The point is not to copy American solutions but to learn from how they have addressed multi-level governance as a consequence of economic and social interdependence. The lessons may be as much about their mistakes as about their successes and always mindful of the different contexts. One has much to learn even when one does not copy.

One of such issues is the complex issue of taxation in a multilevel system of government, economically interdependent, and the connected issue of financing the Union. Interestingly, there was a period, lasting over a decade, in the American history where both of those issues - taxation and Union's budget - resembled their equivalents in the EU. Namely, in the period between the Declaration of Independence in 1776 (and drafting of the first US constitution a year later - the Articles of Confederation) and the ratification of the US Constitution in 1789. During such period the budget of the Confederation was based on the contributions

from the states.[V] The Union did not have the power to tax, as this power was an exclusive competence of the states, similarly to the tax and budgetary situation of the EU today.

As a consequence, the expenditures that should be financed by the Union, such as the military (Americans waged an expensive war against Britain until 1783), were *de facto* financed by the individual states who had to take up large debts for this purpose. The states who fought a war on their territory held the most of the debt, and some of them decided to pay it off by imposing direct taxation on population. This resulted in tax revolts, with the Shays's Rebellion of 1786/87 in Massachusetts as the most famous example. Those revolts were an existential threat to the new Union and helped to convince the elites from almost all the states that they needed to create a stronger Union or risk disintegration. Thus, another revolution followed, this time - a revolution in favour of government (Edling 2003). The elites gathered in the Constitutional Convention in Philadelphia decided to create a strong Union with a power to tax as its most important prerogative. And later on, this drafted Constitution was ratified by nearly all the states through democratically elected special state conventions.

Why did people who had fought a long tax-motivated war with a foreign power (hence the famous "no taxation without representation") and afterwards rebelled against taxation levied by their state governments, a few years later supported the idea of giving the federal government - which was much more distant than the state governments and almost as distant as the British government - a power to tax? In fact, this was a very rational, if paradoxical, decision to take. The explanation lays in the nature of different types of taxes. In a nutshell, the states could impose two types: direct taxes on income and indirect taxes, usually in a form of tariffs on imported goods. Because the states with large ports, such as New York or Boston, were competing with each other, there was a limit in the tariff rates that could be imposed - otherwise merchants would transport their goods to another port or would try to smuggle them. People were not so mobile as merchants and goods. As a consequence, there was very little they could do to escape the direct taxes on income that many states imposed on them in order to pay back the war debts. The only way to lower the tax burden imposed on the people resulting from direct taxes at the level of the states would be to impose a different type of taxes, only possible at level beyond the state, the federal level. Paradoxically, in order to pay less taxes, citizens had to agree to a new tax power, a federal tax power that could effectively be directed towards the merchants and their income.

The way to make the merchants pay their fair share and to increase the revenue from that source was to shift the power to impose tariffs to the federal level. This would allow a uniform tariff rate to be imposed throughout the states and eliminate tax competition in that respect. At the same time, it allowed the Union to increase revenue and pay off states wartime debt, subsequently freeing them from that liability. The result was a surge of tariff revenue. Once taken over by the Union, the increase was six-fold within a decade, as Table 1 below shows.

Table 1. Revenue from the Tariff Before and After the Introduction of the Federal Tax Power

State	1785-1788	1792-1795
New York	$ 603,000	$ 4,653,000
Philadelphia	622,000	4,299,000
Baltimore	346,000	1,829,000
Charleston	404,000	1,064,000
Total	$1,975,000	$11,845,000

Source: Edling and Kaplanoff (2004: 739).

But the debt, even if large, was of a limited scope and the constitutional power to tax – once given to the federal government - was there to stay. So, what would the federal government do with those revenues once the wartime debt is paid off? It was decided to link the power to tax with federal obligations. Namely, the Union was to be responsible for the military expenditures or "common defence" to use the wording of the US Constitution (the largest and virtually the only public expenditure at the time) and to use the future revenues for that purpose. Hence, the states would not have to go into debt in case of a future war - the federal government would be liable for any war-related debts and it would be able to do so due to a collateral for loans in the form of the expected revenues from the tariff. Thus, the tax and its fiscal purpose had been linked (see Wozniakowski 2018a for details).

To be sure, for some states it was easier to accept such a pooling of the tax power than for the others, and the main reason for this divergence were the differences in their geographies and economies. Unsurprisingly, the coastal states with large, vibrant ports and trade as a significant part of their economies, such as Rhode Island or New York, were against such a transfer of tax powers, because their own budgets relied heavily on tariff, the anticipated federal tax (for instance, revenue from tariff provided more than half of New York state budget [Wozniakowski 2018b, p. 58]). Other states, with no such ports and economies mainly based on agriculture, rather than trade, were generally in favour of this federal power to tax. Part of the reason was that these agricultural states had to pay their share of the custom duties imposed by the trading states, like New York, without benefiting from this income. This was due to the fact that agricultural states were also buying imported goods from the merchants, who included the coastal states' taxes in the price of these goods. As a matter of fact, the states which more strongly opposed the federal power to tax were also the most prominent opponents of the Constitution - for instance Rhode Island ratified it only when the first Congress was already in session, and New York as a ninth one and the last one of the big four (after Pennsylvania, Massachusetts and Virginia). As always, however, issue-linkage provided incentives for those states to also end up endorsing the federal tax. One of the reasons for New York to finally accept losing the main source of its revenue, was the fact that the revenue from the federal tariff was to be devoted to a "common defence". As the state most exposed to a potential foreign invasion, New York was expected to be one of those most to gain from this new federal duty.

3. Why citizens support the introduction of European taxes – survey data[VI]

One of the main arguments against an EU tax power, or equivalent, is that EU citizens would never support any new taxes. In fact, the example of the US demonstrates that a new tax power may actually be welcome if it were linked with a fairer distribution of the tax burden.

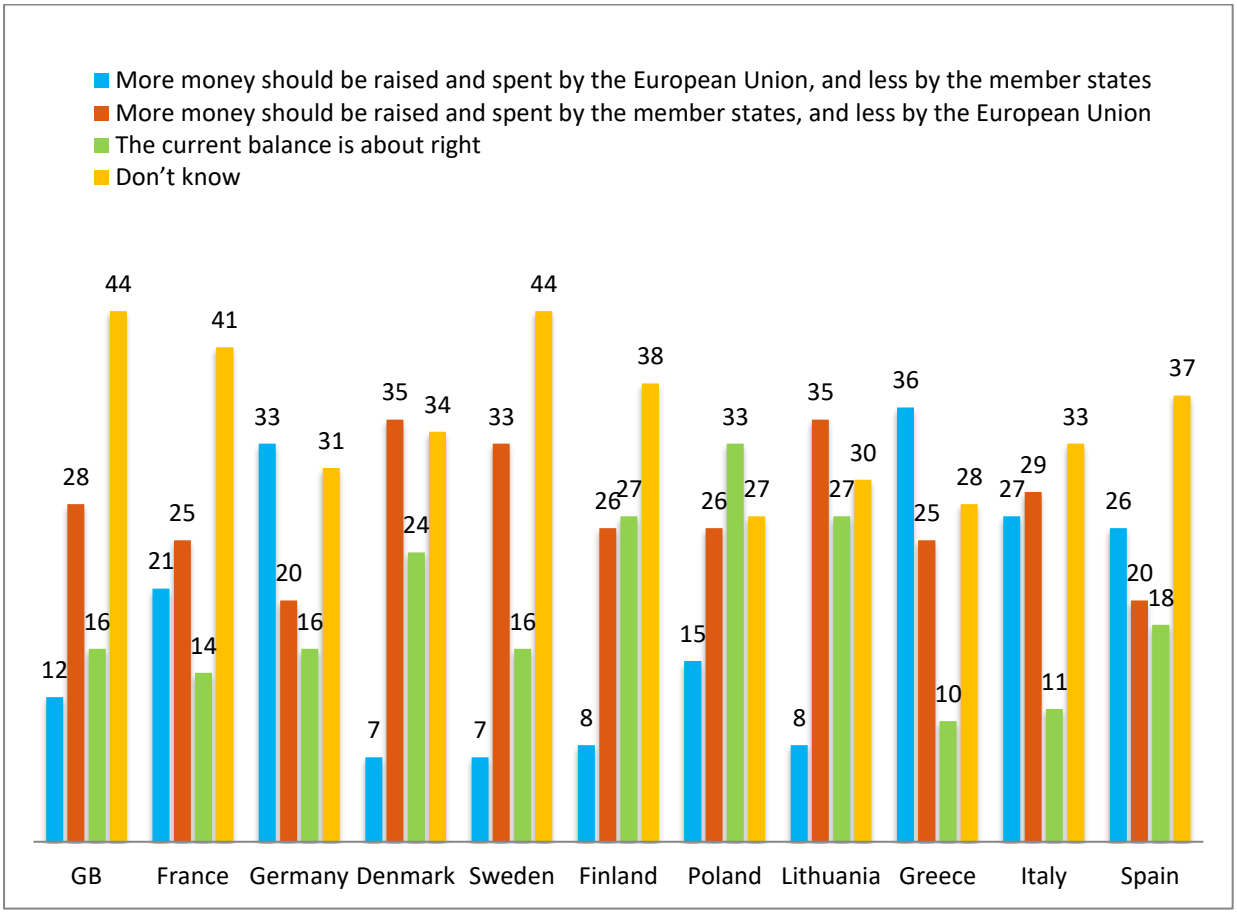
This is the basis for our argument. In fact, the secret for a successful approach to new own resources is to link the growth in revenue with a fairer distribution of the current tax burden in the EU member states (De Grauwe 2006; Demertzis and Wolff 2020; Poiares

Maduro 2012). This will actually help to support, instead of undermining, EU legitimacy. If crafted well these resources could make the Union more politically intelligible by highlighting areas where it has an added value with respect to member states (notably by reinstating tax fairness) or correct negative externalities (Poiares Maduro, 2012: 13).

It was to test this hypothesis that one of us (Poiares Maduro) conducted with You Gov, in the context of the State of the Union of the European University Institute, a survey in 11 member states and asked above 11,000 citizens a number of questions about the revenues and budget of the EU. The opening question regarded the preferences with respect to money raised and spent by the EU and the member states.[VII] Not surprisingly, as shown in Graph 1 below, citizens in a majority of the sample member states favoured the option that "more money should be raised and spent by the member states, and less by the European Union". Perhaps also unsurprisingly, Spain and Greece, as net beneficiaries of the EU budget, were the two countries where there was a majority in support of a stronger EU budget even at the expense of state budgets. Interestingly, however, a small majority in Germany also favoured the EU to raise and spend more money, and the member states less. In several states (notably Sweden) there was a large number who responded that they did not know.

The most significant conclusion was that, overall, there was a strong correlation between States that are considered to be net contributors to the EU budget and larger majorities opposed to a bigger EU budget. This result seems to confirm the popular idea that citizens are more opposed to more money for the EU the more they perceive their State as being a net contributor and not a net beneficiary of that budget. More importantly it underscores the extent to which the way the EU budget is perceived as a zero-sum game. This trend can be exemplified with the most popular slogan of the Leave campaign of the Brexit referendum "We send the EU £350 million a week - let's fund our NHS instead". The way the EU budget is currently funded - mostly by transfer from the national budgets – promotes that zero-sum understanding and hides the true nature of the economic benefits and costs of the Union. In addition, the asymmetry between the national funding of the EU budget and the diffuse nature of most of its economic benefits (through the internal market) further undermines the support for the EU budget.

Graph 1. Approval and Rejection of Division of Raising and Spending Competences between the EU and the Member States in Eleven European Countries

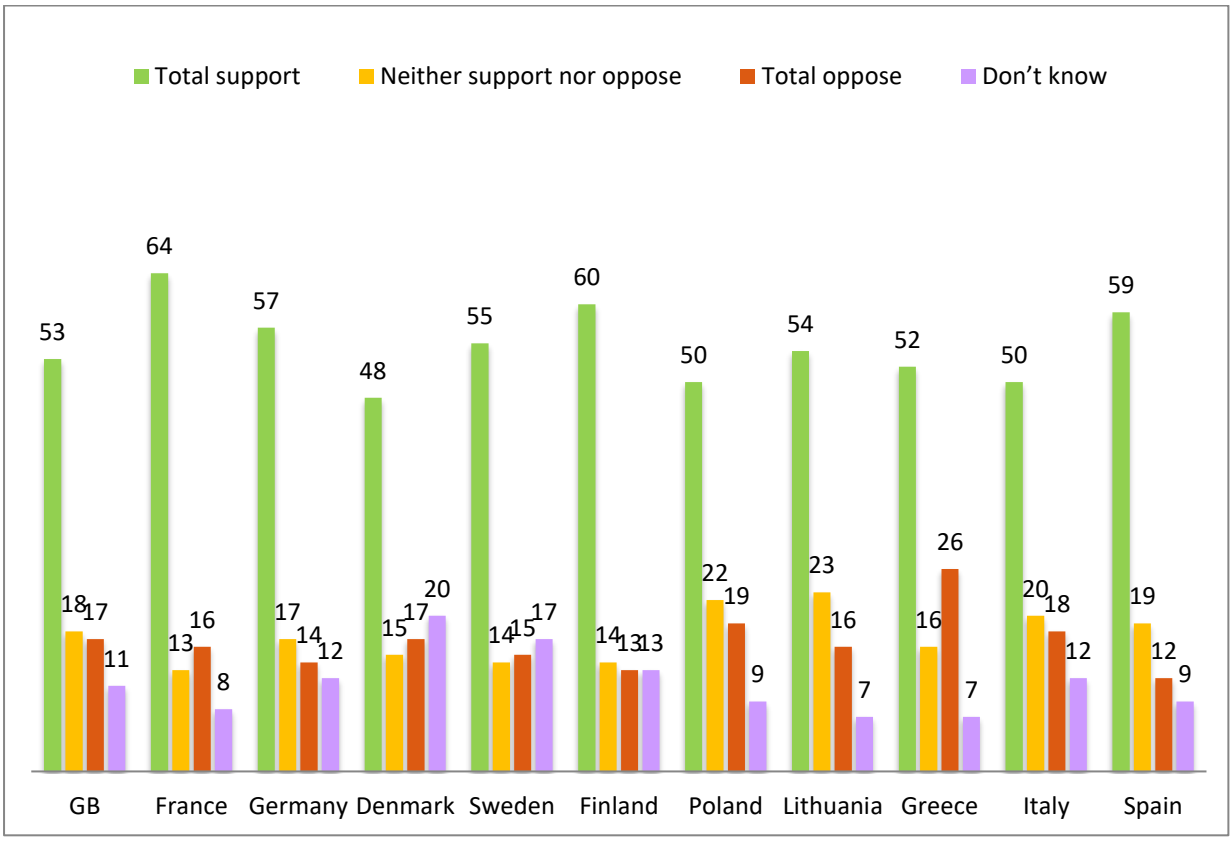


Note: Answers to the question: "Thinking about the money that is spent by the European Union and the money that is spent by member states, which of the following best reflects your view?"
Source: Poiares Maduro 2018

However, this picture changed substantially in the survey once we moved to a different set of questions, in which the following was asked: "Would you support or oppose the EU introducing new European taxes on the following?". The subsequent four questions asked about the preferences regarding the introduction of the following four types of taxes:

1. Carbon emissions by businesses;
2. The revenue of large internet companies;
3. Financial transactions (such as trading in shares); and
4. Business profits.

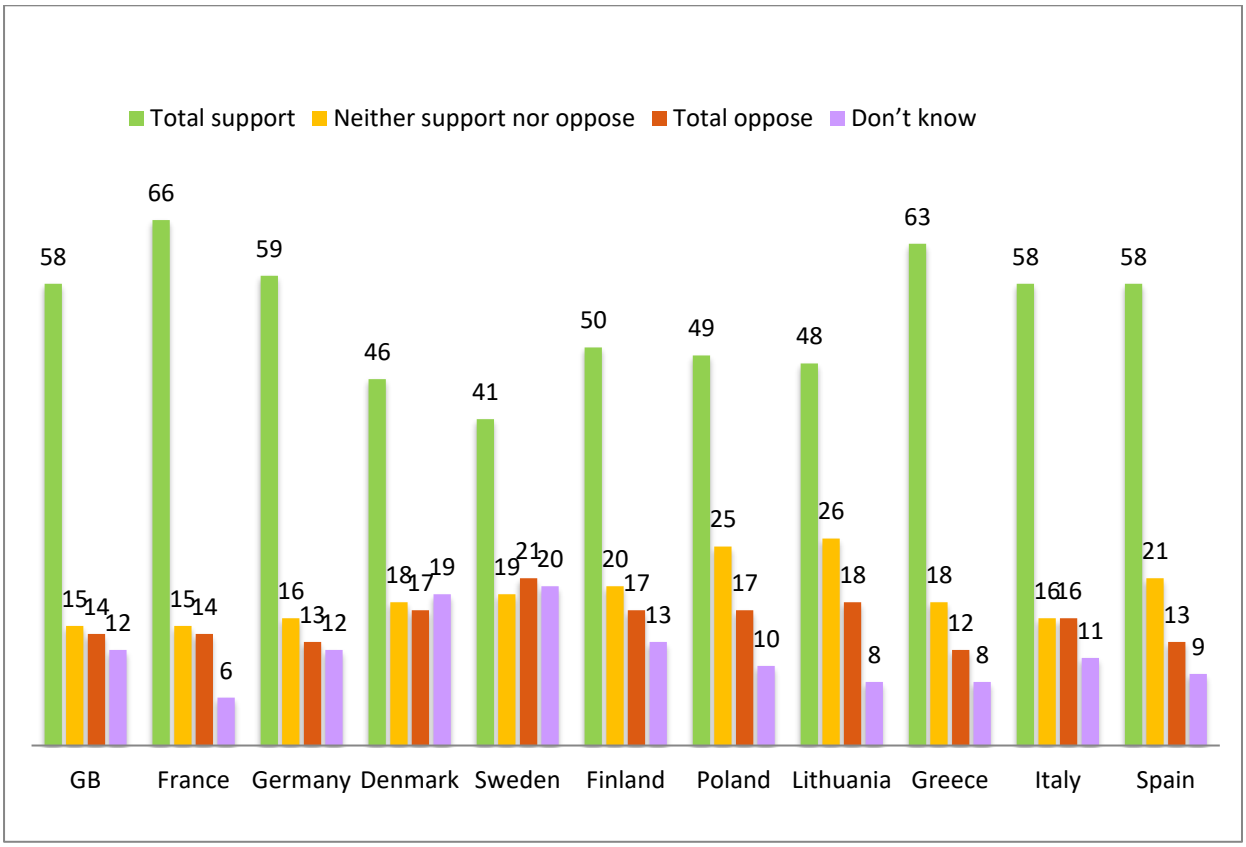
Graph 2. Approval and Rejection of European Tax on Carbon Emissions by Businesses in Eleven European Countries



Note: Answers to the question: "Would you support or oppose the EU introducing new European taxes on the following? Carbon emissions by businesses"
Source: Poiares Maduro 2018

The surveyed citizens supported the introduction of the four taxes in virtually all the states in which the survey was conducted. As shown in Graph 2 above, the highest support was for the tax on carbon emissions by businesses - in all countries support for it was above 50% (Denmark being the only exception with 48% but still much higher than those opposing, only 17%). The introduction of EU carbon tax was the most popular in France, Finland and Germany, while the "total oppose" answer was chosen by less than 20% in all countries but Greece (26%).

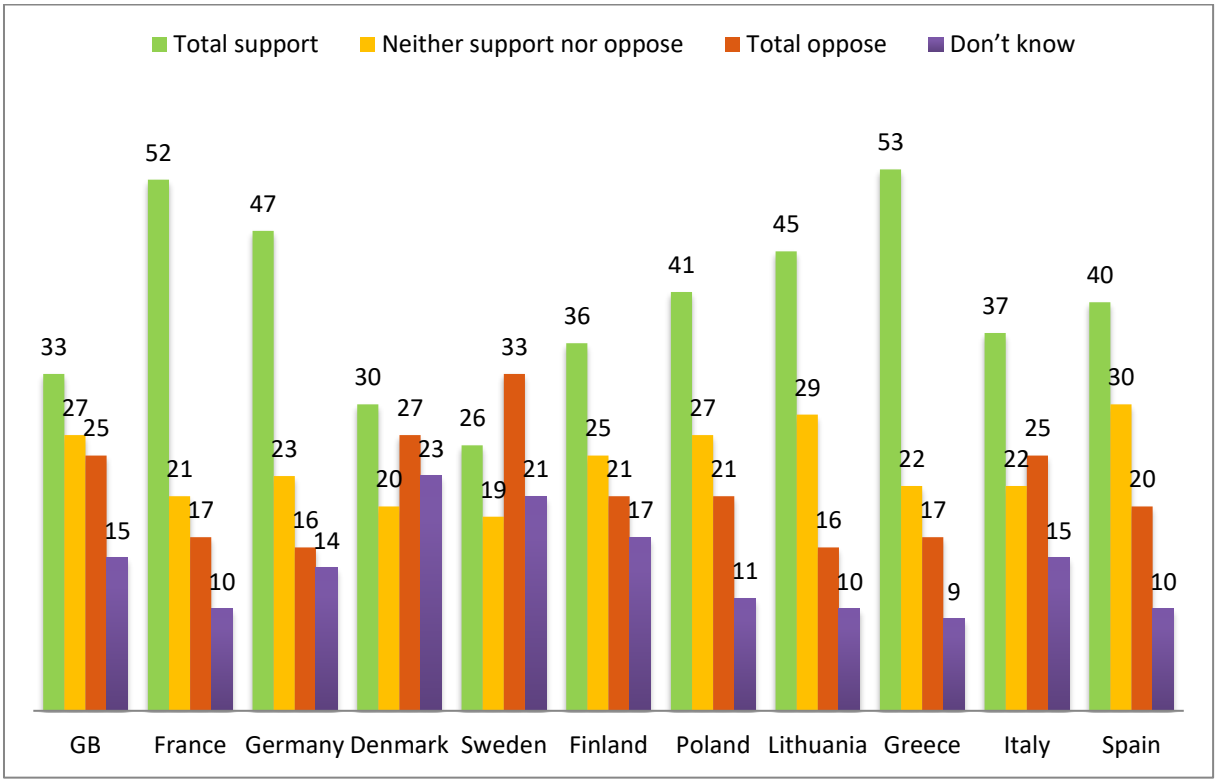
Graph 3. Approval and Rejection of European Tax on the Revenue of Large Internet Companies in Eleven European Countries



Note: Answers to the question: "Would you support or oppose the EU introducing new European taxes on the following? The revenue of large internet companies"
Source: Poiares Maduro 2018

The second most popular was a European tax on the revenue of large internet companies as shown in Graph 3. A majority supported it in all States and only in four countries was the support less than 50% (but more than 40%). The strongest opposition was in Sweden, but even there only at 21%. In all other countries, the support was more than double than that opposing it, with the highest in France, Greece and - again - Germany. The third most popular was the tax on financial transactions (such as trading in shares), as one can see in Graph 4 below. Only in one country - Sweden - there was more opposition (33%) than support for this tax (26%). In Greece, France and Germany support was the strongest.

Graph 4. Approval and Rejection of European Tax on Financial Transactions (such as Trading in Shares) in Eleven European Countries



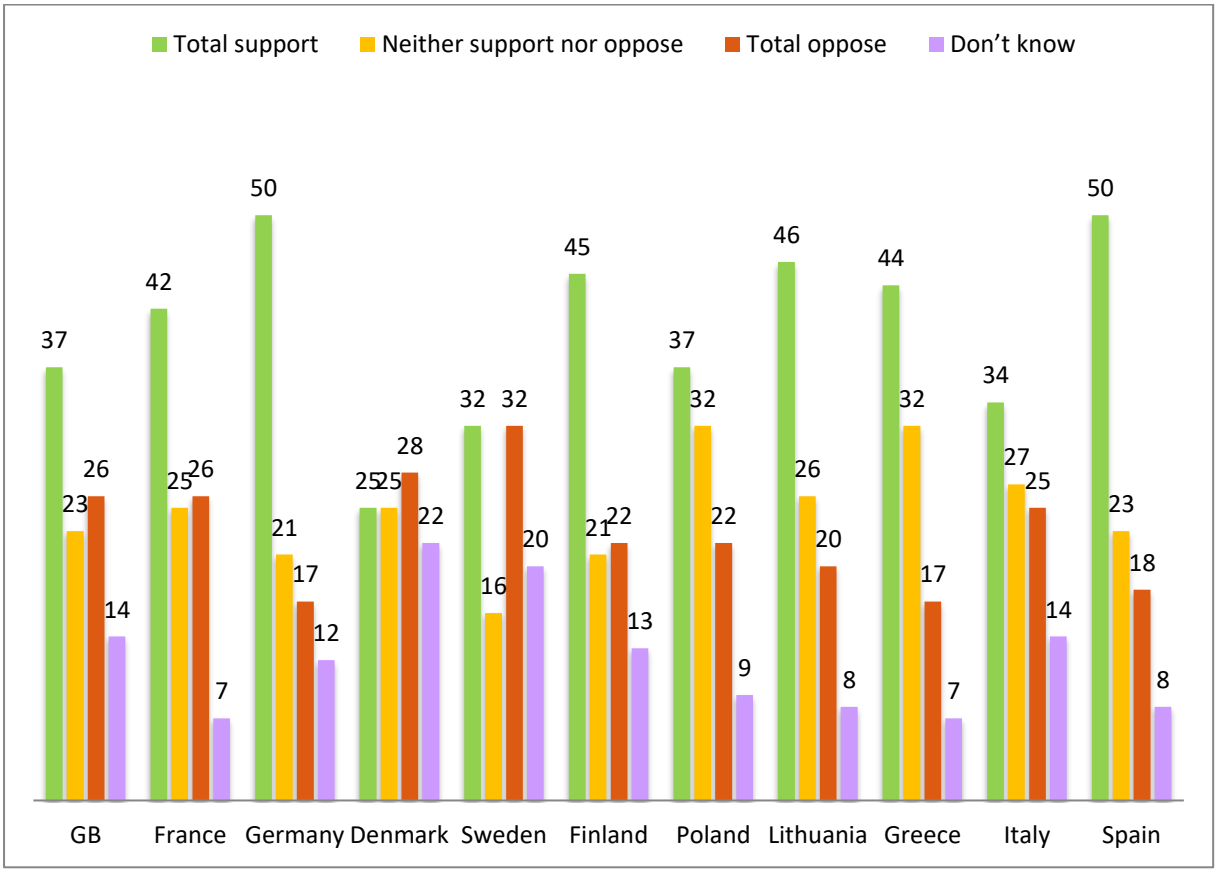
Note: Answers to the question: "Would you support or oppose the EU introducing new European taxes on the following? Financial Transactions (such as Trading in Shares)"
Source: Poiares Maduro 2018

The fourth type, the tax on business profits, was the least popular but, even in this case, there was only a majority opposing it in one country (Denmark, by a narrow margin: 28% opposing and 25% supporting it) as shown in Graph 5. In Sweden there was a draw: support and opposition were equally divided (32%). In all other states, the support was above 30%, and in two – Germany and Spain it was at the high level of 50%. All questions presented relevant levels of indifference (neither support nor approve) and unfamiliarity (don't know), between 20 and 30%. In any case, the level of support for these possible new European taxes could be classified as overwhelming. It was almost always the double of those opposing it and, in most instances, well above the 50% mark of all the answers given.

We could see that France and especially Germany, the two largest EU states in the survey, repeatedly ranked the highest in the support for European taxes. In fact, Germany, perhaps

to the surprise of some, was the only member state that ranked among the top three states with highest support for a European tax, in all four categories, as we described above.

Graph 5. Approval and Rejection of European Tax on Business Profits in Eleven European Countries



Note: Answers to the question: "Would you support or oppose the EU introducing new European taxes on the following? Business profits"
Source: Poiares Maduro 2018

These results appear to present a paradox: citizens that do not want a bigger EU budget welcome new EU taxes. The explanation is that reason why they oppose the current budget is linked to how it is funded (mostly by national contributions). If the EU budget were linked to taxes that are perceived by EU citizens as reinstating tax fairness, not only would they not oppose it, but rather they would welcome it. We argue that the results of the survey confirm that having the EU budget funded by new European own resources (taxes) – if they would be the right taxes - would change the dynamics of how citizens understand and view

European integration. This would also limit the current zero-sum understanding of the EU budget that undermines the EU legitimacy and negotiations on the EU budget. Finally, by linking EU taxes to economic activity promoted by the internal market and the regulation of externalities emerging from the Union would be perceived both as distributing wealth it generates (and not the member states) and reinstating tax justice where states can no longer do it (Poiares Maduro, 2012). Those who benefit the most from EU policies, such as single market – for instance internet companies - would be paying the most and those that escape national taxes will now be subject to an EU tax. This may also give margin for lower taxes at the level of the states. We would have a similar dynamic to that which led to the granting of tax power to the federal government in the US.

4. Implications for the EU

When the Euro crisis started, there was an agreement among EU political elites on the need to strengthen the governance of the EU, and it was also generally agreed that there were two ways of doing this – either by regulating the fiscal policies of the EU member states or by creating a fiscal union, with EU tax and borrowing power, akin to that of the US Treasury. Such a fiscal union would lead to the EU having a larger, independent, budget. This would therefore enable the EU to conduct a fiscal policy on its own to help countries cope with asymmetric shocks.

So far, the approach favouring a focus on the regulation and oversight of national budgets has prevailed over that favouring a strong fiscal capacity. EU fiscal rules were tightened, while an EU treasury and a stronger EU budget were not adopted. When Emmanuel Macron became the President of France in May 2017, the idea of a stronger fiscal capacity of the EU, albeit limited to a Euro Area budget financed through current corporate taxes, became the main part of his plans for the reform of the Euro Area and was a main point of the negotiations on the future of Europe. However, as the result of the opposition from Germany and the Hansa 2.0 (a group of Northern countries led by Netherlands), Macron's initial idea of a Euro budget capable of asymmetric shocks absorption, was watered down to a symbolic "Euro Area" line in a general EU budget. As a result, in December 2018, the Euro Summit mandated the Eurogroup to prepare the specifics of a "budgetary instrument for convergence and competitiveness for the euro area", without a stabilisation

function. It is doubtful, however, that such mechanism would suffice for the Union to cope with future crises. In addition, without the Union disposing of effective instruments of its own to promote economic growth and competitiveness a and mitigate social costs in times of crisis, the most likely outcome will be that the fiscal regulatory and oversight function will also be progressively eroded, as has happened in the past.

There are five lessons that the EU could learn from both the US experience in forging a federal fiscal union and the survey we presented. **First**, an endogenous threat is the usual condition triggering the process of fiscal empowerment of the central government and consequently leading to the creation of a federal fiscal union. In the US, this threat was symmetric (it was present in the majority of the states), whereas in the EU so far, the threat emerging from different crises in the last decade has been asymmetric (it was present only in some member states). This explains the lack of fiscalization in the EU. The closer we have come to a symmetric crisis is the current pandemic. It is this that explains why the Union has finally taken a bolder step in terms of fiscal capacity, doubling its usual budget through an ad hoc program (the Next Generation Economic Recovery Programme) and envisioning the adoption of new resources (including some of the taxes discussed above). This programme is temporary but, as it happened in the US, the new revenues from own resources will open the door for a different EU budget even at the end of this temporary programme.

Second, the lack of a federal power to tax, and thus the existence of a vertical fiscal imbalance, so that central government is financially dependent on the contributions from the states, may trigger a chain of events leading to popular protests threatening the Union. These protests may refer both to the member states that are required to impose austerity measures and to those member states that are required, under the current EU instruments, to fund the financial assistance given to the former. The fiscal empowerment of the EU could help address these social tensions, as the EU tax power would limit national liability for addressing these EU issues. Thus, a shift in tax power would imply a shift in responsibilities to the European Union and a limit on the potential liabilities imposed on national budgets and political communities.

Third, EU fiscal power could help address some of the negative externalities resulting from tax competition without imposing tax harmonization (Poiares Maduro, 2012). In fact, EU taxes could bring two important forms of added value: they could make taxable revenue that currently escapes the tax power of any member state on its own; and they could provide

a sort of regulation of tax competition since the EU could regulate its own taxes (imposable to all) so as to prevent an excessive race to the bottom resulting from tax competition among member states.

Fourth, and as a consequence of the former, such a EU tax power would help to reinstall tax justice in a variety of ways. Digital companies that have made use of the EU internal market mobility to successfully avoid taxation in many respects would be subject to the EU tax power. Large companies which benefit the most from the existence of the Union and its policies, such as single market, would also pay their fair share. The increased scope of economic activity that could be brought under taxation under the EU tax power, where member states no longer effectively have it, may also allow to reduce the tax burden of other citizens and companies at the level of the states.

Fifth, Germany and the countries of Hansa 2.0 coalition which oppose the EU fiscal power, should be shown how they could benefit from it, just like New York, which initially opposed the federal fiscal union, benefited from the introduction of the federal tariff.[VIII] This explains why steps are finally being taken, in the context of the current pandemic. The perception is that the pandemic affects all and that support is necessary to all states and has only limited moral hazard. Still, even in this exceptional context it has not proved easy. Indeed, the current increase in the EU fiscal capacity is presented as strictly limited to the temporary needs brought about by the pandemic. However, once the resources are created, the opportunity is there to preserve that fiscal capacity. For that to be successful, it will be crucial to identify EU policies that the Union may assume as relieving states from correspondent costs and fiscal liabilities. In areas such as defence, border control, bank resolution, pandemic protection it may be possible for this to be successful. This will be more the so the more the Union may also be able to relate the introduction of new own resources with a decrease in contributions from national budgets.

Jean Monnet famously said that "Europe will be forged in crises, and will be the sum of the solutions adopted for those crises" (Monnet 1978, p. 417). The Union has faced a succession of crises in recent years: the financial crises, which became a Euro crisis, Brexit and now the pandemic. It may be the latter or the succession of the three that will come to explain in the future the fiscal empowerment of the Union.

5. Conclusions

We have shown the similarities between the early US federation and the EU today. Between 1781 and 1788, under the Articles of Confederation, the US did not have a fiscal union. Congress had no power to tax; instead, it relied on financial contributions from the states, known as requisitions, and, in fiscal matters, it was governed by the unanimity rule. This system proved to be a failure, because the so-called free-rider problem emerged in which every state expected other states to pay the bills and, as a result, states did not contribute, as they should have (Wozniakowski 2018b). This method of financing central institutions through state contributions, triggering a zero-sum game, whose transaction costs are amplified in decision-making subject to unanimity rule also represents the problem the EU faces today in the fiscal area.

In the United States, the tax-motivated social unrest in the mid-1780s was perceived as an internal threat to the Union, and as such it helped the Constitution to emerge. Paradoxically the granting of federal tax power was one of its most important features that helped to address that tax generated social unrest. Furthermore, the Constitution helped to ensure that American people stay loyal to the Union. The granting to the federal government of the power to tax ultimately brought about a decrease in an overall tax burden. Paradoxically, in order to tax less, the states needed to give up some of their tax powers, such as the power to tax imports. Such a tax could only be effectively levied at the federal level, because otherwise tax competition between states would prevail and a 'race to the bottom' would emerge. In order to address such problem of tax fairness it was necessary to create a new tax power at the federal level.

The evidence from the YouGov survey demonstrates that the same dynamics might be replicated in the European Union. While the majority favours the option of having more money in the member state budget rather than in the EU one, this picture changes dramatically once the respondents were asked if they favour imposing certain European taxes that they can easily perceive as reinstating tax fairness and justice. This evidence shows that the fact that the EU budget is currently funded through national budgets creates a particular blind spot in the minds of citizens, who tend to see the EU budget as a zero-sum game - if the EU has more money that means less money in the member states coffers. That hides the actual and much broader benefits that result from EU economic integration. But it also

ignores the potential the European Union has to reinstate tax power where states can no longer effectively exercise it. If the EU budget is linked to the latter, the survey demonstrates a much higher support for the EU budget. Some taxes, like on the Big Tech or other taxes on companies benefiting from the single market (see Poiares Maduro 2012 for details) can only be imposed effectively at the EU level, because otherwise tax evasion will ensue, just like with the tariff in the 18th c. US, when within one decade following the first federal tariff bill, the federation increased the revenue from this source by six hundred percent (from 2 to 12 million dollars, see Table 1 above). Only European tax power can ensure that those companies which benefit most from the single market pay their fair share allowing other citizens to even benefit from a lower tax burden.

We have shown that giving the EU power to tax would lead to a broadening, and not limiting, of the tax sovereignty of the member states. Member States will benefit from the fact that the EU will be fiscally independent – their share of transfers to the EU and their potential liability for EU policies and financial assistance will diminish, as a result. The EU, itself, will see its legitimacy reinforced by playing a crucial role in reinstating tax fairness and justice where states, on their own, can no longer guarantee it. The steps taken, albeit in a temporary and emergency form, in order to address the pandemic crisis are an opportunity that the Union should seize to redefine itself before its citizens and make its added value clearer.

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[*] The first preliminary results of this comparative study were published as part of the School of Transnational Governance Policy Papers Collection (2020/07).

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This research was supported by funding from the European Research Council under the European Union's Horizon 2020 research and innovation programme (grant agreement no. 716923).

[I] This term was coined by Wozniakowski in his article "Why the sovereign debt crisis could lead to a federal fiscal union: the paradoxical origins of fiscalization in the United States and insights for the European Union", *Journal of European Public Policy*, 2018, 25(4), p. 633.

[II] The most important were perhaps the so-called Five Presidents' Report "Completing Europe's Economic and Monetary Union", 2015 and Franco-German plans - of Emmanuel Macron and Sigmar Gabriel 'Europe cannot wait any longer: France and Germany must drive ahead', June 2015, and the Meseberg Declaration of Macron and Angela Merkel from June 2018, https://archiv.bundesregierung.de/archiv-de/meta/startseite/meseberg-declaration-1140806 (accessed 02.12.2020).

[III] New York Ratifying Convention. Remarks (FRANCIS CHILDS'S VERSION, [20 June 1788]', The Papers of Alexander Hamilton (PAH) Digital Edition, ed. Harold C. Syrett, Volume IV: 1787–May 1788, The Federalist No. 33, [2 January 1788], Charlottesville: University of Virginia Press, Rotunda 2011:p. 19.

[IV] "I have applied these observations thus particularly to the power of taxation, (…) because it is the most important of the authorities proposed to be conferred upon the Union."3", PAH IV, p. 466.

[V] In addition, printing money and issuing debt was used by the Congress to finance the Confederation.

[VI] The data in this section is based on a YouGov Survey, fieldwork conducted 18th - 30th April 2018 with the

following sample size: 1692 GB/ 1005 French/ 1017 German/ 1030 Danish/ 1019 Swedish/ 981 Finnish/ 956 Polish/738 Lithuanian/ 746 Greek/ 1065 Italian/ 1035 Spanish Adults.

[VII] "Thinking about the money that is spent by the European Union and the money that is spent by member states, which of the following best reflects your view?"

[VIII] As this new federal revenue was used for the common defence against foreign invasion to which New York was the most exposed.

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CENTRO STUDI SUL FEDERALISMO
PERSPECTIVES ON FEDERALISM

ISSN: 2036-5438

The future of the EU-ACP relations: possible scenarios after the end of the post-Cotonou negotiations

by

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Perspectives on Federalism, Vol. 12, issue 3, 2020

Abstract

This article provides an analysis of the recent negotiations between the European Union (EU) and the representatives of the African, Caribbean and Pacific Group of States (ACP) for the signature of a new agreement, following the expiry of the Cotonou Partnership Agreement of 2000 (CPA). In particular, we focus on the outcome of the last 20 years of cooperation under the Cotonou Convention, highlighting the positive aspects of the Agreement, but also and above all its criticalities and failures. Taking into consideration such results and the interaction between the two organisations, we analyse the main issues to be solved during the recently concluded negotiating process. The different proposals on the table to revitalise the partnership are particularly important in this paper: whilst the EU is in principle favourable to a so-called 'umbrella agreement', consisting of a single agreement applicable to the EU and all ACP countries and regional protocols, the ACP States look more in favour of maintaining the *status quo*. Moreover, the financing, the legal basis, the model of implementation and the main players of the partnership are key points that will be discussed in the essay.

Key-words

Cotonou Partnership Agreement; ACP-EU relations; post-Cotonou negotiations; development cooperation; trade; regionalism promotion

1. Introduction

It is well-known that Africa is the European Union's trade partner of choice. The roots of this 'special relationship' date back to the period of colonial expansion of the great European powers in the second half of the XIX century, when due to its proximity on the other side of the Mediterranean and its immense natural wealth, the so-called 'Scramble for Africa' began.

When the majority of African States had gained independence, the European Economic Community (EEC) signed its first association agreement with 18 African ex-colonies, in Yaoundé, on the 20th of July 1963. This was followed by the second Yaoundé Convention of 1969. The aim of these agreements was simple: it consisted in the promotion of trade, economic independence and social development of the State Parties.

The Yaoundé Conventions were rapidly surpassed by the Lomé Convention of 1975: the agreement was meant to provide a new framework of cooperation between the EEC and the developing ACP countries, that for the first time participated to the negotiations as a unit. It was characterised by two main aspects: firstly, the duty-free export of most ACP agricultural and mineral products to the EEC and the preferential access based on a quota system for products, such as sugar and beef, in competition with EEC agriculture. Secondly, the EEC committed European Unit of Account (EUA) 3 billion for investment and aid in the ACP countries (Correa 2007: 17). The Lomé Convention was renewed multiple times, in 1980, 1986, 1991 and 1996[I], and formed the basis of a new type of pact.

The Lomé *acquis* was in fact adapted and modified in order to create a more comprehensive agreement on political, social and economic cooperation: this led to the signing of the Cotonou Partnership Agreement on the 23rd of June 2000 in Cotonou, Benin[II]. At the time, the agreement was a significant innovation: never before had a cooperation agreement had such a wide scope[III]. Structured in three pillars – development cooperation, economic and trade cooperation and political dimension – the CPA relies on 4 main principles: the partners to the agreement are equal; the ACP countries determine their own development policies; cooperation is not only among governments: parliaments, local authorities, civil society and the private sector play a role as well; cooperation arrangements and priorities vary according to aspects such as countries' levels of

development (ECDPM 2001: 3). Moreover, the Cotonou Agreement provided for the establishment of a complex structure of ACP-EU joint institutions[IV], whose task is to supervise the implementation of the Agreement[V] and to carry on the dialogue between the organisations. These practices are funded through the European Development Fund, established by voluntary donations of the EU Member States outside the EU budget and usually lasting 6 years. The CPA is also the framework agreement for the negotiation of the Economic Partnership Agreements (EPAs) between the EU and regional organisations comprising the ACP States[VI].

Now, after 20 years of existence, the Cotonou Partnership Agreement (CPA) should have expired in February 2020. However, as the negotiations on the future agreement finished beyond this deadline, the CPA was extended to December 2020. Undoubtedly the negotiating process proved to be extremely complex and time-consuming, given the high number of institutions and interests involved. In addition, the COVID-19 pandemic further complicated the process and created more delays (Pelz 2020).

This being so, this article firstly provides an overview of the history of the negotiations for a post-Cotonou agreement, that formally began in 2018 with the adoption of the negotiating mandates of each counterpart, but that were preceded by important proposals and discussions. Then, taking into considerations strengths and weaknesses of the CPA and the position of the European Union (EU), its Member States and the ACP Group of States, we focus on the results of the negotiations. As it will be shown in this article, the ACP States are particularly resistant to change and seem unwilling to abandon the traditional donor-recipient nature of the CPA, worried as they are to lose their financial privilege granted by the European Development Fund (EDF). Their position is also weakened by the increasing representativeness of the African Union (AU), whose plan is to conclude an intercontinental agreement with the EU. On the other hand, the EU went through a difficult reflection on the possible changes to the structure of the agreement. The transition towards a more regionally owned cooperation framework has been discussed and finally adopted, showing its pros and cons. In general, European negotiators are aware that the global context has changed radically in the past 20 years and that the primacy of the EU as economic partner of the ACP States is threatened by new international actors (Schefer 2019: 20; Bossuyt, et al. 2016a: 22). It is possible to say that a

rethink of the EU-ACP agreement is a fundamental step towards a more comprehensive rethink of the role of the EU as a key actor in the global landscape.

2. The Cotonou Agreement: what worked, what didn't

There is no denying that the undertakings given by the Cotonou Partnership Agreement are ambitious and virtuous. However, it has to be said that its achievements are rather meagre and the evidence of its dilution significant.

The CPA seems to have a weakened political status: a remarkable part of its stakeholders has been excluded from its processes – because of their limited knowledge and interest – and more in general the performance of the Agreement has been unsatisfactory. Moreover, a scarce 'use' of the partnership has been made in multilateral fora, despite the considerable demographic and geographic weight of the CPA.

There are many reasons behind the disappointing outcome of the Cotonou partnership so far. The first one is the 'erosion' of the three-pillar structure of the Agreement (Bossuyt 2017: 3): the fields of migration and security have been neglected, while the trade and political dialogue pillars have been externalised from the CPA framework and regionalised with the EPAs. Given this structural weakness, the CPA looks to be simply a development cooperation tool.

Another reason of the poor record of the Agreement is the significant implementation gap between its provisions and practice. The fact of being a legally binding agreement has not guaranteed the CPA an effective action on many levels: the use of Article 13 has been limited, there has been a lack of non-state actors participation and the political dialogue between the parties has been insufficient. In this regard, Article 96 has been often triggered at a late stage of political crises – only once on a corruption case – and not in a preventive manner[VII] (EC: 5). Moreover, the loss of internal leverage that the ACP experienced with regard to its Member States has made the dialogue on some sensitive issues, for example the support to the ICC and LGBTI rights, even more difficult between the parties (Bossuyt 2017: 9). In addition to this, limited results have been achieved concerning poverty eradication: 50% of the ACP countries are still Least Developed Countries (LDCs) and the whole OACPS only accounts for around 5% of global trade and 2% of global GDP (EP 2016: 5). ACP States economies, still characterised by a significant informal economy, tax

avoidance and tax evasion, remain fragile due to external economic shocks and natural disasters. Not enough progress has been made towards the achievement of the MDGs and the following SDGs, in particular as regards conflict-afflicted countries where population growth and urbanisation are an issue and increasing inequalities have a negative impact on human development. Lastly, meagre results have been achieved with regard to environment protection: the main problem of the CPA is that the environment is not enough integrated in other policy sectors[VIII], while the JAES is more advanced in this sense, foreseeing a 'Common But Differentiated Responsibility' regime (Adelle, Lightfoot 2018: 254).

Furthermore, the marginal position of the EU-ACP partnership within the European External Action had had a negative impact on the CPA performance. In fact, the EU's recent tendency is to go bilateral and regional rather than multilateral with its foreign policy agreements – especially when it comes to the regulation of illegal migration[IX]. The trend will probably intensify after 2020 and if so, the ACP Group may lose even more importance as compared with the AU-EU partnership. Moreover, an erosion of the EDF[X] has been taking place, caused by the implementation of different financial instruments among which the EU External Investment Plan (EIP). As a consequence, the EU-ACP joint institutions were marginalised – especially the Council of Ministers[XI] – and their marginalisation was confirmed by the 2016 EU Global Strategy, that does not mention the ACP States at all and recommends a new way to address global challenges (Bossuyt, et al. 2016a: 14).

Finally, wider geopolitical factors contributed to the partial failure of the Cotonou Agreement. The emergence of a multipolar world, the globalisation process, the marginalisation of post-colonial structures and the growing heterogeneity within the ACP States undermined its foundation. The growing economic and geopolitical influence of new important actors in the global landscape, such as Brazil, India, Arab States and China, considerably affected the EU's role of ACPs' partner of choice. Especially the growth of China in Africa is perceived as a threat. It is not by chance that the EU signed more bilateral agreements with African States and put the JAES in place, willing to reinforce the political dialogue and, according to some, *de facto* replacing the Cotonou Agreement. Also, on the EU side, the process that led former soviet bloc countries to join the European Union created some problems: these new members do not have a colonial history, need to strengthen their economies and institutions and do not have any interest in development

cooperation. Add to this that Brexit confirmed the exit from the Union of one of the leading members in this sector. Ultimately, the 2030 Agenda goes far beyond the traditional north-south cooperation that the CPA embodies. It foresees new partnership modalities, based on the sharing of responsibilities, the negotiation of common interest, the attraction of alternative source of funding and a multi-actor approach: all things that the CPA does not provide for (Bossuyt, et al. 2016a: 9).

All this is highlighted in the November 2016 EC Joint Communication on 'A renewed partnership with the countries of Africa, the Caribbean and the Pacific'. In this document, the European Commission and High Representative of the Union for Foreign Affairs and Security Policy pointed out that, although considerable progress has been made in the EU-ACP cooperation, the overall results of the CPA are poor and some 'worrying trends' are emerging (Bossuyt 2017: 4).

3. Towards a post-Cotonou agreement: the timeline of the negotiations

The negotiating process of the agreement between the EU and the ACP Group started well before 2018. In fact, the European Commission and the High Representative of the Union for Foreign Affairs and Security Policy adopted a joint communication on the future partnership with ACP countries on the 22nd of November 2016. In this proposal, the main aspects considered were the structure of the future agreement, its legal nature and its geographical scope, being possible an enlargement to include African neighbouring countries (EC, HR/VP 2016: 23-29). Immediately after, on the 28th of November, the Foreign Ministers of the EU Member States reunited in the Council and began discussions on the nature and structure of the future relations between the EU and ACP (Council of the EU 2016: 3). Important meetings were held also on the other side of the partnership, notably the 7th and the 8th Summits of ACP Heads of State and Government. During these sessions decisions were taken on the official position of the ACP Group in the upcoming talks with the EU (ACP Group 2017: 1).

These steps were followed by a joint statement by the Parliament, the Council and the Commission, that also took into account the compliance with the UN 2030 Agenda and the Sustainable Development Goals (SDGs) (Council of the EU 2018: 1-4). Afterwards, a

Commission recommendation to the Council, including a proposal for the negotiating directives, was discussed by the Foreign Ministers in a meeting on the 22nd of January 2018 (Council of the EU 2018: 4). Concurrently, the EU was carrying on the talks with the African Union: formally, the EU-ACP negotiations were not in the agenda on the fifth EU-AU Summit that took place in November 2017, but the two negotiations could show some sign of incompatibility (Keijzer et al. 2017: 1-2).

According to the time schedule, in May and June 2018 the negotiating mandates were adopted by the ACP countries and the EU respectively (CEU 2018b: 16). The negotiations formally started on the 28th of September 2018, one month later than established by Article 95 of the CPA. After the appointment of their chief negotiators[XII], the parties launched their talks on the future partnership in the margin of the UN General Assembly in New York (Medinilla, Bossuyt 2019: 1-3). The first round of negotiations, focused on the structure of the future agreement and strategic priorities, was concluded on the 14th of December 2018 (European Council 2020: 1), while the second, devoted to the drafting of the foundation text, lasted until the 4th of April 2019 (European Council 2020: 1). Later, the chief negotiators met each other in May to start their consultations on the new institutional set-up (European Council 2020: 1).

Thereafter, however, no progress was made in order to draw the final text of the treaty until the 14th of February 2020, when the EU and the ACP's negotiating teams, led by Togolese foreign minister Robert Dussey and EU International Partnerships Commissioner and new chief negotiator Jutta Urpilainen, agreed to extend the existing agreement until December 2020. The reason of the extension is that more time was needed to discuss the content of the regional protocols of the agreement[XIII]. Urpilainen's schedule for the continuation of the negotiations, foreseeing new meetings and talks until April and seven months of legal scrubbing of the final agreement, was subsequently abandoned after the pandemic outbreak (Fox 2020: 2). Finally, on the 3rd of December the chief negotiators reached a deal on the text of the new agreement, creating the new legal framework for economic and political cooperation between the 79 ACP Members and the EU. At this stage the text will go through internal revision procedures (EC-press release 2020: 1). The signature will take place at a later stage of 2021. To enter into force, the agreement must be ratified by a minimum number of States for each party. With regard to the EU, signature, provisional application and conclusion will require the Commission's proposals to be

approved by the Council. These proposals will be forwarded to the Council in early 2021. With the European Parliament's consent, the Council will decide on the conclusion of the agreement, as set out in Article 218.6 of the Treaty on the Functioning of the European Union (TFEU). In any case, during this process the CPA will remain applicable: in order to allow the EU to carry its internal process out, its application has been extended until the 30th November 2021 (EC-press release 2020b: 1).

Simultaneously, the EU proposed a new strategy with Africa: the European Commission and the High Representative for Foreign Affairs and Security Policy proposed to intensify cooperation through partnerships in five key areas: green transition; digital transformation; sustainable growth and jobs; peace and governance; and migration and mobility. The strategy was meant to be endorsed at the European Union-African Union Summit in October 2020, but the event did not prove to be immune to COVID-19 and the decision to postpone it to 2021 was finally taken (Laporte 2020).

4. The position of the parties with regard to the new agreement.

4.1 The position of the EU.

The European Union has significant interests in the revision of the Cotonou Partnership Agreement. According to the words of its chief negotiator, Jutta Urpilainen, the EU considers the post-Cotonou agreement a key point of its external action[XIV]. But which are the main reasons why the EU strongly wants to renew its partnership with the ACP Group?

First of all, the EU wants to preserve the Cotonou *acquis*, the set of rights, obligations and political objectives shared by the parties. The acquis includes legally binding nature of the CPA, which is something that the EU desires to retain in order to make progress on fundamental values and strategic interests. The EU also wants to keep at the centre of the new agreement the political dialogue provisions of the CPA, trying also to strengthen them, and the EPAs articles.

Moreover, the EU could in theory appreciate the limited expenses deriving from the preservation of a single interlocutor – the OACPS – in the negotiating process with 79

countries, even without ruling out a series of regional and sub-regional strategies (Bossuyt, et al. 2016a: 13)[XV]. In fact, the EU, aware that the traditional north-south cooperation scheme of the CPA has been outgrown and regional integration has become a remarkable force of change, wants to ensure the continuity of the actual institutional framework, but also to create the conditions for a further regionalisation of the partnership (Medinilla, Bossuyt 2019: 1). Consolidating the partnership with regional institutions can be also a way to preserve the EU's role of main partner of the OACPS, given the growing competition from China and other emerging global powers. This applies especially to Africa, where the main interests of the EU lie. The African continent – traditionally seen as continent of opportunities on one side, source of potential threats on the other – is a key focus of the EU's External Action for migration, security and investment reasons (Medinilla, Bossuyt 2019: 1).

But this has not been the case. The ACP construct has progressively disappeared from the EU's External Action priorities. The EU ostensibly prefers bilateral and regional partnerships. In addition to this, the proposed 2021-2027 Multiannual Financial Framework (MFF) for external action does not mention the ACP Group and envisages the budgetisation of the EDF, depriving it of its separate functioning (Jones et al. 2018: 5). In this context, it is likely that the AU-EU partnership will gain importance at the expense of the ACP-EU partnership, thanks to its effectiveness in addressing common interests including peace, security, migration and youth employment (Fox 2018a: 3-4). But the European Commission does not want to make a clear connection between the AU and the ACP dossiers, keeping the two negotiating processes separate. Anyway, the EU is still trying to frame its relations with its main African partners within the ACP-EU scheme. Clearly, the EU is reluctant to abandon the post-Cotonou negotiations because it is worried about losing control on its partners and being overcome by other key geopolitical actors.

In short, the EU still wants to proceed with the negotiations with the ACP institutions – despite the ACP-EU relations not being high on its priority list – and reach an agreement of which regions are the new 'centre of gravity'. The ACP institutions are considered to be more accommodating and less resistant: negotiating with them could be a way to avoid a deeper rethinking of the ACP-EU model of cooperation[XVI].

4.2 The position of the EU Member States…

Within the EU, the Member States have taken up different positions concerning the renewal of the Cotonou Agreement. The discussions on the new agreement started in 2015, when the European Commission launched a consultation process among the Member States. Conversations took place in the Development Cooperation formation of the Foreign Affairs Council (Tindemans, Brems 2016: 1).

First of all, the so-called EU13, the new members that joined the EU after the implementation of the Cotonou Agreement, think that the ACP-EU partnership should be rebuilt from the foundations, with no preconceptions. They did not participate to the CPA negotiations and for the first time can actively take part to the shaping of the future relations with the OACPS. In addition to this, they are not enthusiastic about a donor-recipient model of cooperation and they believe in a conditional approach to development cooperation: these Member States think there should be some reciprocal benefit returning to all the EU contributors to the EDF. Above all, their interest in the partnership is not obvious: their focus is on the EU Eastern Partnership countries[XVII], with whom they have much closer ties and shared historical background (Tindemans, Brems 2016: 3).

On the contrary, the EU founding Members with former colonial ties have bilateral relationships with the ACP countries and, consequently, the biggest interest in this partnership.

With regard to the model of cooperation, the majority of the Member States agreed on giving more importance to shared interests – security, mutual trade and employment, migration and climate change – going beyond development cooperation. They also want the SDGs to have a more significant impact on the new agreement.

Concerning the geographical scope of the new convention, some States agree on the fact that the differences among the ACP Member States have to be accommodated and more differentiated regional agreements are necessary to pursue a 'tailor-made approach' (Tindemans, Brems 2016: 4). Germany, the Eastern countries and the Scandinavian countries are the main sponsors of this course of action, while France and Spain are more in favour of maintaining the actual structure of the agreement.

All the EU Member States then acknowledge the limited role of the ACP-EU partnership in multilateral fora. This is considered as an argument in favour of 'going regional' by those who want a deeper regionalisation of the partnership, putting the centralised ACP institutional structure aside: common positions with smaller groups of countries can be better supported on the international scene. Those in favour of keeping the actual structure reply saying that the collaboration between the EU and the OACPS during the negotiation of the 2015 Paris Agreement on Climate Change and the possible partnership in Multilateral Environmental Agreements (MEAs) are a sign of the renewed geostrategic importance of the partnership (Waruru 2018).

With regards to the legal nature of the agreement, the majority of the Member States endorses its actual legally binding status, given the uniqueness of the CPA as a legally binding agreement with a specific focus on poverty eradication. Some other European States, however, ask for change: in their opinion, different kinds of agreements – like those between the EU and Colombia or Russia – have proven more effective.

Conversely, an element on which all the Member States agree is political dialogue. The political dialogue between the parties is considered a crucial element that must be kept after 2020 and the most important reason for strengthening the Cotonou *acquis*. To do so, all the Member States believe that the partners of the future agreement should be equal, but they should also have the chance to take fundamental values up when some ACP members violate them. Looking in detail at Articles 8 and 96, the Member States evaluate their mechanisms as overwhelmingly positive, as well as that of Article 9[XVIII]. They provide the Agreement with a sufficient level of conditionality. However, Member States argue that these provisions were not used enough (Tindemans, Brems 2016: 7). Focusing on Article 13, all the EU Members consider migration a key point of the CPA. Some of them then stress the importance of readmission agreements, while others prefer to have a more holistic approach to this issue and not to use the EDF as 'carrot and stick' (Tindemans, Brems 2016: 7).

In connection with the EDF, there is a consensus that it has been the main driver of the partnership. However, in some Member States' opinion, the EU should present an alternative: a new financial instrument requiring a stricter conditionality for the ACP States to receive their money would be preferable. This possible new format would grant the EU Member States more return from the investments in the ACP countries. Also a better

coordination between the EDF and the other European financial instruments, in order to better take into account regional differentiation, would be appreciated by many European countries.

Another important aspect of the partnership is trade, which has been mainly taken over by the EPAs. Despite their noticeable shortcomings, many Member States wants the latter to remain as self-standing agreements outside the Cotonou framework, since they perfectly comply with the WTO rules. Nevertheless, other States argue that a new comprehensive partnership without the trade pillar would be almost useless. Outside Cotonou or not, there is universal agreement that more attention has to be paid to intra and inter-regional trade among developing countries and trade must go hand in hand with development, trying to close the gap that prevents LDCs from joining the EPAs.

4.3 … and the ACP Group.

It only remains to analyse the position of the ACP Group of States in this negotiation. The OACPS is considered as a group that can advance cooperation among countries with different religions, cultural and ideological orientations, as stated in its founding act, the 1975 Georgetown Agreement. The organisation declared his willingness to become the leading transcontinental group working for better standards of living through both north-south and south-south cooperation. In order to achieve this goal, it promotes good governance and sustainable development and pursues poverty eradication and the equitable integration of its Member States in world economy. The ACP-EU partnership can be of great help in reaching these objectives. In fact, the ACP heads of State and Government, at their 8th Summit[XIX], identified three areas that would benefit from the renewed agreement: equitable and sustainable development, ACP role in global governance for development and peace, security and stability (ACP Group 2017: 4). To achieve these goals, the ACP leaders believe that the structure of the organisation has to be redesigned, making it more effective through a greater political engagement of the Member States, an institutional reform and an increased financial stability (ACP group 2017: 4). Moreover, ACP policies should be always guided by the principles of unity and solidarity, giving the group a strong foundation and making its international influence more incisive. Only through the

combined political authority of all the ACP States, the agenda of the Group can be truly ground-breaking. Obviously, this unity of purpose is also expressed with regard to the post-Cotonou negotiations: the ACP ambassadors in fact declared that the ACP countries 'remain as an entity' (Frisch 2015: 1).

The urgent issues of the OACPS at the moment are the conclusion of the post-Cotonou agreement and ensuring that its trade interests are not harmed by Brexit[XX]. The ACP group recognises the radical changes that occurred since 2000 and that should shape the basis of the Cotonou successor agreement. Its main goal is to achieve a rapid and sustainable development for all its Members, in line with the 2030 Agenda. Having said that, the OACPS wants to renew the partnership with the EU without abandoning the intergovernmental and asymmetric mode of the partnership.

Three strategic pillars should shape the future agreement, according to the ACP States: trade, investment and services; development cooperation, technology and research; political dialogue (Laporte 2018). In addition to this, the Group wants the vulnerability of the Caribbean and Pacific members to be particularly taken into account and African regional integration to be encouraged[XXI]. All this has to be included in a single legally binding agreement with the EU and in a single negotiating framework, which is essential for the predictability, transparency and mutual accountability of a 'contractual partnership' (Medinilla, Bossuyt 2018: 14). The agreement should also rely on the Cotonou *acquis* and preserve flexible and predictable aid through the EDF, which has granted enough ODA. Moreover, essential elements of the new agreement should be, according to the OACPS, a return to more development oriented preferential trade arrangements, given the bad results of the EPAs[XXII] and a structural support for debt management, given that the majority of the ACP States is attaining the middle income countries status (ACP Group 2017: 3).

In short, the OACPS' interests are very close to the *status quo*: even though the ACP Aide Memoire calls for a 'radically transformed relationship', however the organisation wants to keep the traditional aid-driven north-south partnership, willing to access to 'adequate and predictable resources' more than mobilising domestic funds and still asking the EU to sustain the ACP Secretariat and bear the costs of the existing joint institutions. It seems clear that there is no space in the ACP conservative agenda for new partners, notably the AU. Indeed, African countries generally seem not in favour of transferring

powers to their continental organisation and tend to consider the AU as a threat to their own interests with regard to the EU.

The AU, however, during its extraordinary session organised in Kigali in 2018 expressed the determination to negotiate a new continent-to-continent cooperation agreement with the EU outside the ACP framework (AU 2018: 5; AU-press release 2018: 2, Fox 2018b). This new partnership would replace, or at least complement, the ACP-EU one after the expiration of the CPA – that in the eyes of the AU representatives is a 'mere bureaucratic system for delivering ODA' (Medinilla, Bossuyt 2019: 2). In general, this calls for a separate negotiating process outside the ACP-EU framework – which is not a novelty, considering that the Cotonou Agreement was signed in the same year of the first Africa-EU Summit in Cairo – and somehow marks the disagreement and confusion that reigns supreme among the ACP Member States.

5. Post-Cotonou negotiations: what's next?

The renegotiation of the Cotonou Agreement is a rare opportunity to modernise the cooperation and go beyond the state-centric donor-recipient partnership that the CPA launched in 2000. What is unclear is whether the parties are ready to do this or not. Some experts argue that the EU is not ready to 'cross the Rubicon' and to start a deep refoundation of the partnership, looking more inclined to 'put old wine in new bottles' instead (Bossuyt 2017: 1).

On this basis, the key issues of the current negotiations will be examined in this section. The link between a central agreement and the ACP regions will be analysed first, then the funding of the future agreement, the legal basis and the actors of the new agreement will be taken into account, highlighting strengths and weaknesses of each possible solution.

a. The role of regional organisations

The first issue to be considered while analysing the possible outcome of the ACP-EU negotiations is the relevance of regions. The regionalisation of the ACP-EU relations has

evolved since 2000 and the centre of gravity of the future agreement has to be shifted towards regional bodies. But the parties may have different expectations about how regionalisation should be implemented. Four alternative scenarios will be presented for the structure of the upcoming agreement. For each one of these, pros and cons will be pointed out, as well as the position of the parties and the possible consequences of their adoption. The options are as follows: a revised Cotonou Agreement, a series of coordinated regional protocols, a thematic and multi-actor partnership and an 'umbrella agreement' linked to regional conventions. As we shall see, it is the last one of these hypotheses that the parties agreed to fall back on.

The first scenario envisages a follow-up agreement almost identical to the CPA, but adapting the ACP-EU framework to new demands and geopolitical circumstances. This agreement would encourage continuity with the expiring agreement, since no changes would be made to its basic principles and format (Bossuyt et al. 2016a: 7). Also the joint institutions and the legally binding nature would be maintained. With this solution, regionalisation would not evolve so much. As mentioned above, this solution is backed by the ACP Group, which is in favour of the maintenance of the *status quo*.

A positive aspect of this option could be that keeping the same structures would make the management of considerable amounts of aid easier. Additionally, continuity of cooperation funding would be granted to ACP States.

However, this scenario does not lie on solid foundations: this new agreement would miss international weight, given the global trend towards bilateral agreements, and would be reduced to a mere development cooperation tool. The appearance of different ways of funding and the increasing intra-ACP differentiation would also adversely affect the effectiveness of the partnership. Moreover, some atavistic problems of the CPA – the protection of LGBTI rights, the recognition of the ICC, the difficult management of migration and a cumbersome institutional framework – would not be solved with this kind of agreement. Also Brexit could have a negative impact on the partnership: the UK was one of the few EU countries with post-colonial ties and strong national interests in the ACP regions (Bossuyt et al. 2016a: 9-11). Finally, the growing fragmentation of competencies and decision-making, split between the ACP Group and the AU as regards Africa, would not help.

The second scenario consists in a deeper regionalisation of the ACP-EU partnership, rebuilding the partnership around regional relations and avoiding the intermediation of the ACP structure. The Regional Economic Communities (RECs) of Africa and the regional institutions of the Caribbean and the Pacific should be reviewed and strengthened, creating a new interest-driven form of cooperation (Bossuyt et al. 2016a: 16).

This scenario, unlike the previous one, would be coherent with the actual trends of international relations and the goals of the 2030 Agenda. It could represent a way of accommodating the increasing differentiation among the ACP Member States. This solution would also allow the EU to go deeper into the ACP regional dynamics and to better shape tailor-made agreements with its regional bodies. It would also transform the existing regional institutions into more effective frameworks for cooperation and development[XXIII], making the negotiations for a new comprehensive agreement unnecessary (Bossuyt et al. 2016a: 16).

Nevertheless this scenario is very difficult to implement. It would require a paradigm shift from the actual framework and from the actual wavering approach of the EU towards regionalisation[XXIV]. Its realisation is also made difficult by the complexity of the regional panorama within the ACP Group, the presence of overlapping institutions, slow integration procedures of certain regions, the risk of marginalising the Caribbean and the Pacific and the need of a deep reform of financial instruments. Furthermore, the ACP Group would be for sure at odds with this solution, given the potential marginalisation of the ACP.

The third scenario consists of a mixed regional and thematic multi-actor partnership. This scenario requires a step further in the diversification of the agreement and a more functional approach. This option assumes that the era of north-south cooperation is over and that the new partnership should ensure global governance in a multipolar world (Bossuyt et al. 2016a: 21). To do so, it would be better not to put all the provisions in a single agreement, but to negotiate core interests according to a more strategic prioritisation. Each partner – EU and Africa, Caribbean and Pacific individually – should autonomously identify their external action priorities, and partner with the most suitable actor in order to achieve mutual interests only at a later stage. This would lead to a series of strategic

partnerships along thematic and regional lines, enhancing the efficiency, pragmatism, political backing and legitimacy of the partnership.

Although this scenario seems unapplicable, given the abandon of the actual treaty-based model of cooperation, however it is the one that better reflects the current state of play of the ACP-EU partnership (Bossuyt et al. 2016a: 4). Clearly, those in favour of a more traditional solution will not be enthusiastic about this scenario. However, a shift towards this kind of strategic cooperation is already underway between the parties. To go along with this change also at an institutional level could be beneficial for both the EU and the ACP Group: a stronger commitment to invest in regional and thematic groups would result in increased competition. Migration is a blatant example of that: migration-related issues would be better tackled by a multi-layered scheme of dialogue in global fora, continental organisation and local institutions. Also climate change is one of the sectors benefitting from this scenario. Environment is overshadowed in the actual agreement: due to a lack of environmental ambitions, it is not mentioned by the Articles concerning political dialogue and no reference is made to biodiversity, although it is a crucial cross-cutting theme (Schefer 2019: 8). The EU negotiating mandate, recalling both parties' commitment to the respect of the 2015 Paris Agreement in title IV (Council of the EU 2018a: 17), already marks a significant step forward compared to the Cotonou Agreement. However, the thematic approach presented in this paragraph is even more suitable for environmental policies, making it possible to involve many stakeholders including civil society[XXV] and local organisations.

In conclusion, this final scenario, albeit difficult to put in place and very ambitious, would probably be the most ground-breaking and modern solution. However, as things stand, it seems that the parties found a compromise based on the following 'umbrella agreement' scenario.

Finally, the fourth scenario is the one of the so-called 'umbrella agreement'. The focal point of this 'hybrid formula' (Laporte 2018: 4) is to safeguard the Cotonou *acquis* through an overall ACP-EU agreement, legally binding and including the basic principles of the partnership - notably Articles 8, 9, 12[XXVI], 96, 97 and minimum requirements for the EPAs, that regulate the now externalised trade pillar[XXVII] – but also to deepen regional partnerships through three separate agreements with the local institutions of Africa,

Caribbean and Pacific respectively. Again, the agreement would be legally binding, in the wake of the CPA (EP 2016: 7), and could also allow an outreach to non-ACP countries, namely EU's African neighbourhood countries (Bossuyt 2017: 6). This fourth hypothesis is the one supported by the EU, and by the Commission's Directorate-General for International Cooperation and Development (DG DEVCO) and the EEAS in particular (EC 2016: 3). Also the European Parliament stressed the need to rebuild the partnership on these 'fresh foundations', with the primary aim of achieving the SDGs, promoting human rights, facilitating predictability and strategy ownership in development cooperation and tackling present global challenges – such as climate change, terrorism, migration biodiversity and economic instability (EP 2016: 13).

It clearly looks like a compromise solution: the regions would become the centre of the agreement (EC 2016: 3; Schefer 2019: 2) but without 'shaking things up too much' (Bossuyt et al. 2016a: 14), since the comprehensive agreement also remains[XXVIII]. This scenario, guided by subsidiarity and complementarity, would be consistent with today's international tendencies of 'going regional', and would also introduce new means of implementations in accordance with the 2015 Addis Ababa Action Agenda, that envisages more domestic resources mobilisation and more efficient and transparent tax systems.

However, a problem could be the readiness of many regional bodies – especially those of the Caribbean and the Pacific – to become key actors of the ACP-EU partnership and to deliver on the 2030 Agenda. Moreover, the interaction between the regional conventions and the umbrella agreement seems difficult to operate, with special regard to the principles of complementarity and subsidiarity.

Consequently, some issues have to be necessarily addressed in order to make this scenario viable. First of all, the parties have to discuss on how far they are actually willing to go with regionalisation, deciding if this process of 'Regions first' will be guided by the ACP institutions or by the Member States. Then, a scrupulous allocation of competencies between the central agreement and the regional ones has to be made, avoiding overlapping powers and responsibilities. Otherwise the risk of conflicts on mandates and increased transaction costs would make this scenario unprofitable. In this regard, consultations on regional priorities ended in spring 2019 (EC-press release 2019b: 1).

In short, if on one side this umbrella agreement solution can be positive for its clear commitment to regionalisation and differentiation, on the other side it looks fragile for the

challenge of negotiating different on levels – ACP-EU, regions-EU – the possible conflict between the comprehensive agreement and the regional conventions and the possible risk of increased asymmetry between the counterparts (Bossuyt et al. 2016a: 15).

As it turns out, this last scenario is the one adopted for the freshly signed agreement. As expected, it foresees a 'common foundation', setting out the shared principles between the parties and the strategic priorities of their common agenda. The latter are: human rights, democracy and governance, peace and security, human and social development, environmental sustainability and climate change, sustainable economic growth and development, migration and mobility (EC-press release 2020b: 2). The regulatory set concerning migration is particularly expanded in the new text: instead of a single article – Article 13 – an entire title of 14 articles and an Annex are devoted to the issue. The main focus is on managing migration flows and fighting irregular migration and trafficking, although not enough seems to be stated about the readmission and repartition of illegal migrants. In addition to these domains, already present within the Cotonou Agreement, some new sectors are also added: digital economy, cybersecurity, fight against drugs, organised crime and trafficking, data protection and fight against the proliferation of weapons of mass destruction (WMD). However, the trade pillar will keep its externalised position and will be still handled through the EPAs (Boidin 2020: 1-2). To complement the comprehensive agreement, three specific regional protocols are adopted – Africa, Caribbean, Pacific – focusing on each region's specific needs. These protocols will equip regions with their own governance – including joint parliamentary committees – to manage cooperation with the EU. Alongside this new regional institutional system, the central joint ACP-EU framework will remain and will be more parliament-oriented[XXIX] (EC-press release 2020b: 2). Like the CPA, the new agreement is concluded for 20 years, and it could be prolonged for 5 extra years through silent procedure. The mid-term review that is scheduled for 2030 will coincide with the target-date for the SDGs. It will be an opportunity to update the agreement in view of the future commitments made on the global scene. After reaching agreement, the chief negotiators publicly expressed their satisfaction. They both believe that the OACPS and the EU will now be better equipped to address today's global challenges, such as the COVID-19 pandemic, peace and security, migration, climate change and ocean governance (EC-press release 2020b: 1).

In conclusion, this scenario looks like an 'half-baked reform proposal' (Bossuyt 2017: 12). It gives voice to regional organisations but constrains them within the usual post-colonial framework of the CPA, which could limit their scope, action and responsibilities. The fact that the parties are negotiating on this kind of EU's proposal probably means that both the EU and the OACPS want, more than anything else, to avoid excessive controversy (Keijzer et al. 2017: 4).

b. Financing the new partnership after 2020

The question of the funding of the upcoming agreement is central in the ongoing negotiation. The amount of money that will be intended to the ACP-EU partnership will strongly influence the future of the cooperation.

The new MFF starting in 2021 will define the EU's overall budget and, as a consequence, the money the Member States will allocate to the ACP Group. At present, not many Member States want to increase the budget, in the light of the 2008 and 2020 economic crises. In addition to this, the EU is going through a challenge of internal legitimacy, as Brexit demonstrates. The aim of the EU is to better combine its commitment to development, its geopolitical interests identified in the 2016 EU Global Strategy and the international pledges set out by the 2030 Agenda. To do so, financial instruments have to be reformed – since the simultaneous expiry of the MFF and the CPA is a unique occasion of reform (EP 2016: 22) – in order to grant simplification and more flexibility (Medinilla, Bossuyt 2018: 12), although this outcome would encourage the ACP States to be less amenable during the negotiations on sensitive issues like human rights and democracy.

The EDF has already proven ineffective in promoting human rights protection, providing ineffective support to civil society and private actors. The future financial instrument should be reinforced in this sense, even if the ACP countries do not like it. A serious decision concerns the budgetisation of the EDF. This solution would enable the democratic scrutiny of the EP on the funding and increase its transparency and efficiency[xxx]. A compromise hypothesis could be budgetisation conditioned by a ring-fencing of development funds, in order to maintain a predictable level of financing for poverty eradication and to separate this kind of expenses from the security ones (EP 2016: 10). Some asked for the budgetisation of the EDF, but it is clear that this move would have

both pros and cons: on one hand the functioning of the EDF would be more transparent, it would involve the EP and contributions would be easier; on the other hand, the EDF would be probably reduced in size, would be no longer suitable for financing off-budget Peace Support Operations (PSOs) and would not allow to discuss its allocations with regional partners (Tindemans, Brems 2016: 7). In addition to this, a solution would have to be found with regard to the African Peace Facility (APF), which is financed today by the EDF precisely in order not to support military expenditures on the EU budget (Tindemans, Brems 2016: 8).

Also important for the EU is to decide whether to fund regional bodies or the central ACP institutions and how to differentiate funding among the ACP States, considering that some ACP Member States are now MICs and may no longer need traditional aid. Shifting the 'centre of gravity' from the central organisation to the regional ones will also imply that there will be less need to use the future financial instrument to maintain joint institutions. The ACP Group may not like it, but if it wants to become a key global player it must be able to finance its own Secretariat (Medinilla, Bossuyt 2018: 12).

The recently released text of the future agreement seems to give quite clear answers to all this questions. The EDF will be abolished and the new funding channels will be incorporated in the EU budget. As a consequence, the financing management will come under the responsibility of by EU internal rules, namely the Neighbourhood, Development and International Cooperation Instrument (NDICI) regulations[XXXI]. Conversely, only a little section of the new agreement will be devoted to the means of cooperation and implementation.

This is a though break for the ACP countries, that will lose financing predictability – despite this being reaffirmed in the new text – and aid management (Boidin 2020: 5).

c. The legal basis of the partnership for political dialogue and cooperation

With respect to the legal foundation of the post-Cotonou agreement, the main issue for the parties is to keep the *acquis* in place in order to preserve the 'shared values' of the Cotonou Agreement – human rights, democracy, rule of law and good governance above all. Particular importance is given to the enforcement of Articles on political dialogue and

conditionality. These provisions emphasise the will of the EU's external action to favour control on the counterpart over strategic cooperation on sensitive topics.

Anyway, the EU and the OACPS seem to agree on the legally binding nature of the new agreement[XXXII], but the choice has to be made between merely replicating the rules of the CPA or revising the contractual nature of the agreement and implementing a more flexible convention. In the first scenario the predictability of the partnership would be preserved and the negotiations would be much easier. However, the deficiencies of the CPA political dialogue provisions would remain and, given their limited effectiveness, the EU would see its influence in the ACP States fall. In the second scenario the general principles of the partnership would be preserved, but the functional approach would be emphasised. New lighter procedures would make political dialogue more effective and a greater involvement of existing regional actors would allow for a more context-driven normative agenda (Medinilla, Bossuyt 2018: 16). Subsidiarity would be put in the foreground as the new leading principle of the agreement (EP: 7). However, such a pragmatic approach is not necessarily a 'trump card ensuring impact' (Bossuyt et al. 2016a: 9). A lighter agreement can be seen as a reduction of the EU's involvement in the partnership and radical changes to the agreement require a much more decisive shift in the EU's approach to foreign policy, both in terms of political dialogue and cooperation practices.

That said, a lighter and agile partnership is preferable: it would help the dialogue with regional institutions and make cooperation way more flexible and adaptable to new circumstances. The parties should agree on core essential principles – preserving the necessary parts of the aforementioned *acquis* – streamline the heavy formal procedures of the CPA, negotiate regionally differentiated provisions, give more space to political talks and arrange a more pragmatic agenda (Medinilla, Bossuyt 2018: 17). Apparently, this is the solution adopted in the freshly signed agreement: the latter remains a legally binding agreement, keeping the same joint institutions legal basis, but its exact legal nature is still to be decided (Boidin 2020: 2).

d. New protagonists in the ACP-EU relations?

One of the main shortcomings of the CPA is the scarce involvement of non-State actors, despite numerous provisions encouraging their participation to political dialogue. In line with the provisions of the 2030 Agenda, the new agreement must rely on other actors than States and governments – civil society, private sector and local authorities – to achieve sustainable development. These subjects should be no longer targets, but drivers of change (Medinilla, Bossuyt 2018: 18).

The State-driven model of cooperation must be set aside in favour of a 'multi-stakeholder involvement'. This requires to deeply reform the text of the existing agreement but can bring satisfactory results. The parties should be prepared to remove institutional and formal barriers to cooperation, make the political environment for favourable to consultations, prioritise multi-stakeholder partnerships, give more autonomy to local governments, encourage the participation of civil society and private sector[XXXIII] and allow EU delegations to engage with new non-governmental actors.

Moreover, the possibility of merging the Cotonou structures of the ACP-EU partnership with the JAES structures of the AU-EU partnership should be taken into account (EP 2016: 13). The EU has recently proposed to intensify its relationship with Africa through a new partnership in five key areas: green transition; digital transformation; sustainable growth and jobs; peace and governance; and migration and mobility (EC-press release 2019a: 1). This proposal lays the foundation for an intensified cooperation between the two continents. In order to produce an innovative agreement, the EU went through internal discussion with the Member States, the European Parliament and civil society, basing its work on the 2017 jointly agreed Agenda (EC-questions and answers 2020: 2). Then it was confronted with its African partners during several continent-to-continent meetings. With this new strategy, the AU is seeking a change of course in its relationship with the EU. The AU wants to put in place a mutually beneficial partnership (AU 2018: 4), that matches the needs of the continental Free Trade Area (AfCFTA) and promotes social and economic transformation of Africa. Its representatives believe that such solution is compatible with the preservation of a common set of shared principles with the Caribbean and Pacific members of the ACP Group, while they hope that the financial and technical

aspects of the partnership will be regulated by the new continent-to-continent agreement (AU 2018: 5).

However, despite its growing importance in the EU's external action agenda, the AU was side-lined during the first phase of the ACP-EU negotiations and did not receive the negotiating mandate from the African countries (Schefer 2019: 18), making it clear that the ACP-EU and the AU-EU relationships will remain separate. Therefore, what kind of coexistence we should expect between the two partnerships?

The hypothesis of an African protocol involving the AU within the ACP-EU framework was rejected. Initially some African countries were in favour of this solution, but then changed their mind and preferred to continue on the path of the ACP-EU negotiations (Fox 2018b: 2). The debate over who can legitimately represent Africa in the partnership was not solved and the AU still considers itself as the only institution entitled to negotiate the new agreement with the EU (Medinilla, Bossuyt 2019: 5). In this scenario, the upcoming agreement will be applicable only to the African States members of the ACP Group and not to the continental institutions, leaving intact the overlap between the CPA and the JAES.

A solution to this impasse could be the creation of an additional protocol, applying only to North African countries and associating them to the post-Cotonou agreement (De Groof et al. 2019: 16). The EU recognises the importance of mobilising this part of Africa, where there is no integration whatsoever, but these countries seem reluctant to adhere to the future agreement (Medinilla, Bossuyt 2019: 6; EP 2016: 7). Under these circumstances, the only viable solution is an 'hybrid approach', creating parallel partnerships with the ACP and the AU. However, this approach could weaken African integration, preserve inefficient and overlapping institutions, overemphasise the role of traditional aid and fragment the EU's external action in Africa. A complementary agreement bringing together the ACP Group and the AU would not be affected by these vulnerabilities (Frisch 2015: 5).

By the look of it, the agreed text of the future agreement provides increased space for non-state actors: private operators, local authorities, civil society are expected to be actively involved in the dialogue with the ACP-EU and regional institutions and should be involved as much as possible in the enforcement of cooperation programmes (Boidin 2020: 3). Furthermore, the African regional protocol attempts to merge the AU and the ACP agenda: it involves 49 of the 55 African States and contains numerous references to the AU

continental agenda, instruments and strategies. It also recognises both the political and economic competencies of the AU[XXXIV] and foresees the possible future recognition of the observer status to the North African countries (Boidin 2020: 7). In other words, the African protocol and the AU-EU relations seem to be structured in a complementary way.

6. Conclusions

The objective of this paper has been to analyse the evolution of the ACP-EU relations in the light of the negotiations for a post-Cotonou agreement. It has been tried to highlight each party's interests in the renewal and to identify the best solution for the revival of the ACP-EU cooperation.

The Cotonou Agreement had run its course. Despite being arguably ahead of its time for 2000 and a great step forward from its predecessors Lomé Conventions, after 20 years it had lost momentum and needed a major overhaul. Particular attention has been paid to the political dialogue provisions: their enforcement failure has been one of the main signs of the need of reform of the CPA.

Already in 2016, the parties started to discuss the content of the future agreement. They first launched internal consultations with the aim of preparing their own agenda and identifying their core priorities. Later they adopted their negotiating mandates and the real negotiations began. The negotiating procedures proved to be long and rich in treacherous obstacles. For this reason, the EU and the ACP Group decided, on the expiry date of the Cotonou Agreement, to extend it until December 2020. The EU tried to defend its own interests, namely the preservation of the Cotonou *acquis*, the maintenance of a single counterpart and the deepening of its ties with the ACP regional bodies, and to keep its role of OACPS' special partner. Also the EU Members expressed their views, the ones with ex-colonial ties in a positive sense, the EU13 in a negative one. They all agreed on the budgetisation of the EDF and an increased conditionality of the funding. However, the pivotal role of the UK was lost because of Brexit. On the other side of the fence, the ACP States showed more interest in keeping a high level of ODA and the EDF outside of the EU budget, persisting with a legally binding agreement and without diverging too much from the *status quo*.

In December, the chief negotiators finally reached an agreement on the text of the post-Cotonou agreement. With regard to the importance of regional integration, the parties opted – unsurprisingly – for the 'umbrella agreement' scenario. In essence, the comprehensive agreement remains, but it is complemented by three regional protocols. The agreement looks more political and less economic than its predecessor, focuses of development in all its forms and adds new domains, in line with the actual global trends of cooperation. Concerning Africa in particular, it seems that the regional protocol could act as a bridge with the AU and EU's neighbouring countries. We will see if, when the agreement enters into force, this compromise solution will pay dividends.

Something on which the parties disagreed on the eve of the negotiations is the financing of the partnership. It seems that the EU's opinion prevailed, since the EDF will be suppressed and the funding will be incorporated into the EU budget. Time will tell if this solution will be effective or whether it will encourage – as some says – ACP States to be more reluctant to strengthen human rights protection.

As expected, the new agreement will be legally binding. The legal nature of the regional protocols is still uncertain, but in any case the most important thing in this sense is that formal procedures will be streamlined and bureaucracy will be simplified.

Finally, the new text bodes well for a greater involvement of non-state actors in the partnership. The provision of new private sector funding methods and an increased willingness to stimulate local investment could revitalise a multi-stakeholder participation, unless discrepancy between promises and practices will emerge again, as in the case of the CPA.

In conclusion, the new agreement was much awaited by public opinion in the EU and ACP Member States. It comes in a very complex time, because of the limited effectiveness of its predecessor, the crisis of internal legitimacy the EU is going through and the COVID-19 pandemic outbreak. All that remains is now to follow closely the ratification process: only when completed judgements can be given on the new agreement.

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I The renewals of the agreement were named Lomé II, Lomé III, Lomé IV and Lomé IV-bis. Concurrently, the 1975 Convention became known as Lomé I.

II It is one of those association agreements governed by Article 217 of the TFEU.

III In accordance with Article 1 of the CPA, the agreement is aimed at the reduction and eventual eradication

of poverty, the contribution to sustainable development and to the gradual integration of ACP countries into the world economy.

[IV] Namely the ACP Council of Ministers, assisted by the Committee of Ambassadors, the ACP-EU Joint Parliamentary Assembly, the joint ACP-EU ministerial trade committee and the ACP-EU development finance cooperation committee.

[V] Including the mandatory revisions foreseen by the revision clause (Article 95.3), that indeed took place in 2005 and 2010.

[VI] The groupings of ACP States are six: Central Africa, West Africa, Eastern and Southern Africa (ESA), East African Community (EAC), Southern African Development Community (SADC), Caribbean and Pacific.

[VII] In case of violation of the CPA essential principles, different channels of consultation can be activated within the Cotonou framework. Article 8 and Articles 96-97 provide for ad-hoc political dialogues in the event of a breach of human rights and in case of serious corruption cases by a counterpart respectively. These provisions were implemented with the objective of engaging the counterpart – notably the stronger one, the EU – in the event of serious difficulties of the partner – especially ACP Group members.

[VIII] Despite the insertion, in the 2010 revision, of Article 32.a which makes explicit reference to 'climate change' and gives an inter-regional approach (Durán, Morgera 2012: 95).

[IX] In this sector the EU follows an internal security driven agenda of external action, which is reflected in the EU Communication on Establishing a new partnership framework with third countries under the European Agenda on Migration (Bossuyt, et al. 2016a: 9).

[X] . The EDF is not part of the EU general budget and it is financed by the EU Member States. It is subject to its own financial rules, set in Annex I of the CPA itself, and managed by a specific committee consisting of members of both the European Commission and the European Investment Bank (EIB). Each EDF has a duration of 5 years, after which it has to be renegotiated. The EP has no scrutiny and power over the EDF.

[XI] It must not be forgotten, talking about the shortcomings of the CPA, that the EU finances 50% of the ACP Secretariat, while some OACPS don't pay their contribution for its maintenance.

[XII] Robert Dussey, Togolese Minister of foreign affairs, is the chief negotiator for the ACP Group. Neven Mimica, European Commissioner for International Cooperation and Development, was the first chief negotiator for the EU. The latter is assisted by a team of experts called post-Cotonou Task Force (Schefer 2019: 15).

[XIII] Minister Robert Dussey stated about the protocols: "Regional protocols that focus on the needs and aspirations of African, Caribbean and Pacific countries will ensure that the new agreement is inclusive and at the same time sensitive to the diversity of the ACP group" (EC 2020b: 1).

[XIV] "The ongoing negotiations with OACPS countries remain a priority. Despite the disruption caused by the coronavirus pandemic, the negotiations are progressing in the same cordial spirit that has guided our talks until now. I am pleased to see that we are getting closer and closer to the finishing line" (EC-press release 2020a: 1)

[XV] These strategies could be also helpful with regard to the compliance with the Agenda 2030 for Sustainable Development and the 2016 EU Global Strategy, both bearing a more flexible and pragmatic idea of cooperation.

[XVI] As noted by Keijzer and Medinilla, "leaving Post-Cotonou from the agenda may be convenient for short-term political purposes, but in the long run it could be a major missed opportunity" (Keijzer et al. 2017: 2).

[XVII] Namely Armenia, Azerbaijan, Belarus, Georgia, Moldavia, Ukraine.

[XVIII] Article 9 of the CPA contains the Essential Elements Clause, which requires the parties to adopt domestic and international policies compatible with the fundamental values agreed in the convention (DG for External Policies 2017: 9).

[XIX] That took place in *Port Moresby, Papua New Guinea, on the 1st of June 2016.*

[XX] Concerning the new agreement, the commitment of the organisation clearly emerges from the declarations of its chief negotiator, professor Robert Dussey: "The negotiation for renewed and revamped relations with our European partners have moved forward satisfactorily, despite COVID-19, thanks to modern technology. I am happy to say that the Members of the OACPS remain committed and are on course to conclude a partnership agreement that will also take into account the unprecedented challenges that now confront us at national, regional and global levels due to COVID-19" (EC press release 2020a: 1).

[XXI] In fact, in their official Aide Memoire, the ACPs underline that the relation with regional groupings has to be 'formally structured' in the new agreement (ACP Group 2017: 2-3).

[XXII] "The agreements are perceived as unfair in Africa", says John Maré, a South African diplomat who

negotiated several agreements with the EU (Pelz 2020: 3).

[xxiii] This transformation could be facilitated by the fact that this kind of regionalisation is already valid for the trade pillar, due to the existence of the EPAs. It would be simply extended to other aspects of cooperation. However, some experts consider the EPAs one of the main obstacles on the way to regionalisation: "A new agreement cannot fundamentally influence the partnership agreements. They are independent international treaties that cannot be substantially changed by a new agreement" (Pelz 2020: 3).

[xxiv] Which is attested by the disconnection between the AU-EU and the ACP-EU relations.

[xxv] This would be consistent with the provisions of the 1998 Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, usually known as the Aarhus Convention.

[xxvi] That concerns the coherence of Community policies and their impact on the implementation of the Cotonou Agreement.

[xxvii] In order to ensure continuity with the CPA in this sector.

[xxviii] Assuring the EU the maintenance of its role of noble patron linked to its longstanding relationship with the ACP countries, particularly important in today's volatile times (Bossuyt 2017: 8).

[xxix] The agreement now foresees for those institutions to operate a double operational level: a plenary level when the dialogue involves the EU and the entire ACP group, and a regional level for discussing specific African, Caribbean or Pacific issues (Boidin 2020: 2).

[xxx] But this would probably jeopardise the financing of the African Peace Facility and the Africa Trust Fund (EP 2016: 7).

[xxxi] It was proposed by the EC in 2018. It is a single financial instrument incorporating all the existing ones, including the EDF. It is perfectly in line with the EU's orientation towards new kinds of interest driven cooperation like the EIP and removes to the EDF its role of privileged instrument of the ACP-EU partnership (Schefer 2019: 26).

[xxxii] Which is understandable: 'soft strategic partnerships' have proven generally less effective.

[xxxiii] That can massively contribute, with an increased assistance of the European Investment Bank (EIB), to the financing of development (EP 2016: 9). This applies especially to Micro, Small and Medium Enterprises (MSMEs).

[xxxiv] They include on one side the fields of peace and security, human rights, governance. On the other side they cover all the AU's economic integration plans (African Economic Community - AEC, African Continental Free Trade Area (AfCFTA), Comprehensive Africa Agricultural Development Plan (CAADP), Programme for Infrastructure Development in Africa (PIDA) (Boidin 2020, 6).

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CENTRO STUDI SUL FEDERALISMO
PERSPECTIVES ON FEDERALISM

ISSN: 2036-5438

Ethnolinguistic federalism and interborder conflict in Ethiopia

by

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Perspectives on Federalism, Vol. 12, issue 3, 2020

Abstract

This study examines the interplay between federalism and interborder conflict between the Tigrai and Amhara regions of Ethiopia. To this effect, secondary data, both qualitative and quantitative, were collected from the National Census Report, YouTube and official government letters. The qualitative data were analysed through thematic analysis, while the quantitative data were expressed in terms of percentages. Results indicate that ethnolinguistic federalism was not implemented based on concrete parameters, but mainly on language that the government used as a tool for interborder demarcation and historical ownership of territories that can serve as a sound parameter. This practice has led to interborder conflict, which has both historical and linguistic bases, between the Tigrai and Amhara regions. Thus, it is concluded that ethnolinguistic federalism could not be a panacea for ethnic conflict in Ethiopia, especially in the north. Both regions are working to expand their territories beyond their current statuses, and thus laying claims for pieces of lands from each other.

Key-words

Ethiopia; Ethnolinguistic federalism; interborder conflict; Raya; Wolkait

1. Introduction

Following the collapse of the military regime in 1991, the Ethiopian Peoples' Revolutionary Democratic Front (EPRDF) introduced ethnolinguistic federalism. It divided the country's political map predominantly along ethnolinguistic lines to establish regional autonomy and decentralise government power. Hence, politically, Ethiopia is a federal state, comprising nine administrative regions, namely Tigrai, Afar, Amhara, Oromia, Somali, Benishangul-Gumuz, Gambela, Harari, and Southern Nations, Nationalities, and Peoples Region (SNNPR), as well as two chartered cities, namely Addis Ababa and Dire Dawa. Each of the first four regional states is dominated by one linguistic group, and thus they are somehow homogenous, while the SNNPR is the most heterogeneous region consisting of 56 different linguistic groups. Gambela and Harari are also heterogeneous regions where more than two numerically competing linguistic groups dwell. Unlike the other regions, Benishangul-Gumuz, as the name denotes, is a home for two linguistic groups, namely Benishangul and Gumuz.

The current administrative structure – federalism – is a new phenomenon for Ethiopia but not for other federalist countries. The idea of federalism dates back to the ancient Greek civilisation where the legal relationships between the leagues and the city-states were attempted to be elucidated; nonetheless, the modern concept of federalism was brought in by the American Constitution of 1787 (Graves 1964). The very discourse of federalism deals with devolution of state power among the central and regional governments. It is 'a system of government in which central and regional authorities are linked in a mutually interdependent political relationship' (Ville 1961:196). Nonetheless, the practices of federalism differ owing to the linguistic, ethnic and economic contexts of a given country that formulates and implements it. For instance, Ethiopia's federalism is implemented mainly on an ethnolinguistic basis. The legal foundation for the federal model is clearly stated in the preamble of the 1995 federal Constitution of Ethiopia; 'We, the Nations, Nationalities and Peoples of Ethiopia: *Strongly committed*, in full and free exercise of our right to self-determination, to building a political community founded on the rule of law and capable of ensuring a lasting peace, guaranteeing a democratic order, and advancing our economic and social development'. To put the federal model into practice, as stated in the

Constitution (Article 47(1)), nine regional states were established. The boundaries of the regions were demarcated predominantly based on language and ethnicity in order to protect the unity of the country, promote peace and ensure the rights of nations and nationalities. The Constitution (Article 46) indicates that 'States shall be delimited on the basis of the settlement patterns, language, identity and consent of the peoples concerned'. The use of language and ethnicity in the establishment of the regions was meant to pacify national and border conflicts. Meles Zenawi, the architect of the federal arrangement, who served as the head of the federal government since its inception until 2012, said:

> From a purely legal point of view, what we were trying to do was to stop the war and start the process of peaceful competition. … The key cause of the war all over the country was the issue of nationalities. Any solution that did not address them did not address the issue of peace and war. … People were fighting for the right to use their language, to use their culture, to administer themselves. So, without guaranteeing these rights it was not possible to stop the war or prevent another one. (Quoted in Vaughan 2006:33-37)

This implies that ethnolinguistic federalism was introduced to exterminate conflicts between ethnic groups and promote peaceful competition. This model has been in practice for the last three decades and has protected the country from disintegration. Ethnolinguistic federalism has preserved the unity of Ethiopia, while providing full recognition to the principle of linguistic, cultural and ethnic equality as well as political, cultural and linguistic autonomy at regional level (Alem 2003). It has helped to minimise internal conflicts in the last three decades. Since most violent conflicts of a country are fought between different groups within the country, the potential of ethnic federalism to maintain political stability, prevent territorial disintegration and facilitate the accommodation of differences has rendered it one of the international society's preferred conflict resolution strategies (Monteux 2006).

However, ethnolinguistic federalism is not without problems. The major argument against ethnic federalism is that it "will only lead to further ethnic fragmentation, tensions and conflicts and will thus ultimately result in the demise of the state" (Beken 2009:1). This view appears to be true when we see it in terms of interborder conflicts in Ethiopia that have taken place following the focus only on language and ethnicity to establish the regional states and mark out their borders. Therefore, it is argued that though language and

ethnicity appears to be unavoidable in the establishment of regional states, they are not the only parameters, and thus there is a need for consideration of other factors such as historical ownership of territories.

> To deal with ethnicised conflict and to reduce 'ethnic clashes' in Ethiopia, there probably has to be some constitutional revision and a reordering of the current regional state boundaries in the country to produce workable, balanced units where territory … and regional identity are the building blocks, and not [only] ethnicity or language. … The issue of *land* and access to land is currently playing a major role in this Ethiopian conflict dynamic. Land is the most important resource, and historically it had major existential and identity aspects for people. (Abbink 2006:392)

In a nutshell, it appears that the introduction of ethnolinguistic federalism could not yield the intended result because ethnic conflicts, such as interborder conflict, is still a main state-building challenge in Ethiopia, probability because of the avoidance of other factors, especially historical land ownership that has become a challenge of effective implementation of the federal model. Therefore, this study aims to examine the interplay between federalism and interborder conflict in Ethiopia by taking the border issue of Tigrai and Amhara regions as a case in point. To this end, a qualitative research approach was effectuated for this study. Qualitative data were drawn purposefully from official government letters about the Raya territory and were written a few years after the territory was taken away from the Tigrai province because analysing historical documents is crucial to justify the claims made over the Raya and Wolkait-Tsegede territories. Moreover, it is important to analyse the views of the Tigrai and Amhara elites who lay claims over the territories and thereby triangulate their views with the historical evidences. Hence, qualitative data were collected from YouTube videos of interviews that journalists conducted in 2018 and 2019, with politicians and other professionals who have deep knowledge about the Raya and Wolkait-Tsegede territories. The two years are selected purposefully because the debates on the Tigrai-Amhara interregional borders of the Raya and Wolkait-Tsegede territories have become hot after friction among the coalition forces of EPRDF started in 2018. In addition, quantitative data were drawn from the 1994 National Census of Ethiopia.

The YouTube qualitative data were transcribed verbatim and translated from Tigrinya and Amharic into English. Also, the qualitative data drawn from government official letters were translated from Amharic into English. The translated data were prepared for analysis

by reducing the data into themes via a process of coding and summarising the codes. The condensed themes were organised and categorised and analysed through thematic analysis, while the quantitative data were expressed in term of percentage. Finally, the qualitative and quantitative findings were discussed and interlinked with related literature.

2. Federalism and interborder conflict between Tigrai and Amhara

Federalism refers to the sharing of power among autonomous units through 'shared rule and self-rule' (Watts 2008:1). In other words, a federal system of government is a division of power between a general authority and several regional authorities (Watts 2008). Such a system provides inspiration for the development of a practical way out for the growing demands of diverse ethnic groups for participatory and inclusive democracy that helps to maintain the unity of multi ethnic countries (Palermo 2015). The threat of disintegration and the need to maintain unity are the major reasons why unitary states opt for federalism (Lovise 2002). Federalism is certainly a good bargain for the political elites of conflict-spiked unitary states, which are on the verge of complete disintegration as it provides a platform for conflict management and accommodation of differences (Lovise 2002). It 'has become a very popular "solution" for problems of ethnic conflict in public discourse' (Elazar 1994:167). The more federalism encourages self-governance, the smaller the demands for secession become (Hechter 2000). Federalism is a stabilising measure, as it accommodates the quest for autonomy more through concession than repression (Hechter 2000). Similarly, in Ethiopia, ethniclinguistic federalism is set out to confirm the central government power devolution and maintain the country's unity through concession. The federal arrangement was introduced as a means of power decentralization in response to the hitherto high concentration of power at the centre, and to empower ethno-linguistic groups (Assefa 2006) and thereby mitigate ethnic and border conflicts. However, ethnolinguistic federalism could not be a blameless bargain for interborder conflict. The 'redefinition of Ethiopia along ethnic lines has created conflicts of its own, especially over the demarcation of the territories of the different federal units' (Clapham 2004:53).

> The post-1991 regime in Ethiopia, despite its promise and claims to bring solutions, has been less successful than expected in managing ethnic tensions in the country, and has basically only

> 'decentralised' the problems by defining the sources of conflict to be on the local and not national level. … 'ethnic' struggles between communities are quite frequent and have led to a localisation of conflicts away from challenging the central state, and to an 'essentialisation' of ethno-cultural or linguistic differences, which then came to (re)define local group relations. (Abbink 2006:390-391)

This implies that ethnolinguistic federalism has brought about local conflicts, like the border conflicts between various regions. The border conflict between the Tigrai and Amhara regions is presented here as a case in point to explicate that the parameters used in implementing federalism in Ethiopia has not exterminated interborder tensions. The federal borders between the Tigrai and Amhara regions have not been accepted by a considerable number of individuals of the two regions, especially by the elites. Tigrai elites lay a claim to territories that are presently under the Amhara region because the territories were under Tigrai before 1956. In contrast, Amhara elites lay a claim to territories that are currently under the Tigrai region because the territories were under the Gonder and Wollo provinces in the last two decades of the Haile Selassie era and most of the Derg regime.

Border conflict is not a recent phenomenon for Tigrai and Amhara and other regions of Ethiopia. 'Raya and Wolkait-Tsegede'[I], which have been sources of conflicts since the late 1950s, are typical examples. For instance, before 1956 the border between the Tigrai and Wollo provinces was '*Alla*' River. Alla, which is a Tigrinya term, refers to a borderline. It indicates that the border between the Tigrai and Wollo provinces was Alla River (Allawha Milash). However, in 1956, Haile Selassie took away a large territory from Tigrai, and thus the 'Allawha Milash'[II] borderline was demolished. Some years after the end of the Weyane Uprising, the territory of Tigrai was diminished because Raya was given away to the province of Wollo (Gebru 1991). In this respect, Ras Mengesha Seyoum[III] (2018) says:

> In 1948 and 49 E. C. ... the land from Allawah Milash up to Kobo was given away to Wollo, and Wolkait-Tsegede up to Tekeze was given away to Begemidir. … Before that, I know that the territories were administered under Tigrai throughout their histories. … Everyone knows it; it is a recorded history.

It appears that taking the Allawha Milash and 'Lemalimo Milash'[IV] territories away from Tigrai was a phenomenon of the near past. This practice brought about resistance by the people of Tigrai against the monarch that lasted for decades. Few years after the Haile Selassie government took away the Raya territory, elders, leaders and lawyers of Kobo and

the nearby areas such as Alemrew Gugsa, Abera Belay, Haile Ejigu, Abaye Abasero, Berinto Abaye, Birhanu Kassa, and Teshome Arersa mobilised the Raya people to demand the Haile Selassie government for the reincorporation of their territory into Tigrai province (see Appendix B2). Such resistances continued until the downfall of the Derg in various forms. Despite the resistances, the territories remained under the Wollo and Gonder provinces until 1991 and a part of them until now. As the EPRDF took power, a part of Allawha Milash and Lemalimo Milash were given back to Tigrai following the introduction of ethnolinguistic federalism; however, the Tigraian elites are not yet satisfied with the response of the government since large parts of Allawha Milash and Lemalimo Milash are still under Wollo and Gonder, respectively. On the other hand, Amhara elites are demanding for the reincorporation of Alamata, Oflla, Chercher, and Enda Mexoni because they were under the Wollo province, as well as for Wolkait, Tsegede, and Humera because these places were under the Gonder province in the Haile Selassie and Derg regimes.

3. Interborder conflict in Raya

After the end of the Weyane Uprising, Haile Selassie took away the Allawha Milash territory and introduced an assimilationist policy through the newly assigned Amhara governors and banned any services, including religious service and verbal communication, delivered through Tigrinya. This policy continued until the downfall of the Derg. Though it was hoped that the 1974 revolution, which removed the last monarch from power, would alleviate national oppression and forge the unity of the country on a completely new and democratic grounds, the unity through oppression and inequality was not dismantled (Berhane 1990). As a result, many people, especially those who are still under the Amhara region, are assimilated. Currently, these areas are prone to interborder conflict because the Tigraia and Amhara elites are contesting over the territory.

Kidane Amene[V] (2019) states that 'in the southern part of Tigrai, the border of Tigrai is Allawha Milash; we have documents that confirm this; we have history; we have documents that show that the area was under the administration [of Tigrai].' This implies that historically, Allawha Milash was under Tigrai, and thus Kidane Amene and his party have made a strenuous effort to reincorporate the Allawha Milash territory into Tigrai. In doing so, the party has used historical documents as evidence. Official letters of the last

monarch show that Allawha was the border between the Tigrai and Wollo provinces. One of the official letters of Haile Selassie indicates that Alamata and Kobo were under Tigrai, which helped the province to levy enough tax up to 1956 to cover regional expenses, but the province was unable to pay teachers' salaries because its revenue was highly diminished after the territories were taken away (see Appendix A2). Presently, political parties and the elites of the Tigrai region have used this phenomenon and other related ones to claim the whole Raya territory.

On the contrary, politicians and elites who are inclined to the Amhara linguistic group lay a claim for the demarcation of the Raya territory under the Amhara region, which is currently under Tigrai. Belete Mola[VI] (2019) states:

> What is Raya? There are people of Raya. … In Raya, if we go to Oflla, we find Agew. If we go to Oflla-Korem, we find many Amharas and many Agews. If we go to Mexoni and Chercher, there are people who identify themselves as Tigraians. In a few *Kebeles*, there are few people who speak Oromo. … People who live in places around Alamata, Waja, Balla, Merewa dominantly identify themselves as Amhara.

Similarly, Dejene Asefa[VII] (2018) says that 'we [the people of Raya] want to … live with the Wollo community, with Wollo Amhara.' These views imply that most of the Raya people are Amhara, and should be incorporated to Amhara region. Hence, it can be argued based on the above view that Amhara politicians and some individuals who live in Raya have a common goal, namely the demarcation of the whole Raya territory under the Amhara region. Of course, they did not conduct any needs assessments that enable them to argue that the Raya community accepts the demarcation of Raya under the Amhara region. It seems that they are propagating their own political interest because of two important reasons where most of the Raya people do not have any question on the issue. As stated in the 1994 national census, most of the Raya people, 84.06 per cent of them, identified themselves as Tigraians (see Appendix C) and in a zonal and district level assessment, people selected from each locality of the Raya zone as representatives of the Raya community, confirmed that they are Tigraians (Muleta Yirga[VIII] 2019) and do not have any other aspiration and question of administration under the Amhara region.

Therefore, it is argued that the question of the Raya people is a question of good governance, and infrastructure and economic development. In this regard, Muleta Yirga (2019) states:

> The area, especially the villages, has unique natural resources, but it has not been developed because it was not given enough attention. The representatives mentioned the Raya Valley Development Project as an example. … Several water wells were dug, but they have been there for many years without being utilized. … In the zone and district level discussions, infrastructural related things such as road, quality of education, shortage of classrooms, all season roads, water, shortage of pure drinking water in many localities were raised as issues that grumbled the community. … These problems have made people feel that they are neglected, forgotten.

From this view, it appears that the question of the Raya community is a question of economic development, infrastructure and good governance. They demanded that the government build classrooms and roads and utilise water wells of the Raya Valley. They do not have any resistance on their administration and inclusion under the Tigrai regional state. However, as indicated earlier, some members of the Raya community and Amhara politicians have used the economic and infrastructural development questions of the people as fertile grounds to put their political interest into effect. Thus, it appears that the conflict over Raya is a conflict over territory. It is a conflict of the Tigrai and the Amhara regions' elites over land resources. Conflict on land 'becomes a collective community issue, and pits communities against each other' (Abbink 2006:396).

Thus, the historical phenomenon of the Raya territory is the main factor for interborder conflict between the Tigrai and Amhara regions. This factor has become the causes of interborder conflict between the two regions that are trying to expand their territories beyond their present statuses. Tigraian elites have laid claims to the Raya territory, which is under the Amhara region presently, given that the territory was under Tigrai before 1956. On the contrary, Amhara elites and some members of the Raya community, who are inclined to the Amhara linguistic group, are working to give away the Raya territory of Tigrai to the Amhara region. They indicated that the Raya community speaks Amharic, and thus the Raya territory, which is presently under Tigrai region, must be included in the Amhara region.

4. Interborder conflict in Wolkait-Tsegede

In the west, historically, the border of Tigrai was beyond Lemalimo in that it extended to the Semen Mountains. Bishop Samuel Gobat[IX] indicated the extension of the Tigrai province to the Semen Mountains. Tigrai and Amhara are separated 'partly by the lofty mountains of Samen, which stretch themselves in a gigantic range, to the majestic Laota' (1850:37). Likewise, Bishop Michael Russell[X] states that Lasta, Abergele, Semen, Wolkait, and Waldubba were Tigrai proper (1833:104). It can be thus traced that the territory beneath Lemalimo was under Tigrai and the people have been Tigrinya speakers for centuries. One of the maps published by the Derg in 1978 shows that the people of the territory beneath Lemalimo were Tigrinya speakers (see Appendix E).

Therefore, it can be argued that unlike in the Raya area, the impact of the Shewan assimilationist policies is minimal in Wolkait-Tsegede. The people of Wolkait-Tsegede and other neighbouring territories maintained their Tigrinya language despite the pressure of the assimilationist policies of the imperial and military regimes. Tigrinya is predominantly spoken in Adi Arqai, Abderafie, Mai Tsebri, and other nearby places beneath Lemalimo that are presently under the Amhara region. Therefore, Kidane Amene (2019) states that 'We do not accept the present map of Tigrai; the present map does not include all Tigrinya speaker people of Tigrai; … in the direction of Gonder, [the territory of Tigrai] extends up to Lemalimo.' This implies that even though the people, who dwell in the mentioned and other nearby localities, are Tigrinya speakers and the territories were under Tigrai for centuries, the EPRDF did not use historic land ownership and language to demark the border between Tigrai and Amhara regions in the west. In this regard, Ghelawdewos Araia (2016) writes:

> Just beneath the Lemalimo, there is a place called Mai Liham, and east of Mai Liham on the main road there is Adi Arqai and below Adi Arqai on the same road there is Mai Tsebri, all Tigrinya names; the capital of Wolkait, deep in the interior of the district, itself is Adi Remets, another Tigrinya name and I argued that these names could not be mere coincidences unless they were part of Tigrai, and even if we ignore the names of these places, how could it be possible to dismiss an entire Tigrinya-speaking people as non-Tigraians?

It seems that most of the people who live in the places mentioned in the above extract are Tigrinya speakers and the place names are Tigrinya. However, a large part of the territory beneath Lemalimo such as Mai Liham and Adi Arqai are under the Amhara region. It can be, therefore, argued that the border demarcation in the west did not follow the general rule of federal border demarcation that used language to set the interborders of the country. This practice is advantageous for the Amhara region because besides comprising assimilated linguistic groups, people who still speak Tigrinya are included in the region. However, Amhara elites are not satisfied with this action. They claim for more territories that are presently under the Tigrai region because the territories were under the Gonder province in the Derg regime. For instance, Atalay Zafe[XI] (2019) says that 'we have a denied Amhara identity; we were under North Gonder, Wogera Awraja, Dabat Capital City, Wolkait district, Tsegede district, and Humera district, but presently we are included under Tigrai region.' This implies that, in the Derg regime, Wolkait, Tsegede, and Humera were under the Gonder province that belongs to Amhara. However, the Gonder province was not an Amhara province since it was a home to both Amharas and Tigraians. In this respect, Daniel Berhane (2011) argues:

> The fallacy is that Gondar province was not an 'Amhara Province' – be it by law or in terms of composition. Gondar was inhabited by Amharans and Tigraians, just like Tigrai Province was populated by Tigraians and the Afar. … In fact, there is no relation between the current States and the former Provinces, though, accidentally, there has been a Province by the name Tigrai before 1991.

In addition, Atalay Zafe (2019), who was born and grew up in Wolkait says, 'the people [of Wolkait] speak, express their feelings, and reflect their identity through Amharic; … in January, 'all' wedding rituals are [conducted through] Amharic.' This implies that the people of Wolkait-Tsegede speak Amharic and use to conduct wedding services; thus, the territory belongs to the Amhara region. However, these linguistic practices are not peculiar to Wolkait-Tsegede only. As the language has been used as a government language for more than 150 years, it is disseminated throughout the country, and so it is common to hear Tigraians speaking Amharic and conducting their wedding services in Amharic and Tigrinya, including in the hinterland of the Tigrai regional state. Similarly, the people of Wolkait-Tsegede use both languages as mediums of communication and weddings or other

social affairs. As such, it is common to see differences in peoples' feelings while using languages. For instance, it is when Tigrinya music is served that people in all walks of life dance and express their feelings wholeheartedly. In this regard, Mekonnen Zelelew[XII] (2018) says:

> My parents were the basis of the people [of Wolkait] for a long period of time. … I have heard two things being voiced: 'Wolkait is Amhara; Wolkait has never spoken Tigrinya.'... Wolkait is a Tigrinya speaker from the beginning. Amharic came into Wolkait; it is not Tigrinya that came into Wolkait. Amharic came into Wolkait with the coming of policemen, teachers, especially with the coming of *Azmari* [traditional vocalists] of Gonder. ... The people of Wolkait have different culture [from Amhara]. An elder does not dance *Eskista* [Amhara dance] even in his son's wedding ceremony; he enjoys it seating. But we see an 80 or 90-year-old elder dancing when it is in Tigrinya culture [music].

It appears that it is wrong to think that Tigrinya is not indigenous to Wolkait. It is rather Amharic that is not an indigenous language to Wolkait because teachers, policemen and *Azmari* were the first to introduce Amharic, in the last hundred or so years, into Wolkait-Tsegede, while Tigrinya has been spoken in the territory since time immemorial. Besides, Mekonnen Zelelew (2018) says:

> If you see the place names, they all are Tigrinya; Adi Goshu, Kulita, Bilamba Kirshi, Adi Afterari, Adi Bezza, Kaka, Adi Remets, Adi Hirdi, Kefta, Tolla, Tsili'elo, Dejena, A'werki, what can I say all are Tigrinya names. The identity of Wolkait is Tigrai; they are Tigrai and. This cannot be denied.

The fact that most of the place names of Wolkait-Tsegede are in Tigrinya, proves the indigenity of the Tigrinya and Tigrai identity in the territory. Geographical features have indigenous-language names that reflect the profound connection of the group to the territory: 'Places where important events took place have names that reflect those events, and places with mythological or supernatural associations also have names rich in meaning for the group' (Dorian 1999:32). Hence, the identity of the Wolkait-Tsegede people is undeniably Tigrai because, despite the pressure of the Shoan assimilationist policy, the people have maintained their Tigrinya culture and language; and based on the 1994 National Census, most of the people of Wolkait-Tsegede and other debatable nearby territories (88.29 per cent) identified themselves as Tigraians (see Appendix D).

5. Conclusion

In Raya and Wolkait-Tsegede, historic land ownership has become a playground for different political and social groups. This factor has become the cause for interborder conflict between the Tigrai and Amhara regions that are trying to expand their territories beyond their present statuses. This situation has made the Raya and Wolkait-Tsegede territories prone to interborder conflict and hindrance to the effective implementation of ethnolinguistic federalism. As a result, it is concluded that ethnolinguistic federalism could not be a remedy for interborder conflict in Ethiopia, mainly because it has not taken historical ownership of territories into account. For instance, many territories that were under Tigrai, Oromo and Benishangul-Gumuz before the expansion of the Shewan monarch are given to the Amhara region because of the assimilation of various ethnolinguistic groups into Amharic, which was deliberately spread by central governments for the last 150 or so years. Currently, interborder tensions are in flux. The interborder conflict between Tigrai and Amhara regions has become intense in that the Tigraian elite has aggressively involved in the movement of returning their territories that were taken away by Amhara governors. This tension is likely to lead to fierce conflicts if proper measure is not taken timely. Thus, it is recommended that historic land ownership context should be taken into account in interborder demarcations, especially in Amharic frontiers. People who dwell in the Amharic frontiers have remained bilingual as Amharic was imposed and spread aggressively to assimilate people and destroy their languages. Hence, in such contexts, other languages, other than Amharic, along with historical ownership of the territories, should be used as mechanisms to demark interregional borders to minimise interborder conflict and effectively implement ethnolinguistic federalism in Ethiopia.

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[I] Raya and Wolkait-Tsegede are controversial territories that have become sources of conflicts between the Tigrai and Amhara regions. There are two self-nominated groups that work on the incorporation of the Raya and Wolkait territories, which are currently under the Tigrai region, to the Amhara region. One group that works to return the Raya territory is called the 'Raya Identity Committee', and the other group that lays a claim for the Wolkait territory is called the 'Wolkait Identity Committee'. Each group has active members who reflect their views through various media. The views of two members of the committees, one from each group are analysed in this study. Besides, the view of the president of one of the political parties of the

Amhara region is included in this study. In contrast, there is a self-nominated committee that lays a claim for territories that are presently under the Amhara region, namely the Allawha Milash and Lemalmo Milash Asmelash Committee. One can notice individuals that call upon the committee to make active engagement on the issue through social media such as Facebook. However, there are no recorded views of the members of the committee on YouTube. Thus, views of politicians and other professionals, who press for the incorporation of the Allawha Milash and Lemalmo Milash territories, are taken from YouTube.

II Allawha Milash was the border between the Tigrai and Wollo provinces before the 1950s. Allawha Milash denotes to the whole Raya territory that extends from Alla River to 'Gereb Ago'. Gereb Ago is a river in Tigrai that is situated about 70 kilometres south of Mekelle City. The term 'Milash' is common in Tigrai in that it is used following many place names such as Alaje Milash and Mereb Milash that show boundaries of zonal territories. The Raya territory consists of five *weredas* ('districts') of which four (Alamata, Ofla, Chercher, and Enda Mexoni) are presently under the Tigrai regional state, while the remaining one (Kobo) is under the Amhara regional state.

III Ras Mengesha Seyoum is a member of the imperial family of the Ethiopian monarch. He was one of the government officials of the aristocratic Ethiopian Emperor and a husband of Emperor Haile Selassie's granddaughter. He was the governor of the Tigrai province from 1960 to 1974, that is, since few years after the Raya and Wolkait territories of the Tigrai province were taken away.

IV Lemalimo Milash is in the north west of the Amhara region. Tigraian elites argue that Lemalimo Milash is the border between the Tigrai and Amhara regions.

V Kidane Amene is the president of the National Congress of Great Tigrai opposition political party. He argues for the annexation of the Allawha Milash and Lemalimo Milash territories to the Tigrai region that are presently under the Amhara region.

VI Belete Mola is the president of Amhara National Movement opposition party. He was a vice-president of his party during the time of the interview. He was born and grown up in the Raya territory that is currently under the Amhara region He argues for the incorporation of the Raya territory that is presently under the Tigrai regional state.

VII Dejene Asefa was born and grown up in the Raya territory that is currently under the Tigrai region. At present, he is the vice-president of the Raya Identity Committee and works for the incorporation of the Raya territory of the Tigrai region to the Amhara region.

VIII Muleta Yirga (PhD) is an assistant professor at Mekelle University who conducted an assessment on the question of the Raya people. He was born and grown up in the Raya territory that is currently under the Tigrai regional state.

IX Bishop Samuel Gobat was a Swiss Calvinist who became an Anglican missionary in Africa and Bishop of Jerusalem in 1846. He visited Ethiopia for the first time in 1830 and stayed for three years. He visited Ethiopia in 1834 for the second time and stayed for about two years. In 1850, he published a book titled *Journal of three years' residence in Abyssinia*. In his book, Samuel Gobat stated the moral state, religion, and so forth, of Ethiopia and places that were under Tigrai and Amhara in the early 19th century and before.

X Bishop Michael Russell became the first Bishop of Glasgow and Galloway in 1837. He visited Ethiopia as a missionary before he became a Bishop and lived in Ethiopia for years in the first half of the 19th century. In 1833, he published a book titled *Nubia and Abyssinia*. His book describes the Ethiopian culture, civil history, language, literature, religion, and so on, in detail. The book indicates the territories that were under the Tigrai, Amhara, and other people of Ethiopia, is used as evidence for claims made for territories based on historical accounts.

XI Atalay Zafe is a public relation of the Wolkait Identity Committee. He was born and grown up in the Wolkait territory that is currently under Tigrai. He argues for the incorporation of the Wolkait territory, which is currently under the Tigrai region, into the Amhara region.

XII Mekonnen Zelelew is an executive of the Tigrai Democratic Alliance opposition party. He was born and grown up in the Wolkait territory that is currently under the Tigrai region. During the imperial regime, his grandfather was an administrator of the Wolkait territory. He argues that the whole Wolkait up to Angereb was Tigrai since time immemorial, and thus it should be under the Tigrai region.

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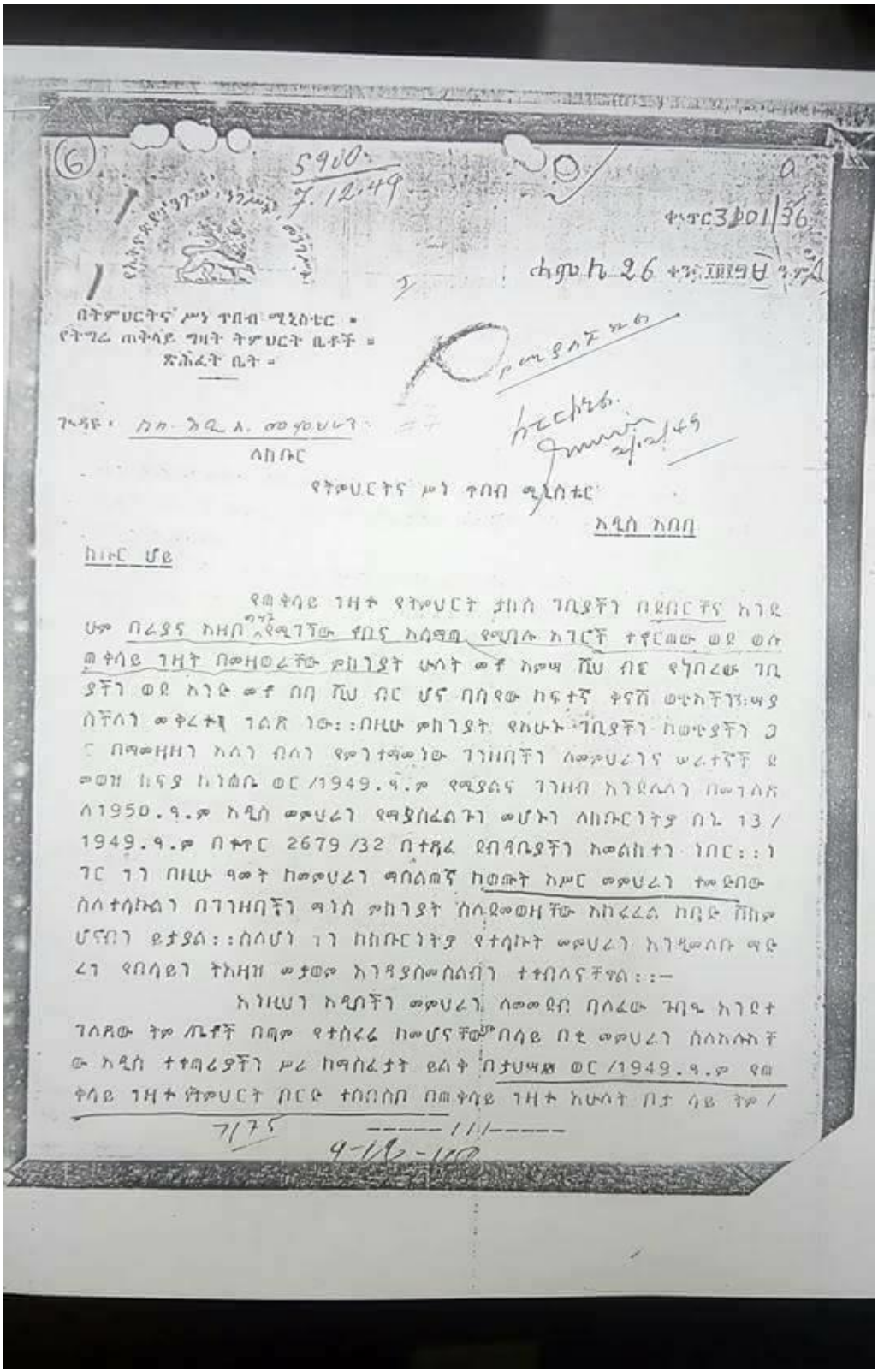
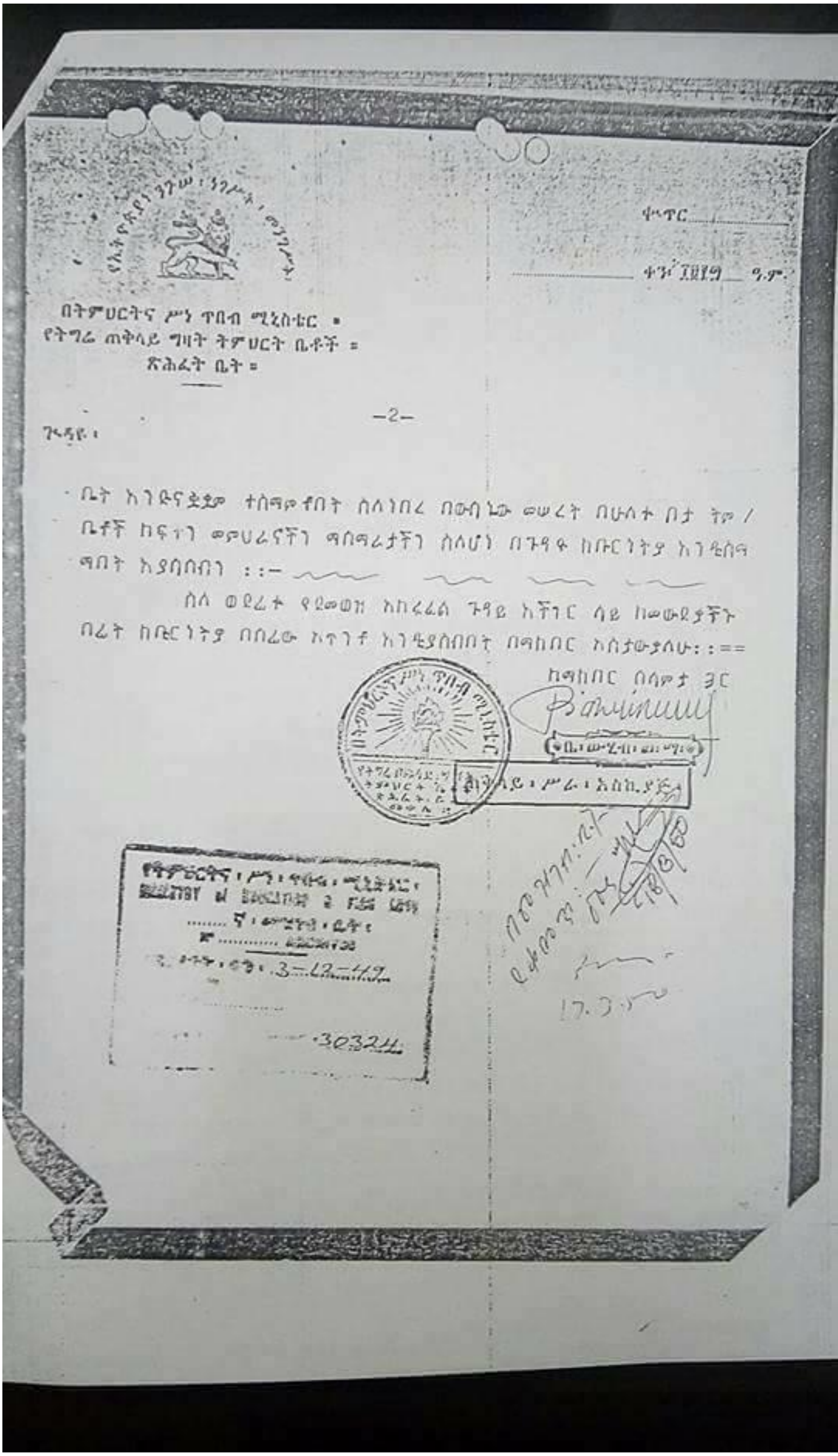
Appendices

Appendix A1: Haile Selassie government's official letter I (Amharic version)





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ጽሕፈት ቤት ።

–2–

ጉዳዩ፣

ቤት እንድናድቃቸው ተስማምተንበት ስለነበረ በውሳኔው መሠረት በሁለቱ በታ ትም/ ቤቶች ከፍተኛ መምህራኖችን ማስማራታችን ስለሆነ በጉዳዩ ከቡርንትያ እንዲስማ ማበት እያሳሰብን ።–

ስለ ወደሬቶ የደመወዝ አከፋፈል ጉዳይ አቸገር ሳይ ከመውደቃቸው በፊት ከቢርንትያ በበሬው እትገኖ እንዲያስበበት በማክበር አስታውቃለሁ።።

ከማክበር በሰላምታ ጋር

Appendix A2: Haile Selassie government's official letter I (translated into English)

No.: 3101/36
Date: 2 August 1957

Ministry of Education and Arts

Tigrai Province Schools' Office

Subject: About new teachers

To: His Majesty the Ministry of Education and Arts

Your Majesty,

It is clear that we could not cover our expenses in that the annual education tax income of the province. It has highly diminished from two hundred and fifty thousand Birr to one hundred and seventy thousand Birr because Debrichi, Kobo and Alamata of Raya are given away to the Wollo province. In this respect, we announce that when we examine our present income and expense, the money we have at hand can only cover the salaries of teachers and other workers of August 1957. Besides, as we informed your majesty through a letter dated 20 June 1957, No. 2679/32, we need new teachers for 1958. However, ten teachers were sent to us from teachers' training college whose salary payment has become a heavy burden for us.

As it was announced in the previous meeting, on top of their expansion, schools have enough teachers. The Education Board of the province assembled in December 1957 and agreed to establish two schools instead of making new employees idle. Thus, I would like to request your majesty to agree with the agenda because we are going to engage teachers, in two places, based on the decision.

With due greetings,

Full name of the general manager Wube Wihib and signature is affixed

The seal of Tigrai Province Schools' Office of the Ministry of Education and Arts

The seal of Ministry of Education and Arts

At the top of this document, a statue, the symbol of Haile Selassie

Translated by: Yonattan Araya Zemaryam, PhD

Appendix B1: Haile Selassie government's official letter II (Amharic version)

ለክቡር ደጃዝማች ደምሴ ወልደ አማኑኤል

የወሎ ጠቅላይ ግዛት እንደራሴ

የራያና ቆቦ አውራጃ ግዛት ካሁን ቀደም በትግሬ ጠቅላይ ግዛት እንደሚተዳደረው ወደ ወሎ ጠቅላይ ግዛት መሆኑ ቀርቶ እንደተዛወረው ወደ ትግሬ ጠቅላይ ግዛት ብትሆኑ ይሻላል በማለት በልዩ ልዩ በበኩትና ለሕዝቡ የመሰብሰቢያ በቂ ገንዘብ በመላክ መሰል ሬዊ ፖሊቲካ ተደርጎ እኛም የሚሻለን የትግሬ ጠቅላይ ግዛት አስተዳደር ነው በማለት ምክንያት እየፈጠሩና ፖሊቲካ በመንዛት እንዲሁም ከትግሬ ጠቅላይ ግዛት በምስጢር እየተላላፈ ያውራጃውን ግዛት ፀጥታ ለማያወክ የተነሱ ፡—

1ኛ— አቶ ዓለሙረው ጉንጫ የአላማጣ ወረዳ ፍርድ ቤት ዳኛ
2ኛ— ግራ/ጌበረ በላይ የቆቦ ም/ወረዳ ገዥ
3ኛ— ቀኛ/ጋዜሌ እጅጉ የአላማጣ ወረዳ ገዥ ዋና ፀሐፊ
4ኛ— ፊታ/ወዘ ጥበቡ አባቡር ,, ም/,, ገዥ ባ—ላባት
5ኛ— ,,በሪንተ አባቡር ,, ,, ,, ,,
6ኛ— አቶ ብርሃኑ ካሣ የልኑ ጠበቃ

እንዲሁም ደግሞ ከትግሬ ጠቅላይ ግዛት የፖሊቲካ ሥራ ማስኬጃ በቂ ገንዘብ በማከማቸት የሚያስከውን የሚያቀርቡና የሚያከፋፍሉ አቶ ተሾመ አረርሣ እነዚህ በመሆናቸው ለጊዜው አውቂ ፍሬ ነገሩን ተከታትዬና ጠብቄ ለመያዝ በመከታተል ላይ ስሆን እነዚሁም ከዚሁ በላይ የተመለከቱት የመንግሥት ሠራተኞችና የሃገር ሽማግሌዎች ሕዝቡን በፖሊቲካ እየሰበኩ ይህ አውራጃ ግዛት እንደቀድሞው ወደ ክቡር ደትግሬ ጠቅላይ ግዛት በዚው በምንም ዓይነት ሊተዳደር አይገባም የማለትን ስብከት በማቅረብ ሕዝቡን ስለሰበኩትና እንዲሁም በፖሊቲካው ውስጥ የዚሁ ግዛት የአድሚኒስትራሲዮን ክፍል ሃላፊ ሽማምንቶች ይህን ሃሣብ ገዳዮች በመሆን እንደልታወቀባቸው ከላይ በስማቸው ከተጠቀሱት ሰዎች ጋር የቃል ግንኙነት አያደረጉ ቢሆን ይሁን ባይሆን ይቅር በማለት ሃሣብ ለሃሣብ እየተገባቡ ወካነገሬ ውስጥ መኖራቸውን ተከታትያለሁ ይሁን እንጂ በነሱም በኩል ሁኔታቸውን በመለከት በዚሁ ፖሊቲካ በመግለፃቸው የመንግሥት ሥራ ተከናውኖ ለሠራ አልተቻለም ፡—

ስለዚህ አሁን [illegible]ነትያ ለጉዳዩ መነሻ ይህን ሃሣብ በገለጽም በነሱ በኩል የተጀመረውን ሃሣባቸውን በፍጥነት ተከታትዬ ውጤቱን በቅርብ ከነማስረጃው አቀርባለሁ ነገር ግን አስከዚያ ድረስ ጉዳዩ [illegible] ይህ [illegible] ፖሊቲካ ከመጀመሪያ ሌሎች የቻለበትን ተረድተውት በበኩልያ ነገሩን አስበው እንዲጠባበቁት ስል በማክበር ማስታወሻዬን አቀርባለሁ። [illegible]

Appendix B2: Haile Selassie government's official letter II (translated into English)

To: Dear Dejazmach Demisie Welde Amanuel, Governor of Wollo province

The relocation of the Raya Kobo administration to the Tigrai province (as before) instead of with Wollo as it is administered presently is advocated by supporting with various preaching and enough money. Individuals who are working to dismantle the security of the Wollo province by creating a motive that the Tigrai province is more crucial for them than the Wollo province and disseminate political thoughts and exchange letters secretly with the Tigrai province include:

1. Mr Alemrew Gugsa, Lawyer of Alamata Woreda Court
2. Grazmach Abera Belay, Vice governor of Waja Woreda
3. Kegnazmach Haile Ejigu, Chief Secretary of Alamata Woreda
4. Fitewrari Abaye Abasero, Vice governor of Alamata Woreda
5. Fitewrari Berinto Abaye, Vice governor of Alamata Woreda
6. Mr Birhanu Kassa, Attorney

Besides, Mr Teshome Arersa is the distributor of accumulated money being sent from the Tigrai province to run political activities. I am following up to get a concrete picture of the situation, but for the time being, the listed country elders are telling the people about politics and informing them that they will not be guilty if this district is returned to the respected Tigrai province. In addition, the appointed leaders of this [Kobo] administration support the idea. They are involved in politics and have oral contacts with the mentioned persons. I also realised that they could not conduct government jobs effectively because politics is inculcated in their minds.

Therefore, despite my presentation of this idea as a clue, I will soon present the idea with evidence. However, until then, I would like to present my note with due respect to your majesty to help you understand and investigate the politics up to its source.

Full name of Dejazmach Desta Shiwa Rikab and signature is affixed
The seal of Wollo Province Office
The date of this document is unreadable, but the context gives a clue that it is around 1957.

Translated by: Yonattan Araya Zemaryam, PhD

Appendix C: Major Ethnic-Group Populations of Raya Zone of Tigrai

Wereda	Enda Mexoni	Raya Azebo	Alamata	Oflla	Total	%
All persons	81 657	87 638	93 659	124 484	387 438	100
Tigrai an	79 962	76 431	58 244	111 038	325 675	84.06
Amhara	901	8 466	31 761	4 304	45 432	11.73
Oromo	---	1 229	2 097	24	3 350	0.86
Others	794	1 512	1 557	9 118	12 981	3.35

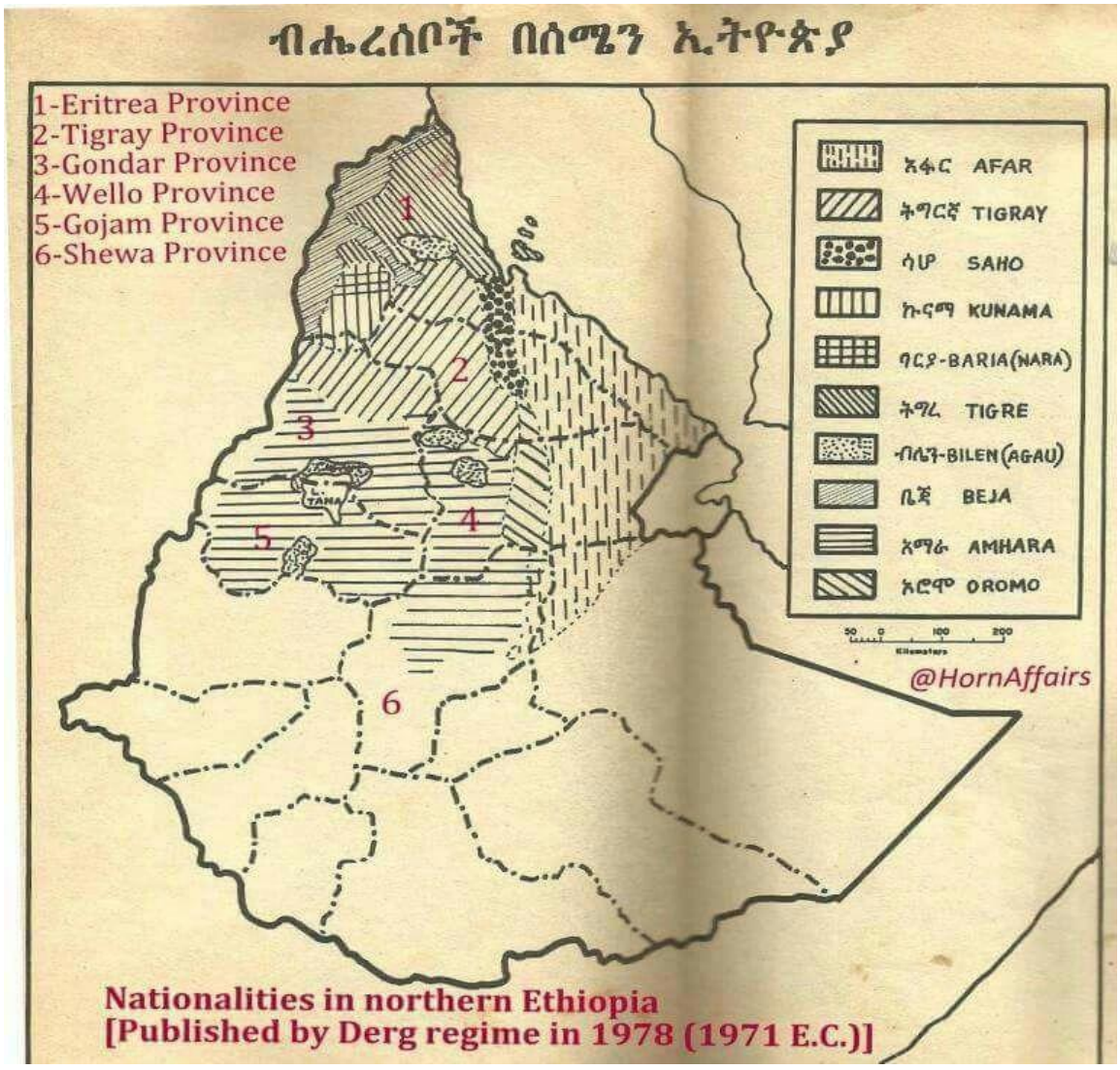
Source: Central Statistical Authority (1995)

Appendix D: Major Ethnic-Group Populations of the Western Zone of Tigrai

Wereda	Kefta Humera	Tselemti	Wolkait	Tsegede	Total	%
All persons	48 690	97 630	90 186	59 846	296 352	100
Tigran	41 999	87 012	87 099	45 532	261 642	88.29
Amhara	3 800	10 382	2 734	14 226	31 142	10.51
Others	2891	236	353	88	3568	1.20

Source: Central Statistical Authority (1995)

Appendix E: Nationalities in North Ethiopia, 1978



Source: Daniel Berhane (2011)

CENTRO STUDI SUL FEDERALISMO
PERSPECTIVES ON FEDERALISM

ISSN: 2036-5438

The International Climate Legal Regime and the Role of the AFOLU Sector

by

Roberto Talenti *

Perspectives on Federalism, Vol. 12, issue 3, 2020

Abstract

It has been years now that the scientific community is warning about the gravity of climate change consequences and about the need to effectively respond to it. However, the climate crisis just seems to get worse over time. Facing this crisis is terribly difficult for at least two reasons. Firstly, climate change is a phenomenon which is both transnational and global in its nature, hence all relevant international actors will need to cooperate with each other in order to address it. Secondly, there is a number of sectors contributing to the global emission of greenhouse gasses (GHG) worldwide, so that all sectors will have to do their part in order to mitigate their climate impact. There is a sector in particular, the sector of agriculture, forestry and other land use (AFOLU) that, despite being one of the major sources of pollution worldwide, has usually been disregarded when it came to take climate change mitigation action. Therefore, this research has decided to focus on the international regulation of the AFOLU sector, in order to understand whether and how it is addressed with the aim of reducing GHG emissions.

Key-words

Climate Change, Climate Change mitigation, AFOLU sector, International Climate Treaties, International Climate Legal Regime.

1.

1.1. Introduction

Human activities are shaping the global environment in such a manner that some scientists, starting from the Noble Laureate Paul Crutzen, have theorized the beginning of a new geological era, the Anthropocene, characterized by the fact that 'humans and our societies have become a global geophysical force' (Crutzen et al. 2007, p.614). Human action on Earth is causing ocean, land, and atmospheric contamination, that are turning, *inter alia*, into ocean acidification, waste production, forests destruction, biodiversity loss, and climate change.

Therefore, climate change can be framed as one of the dramatic consequences of humanly induced environmental pollution and degradation, whose consequences risk to have a great impact on human security and life on Earth. Otherwise, to phrase it in the European Council words, climate change represents '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 this context, the Agriculture, Forestry, and Other Land Use (AFOLU) sector deserves particular attention, being not only particularly vulnerable to climate change, but also a main driver of land degradation and atmospheric pollution (IPCC 2019).

Given the great responsibility of the AFOLU sector in contributing to climate change, and also given the urgency of providing an effective response to the climate crisis, it is fundamental to understand whether and how the International Climate Legal Regime is regulating the AFOLU sector with the aim of mitigating GHG emission. In order to make a satisfactory contribution to the academic literature, but also notwithstanding that a single article cannot provide a full analysis of the International Climate Legal Regime, this research will be structured as follows: after introducing an explanation of how the AFOLU sector affects climate change, the research will focus on the analysis of the three Universal Climate Treaties which constituted the basis of the International Climate Legal Regime that emerged since the early '90s (*i.e.* the UNFCCC, the Kyoto Protocol, and the Paris Agreement). Hence, the article will not provide a full analysis of the International Climate Legal Regime, nor it will carry out a general study of the three international climate treaties,

but it will mainly examine those elements that are necessary to understand whether and how such treaties address the regulation of AFOLU sector with the aim of mitigating GHG emission.

1.2. Drivers of climate change: historical trends, regions, and sectors

Climate change has been defined by the Intergovernmental Panel on Climate Change (IPCC) as "a change in the state of the climate that can be identified (e.g. using statistical tests) by changes in the mean and/or the variability of its properties, and that persists for an extended period, typically decades or longer" (UNFCCC 2011). It has already been a long time since climatologists have virtually no doubt about the fact the climate crisis we are experiencing is entirely caused by human activities (Maibach, 2014). Such climate change is caused by the emission of Greenhouse Gasses (GHGs), among which the most detrimental are carbon dioxide (CO2), methane (CH4) and nitrous oxide (N2O). While CO2 is the most prominent GHG in terms of human emissions (Rafferty 2021), methane is the second most produced GHG, it remains in the atmosphere for a much shorter period of time than CO2 (10 years), and it has a much more powerful greenhouse power, indeed, over a 20-year period, it is from 84 to 86 times more powerful as a greenhouse gas than carbon dioxide (International Gas Union 2017). Finally, N2O is the third GHG in terms of human emissions, and its climate-altering power is about 300 times stronger than that of CO2 (Barton et al. 2014).

Looking at the last 120 years, the concentration of GHGs in the atmosphere increased from 295 ppm (parts per million) CO2 equivalent in the 1900, up to 400.82 ppm CO2 equivalent in the 2000, and 456.81 ppm CO2 equivalent in 2018 (European Environment Agency 2020). In order to break down the different GHGs contributions, it is important to observe that CO2 emissions increased from 295 ppm in the 1900, up to 368.92 ppm in the 2000, and 413.61 ppm in 2020; while CH4 emissions have raised from 890 ppb (parts per billion) in the 1900, up to 1774 ppb in the 2000, and 1890 in 2020; lastly, N2O emissions grew from 280 ppb in the 1900, up to 316.14 in the 2000, and 333.4 ppb in 2020 (Global Monitoring Laboratory 2021). Therefore, it is evident that, while CO2 concentrations in the atmosphere increased by 40.21% from 1900 to 2020, CH4 concentrations increased by 112.36%, and N20 concentration by 19,16%. It is this huge increase in GHGs

concentration in the atmosphere to explain a global mean temperature that is 1.2 ± 0.1 °C above the 1850–1900 in 2020 (World Meteorological Organization 2020).

However, the emission of GHGs is not equally distributed all around the world. If we adopt a state-oriented perspective, China has been the major global emitter in 2018 (responsible for 26.1% of total GHG emissions), followed by United States (12.67%), EU-27 (7.52%), India (7.08%), and Russia (5.36%) (World Resource Institute 2020). However, also to adopt a per-capita standpoint can be relevant. In this case, it is US to have the highest per capita consumption of GHGs (17.97 tonnes of CO2 equivalent per capita in 2017), followed by Russia (17.28 t), South Korea (13.83 t), Iran (10.10 t), and Japan (9.74 t) (World Resource Institute 2020). Ultimately, it is also important to look at GHG emission by sector, and it is here that the role of the AFOLU sector in contributing to anthropogenic GHGs emerges.

The IPCC stated that, by 2010, the sector of electricity and heat production was the first sector in terms of GHG emission (25% of total emission), followed by the Agriculture, Forestry and Other Land Use (AFOLU) sector (24%), Industry (21%), and Transport (14%) (IPCC 2014). Having said this, the most recent IPCC data on the AFOLU sector, extrapolated from the Sixth Assessment Report (AR6) published in July 2021, assert that "Agriculture, Forestry and Other Land Use (AFOLU) activities accounted for around 13% of CO2, 44% of methane, and 82% of nitrous oxide emissions from human activities during 2007–2016, representing 23% (12.0±3.0 GtCO2 equivalent yr-1) of the total net anthropogenic emissions of GHGs" (IPCC, 2021, p.245). It emerges then, that the AFOLU sector is the second sector in terms of total GHG emission worldwide, and the first sector in terms of CH4 and N2O emissions. Indeed, as the AR6 underscores, the AFOLU sector "is a significant net source of GHG emission, with more than half of emissions attributed to non-CO2 GHGs from agriculture"; this makes agriculture "the 2nd largest contributor to warming on short time scales" (IPCC, 2021, p.1488).

What is even more astonishing, is the percentage of GHGs emission exclusively caused by the livestock sector. As the AR6 states, "in the agriculture and waste sectors, livestock production has the largest emission source (109 Tg yr-1 12 in 2008–2017) dominated by enteric fermentation by about 90%" (IPCC, 2021, p.1188). Indeed, while the entire amount of AFOLU emissions account for 24% of global GHG emissions, the livestock sector alone is responsible for "14.5% of all human-induced emissions" (Food and Agriculture

Organization 2013, p.14). It was the UN Food and Agriculture Organization, indeed, to draft in 2013 a report entitled "Tackling Climate Change through Livestock", in which it was explained that the livestock sector is responsible for the emission of 7.1 gigatons of CO2 equivalent per annum, mainly emitted in the form of methane (44%), nitrous oxide (29%), and CO2 (27%) , and primarily released in the process of feed production and enteric fermentation from ruminants (Food and Agriculture Organization 2013).

Evidently, the role played by the AFOLU sector in terms of GHG emissions is anything but marginal, and its regulation is now more urgent than ever. However, as the US historian, political scientist, and diplomat George Kennan stated, "the entire ecology of the planet is not arranged into national compartments; and whoever interferes seriously with it anywhere is doing something that is almost invariably of serious concerns to the international community at large" (1970, pp. 191-192). Evidently, when it comes to the protection of World's climate, the analysis of how climate is regulated on the global scale is necessary.

2.

2.1. The UNFCCC of 1992

The United Nation Framework Convention on Climate Change (UNFCCC), together with the Convention on Biological Diversity (CBD), and the United Nation Convention to Combat Desertification (UNCCD), is one of the three agreements which emerged from the United Nations Conference on Environment and Development (UNCED), hold in Rio de Janeiro in 1992. The UNFCCC entered into force in 1994 and, of the three conventions emerging from the UNCED, it was the one requiring the widest possible international response because, as pointed out by M.V.K. Sivakumar et al., "in the field of climate […], due to the very nature of the atmosphere, all physical causes and effects tend to be global in nature" (2000, p.17).

2.2. The Convention's objective

The Convention has been ratified by 197 states, and its objective, fixed at Article 2, is the "stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system. Such a level should be achieved within a time-frame sufficient to allow ecosystems to adapt naturally to climate change, to ensure that food production is not threatened and to enable economic development to proceed in a sustainable manner". Therefore, it is the case to observe that, although the process that then came out of the UNFCCC has put "strong grounds for having adaptation as a policy goal", the original aim of the Convention is to "focus on reducing the source of climate change, rather than on adapting to the changes" (Schipper 2006, p.82). However, the mitigation objective of the Convention does not seem to be particularly ambitious (despite being reinforced by the reference to a "natural" adaptation), and no precise threshold has been fixed in terms of GHG reductions to be achieved, neither at the global or at the state level.

In addition to this, it should be noted that a reference to food production is present at Art.2. Nonetheless, food production is framed as one of those activities to be shielded from the "dangerous anthropogenic interference with the climate system", instead of being considered as one of those activities that needs to be regulated in order to mitigate the global emission of GHG.

2.3. The Principles of the UNFCCC

Next, the principles of the Convention are present both in the Preamble, that makes reference to the "sovereign right [of states] to exploit their own resources", and in Article 3, which refers to the principles of "equity" and "common but differentiated responsibility"(Art. 3.1), "precaution-prevention"(Art. 3.2) "sustainable development"(Art. 3.4), and "cooperation"(Art. 3.5). Although Article 3 makes no direct reference to agriculture, it may be reconducted to the broader AFOLU sector. Indeed, article 3.3 states that in order to "prevent or minimize the causes of climate change and mitigate its adverse effects", parties should adopt policies that take into account "sinks and reservoirs of greenhouse gases". Of course, the most common and important natural sinks and reservoirs of GHG are forests, which "remove carbon dioxide from the atmosphere";

afterwards, "the sequestered carbon dioxide is stored in live woody tissues and slowly decomposing organic matter in litter and soil" (Luyssaert et al., 2008, p.1). Moreover, as it has been already outlined, agriculture is the main driver of deforestation, and activities as tree felling and tillage, aimed at obtaining new fields to be destined to agriculture, are major drivers of GHG emission and climate change (Silva-Olaya et al., 2012). Therefore, Article 3.3 may be directly reconducted to the sector of forestry, and indirectly linked to the sector of agriculture, meaning that it automatically entails the need to consider the AFOLU sector in the process of designing climate change mitigation policies.

Furthermore, the principle of common but differentiated responsibility introduced at Art. 3.1 is one of the distinguishing features characterizing the functioning of both the UNFCCC and the Kyoto Protocol, and the relevance of such principle is also reflected in the discrimination among Annex I Parties (OECD countries plus economies in transition), Annex II Parties (OECD countries), and non-Annex Parties, introduced at Article 4. Indeed, the text of the UNFCCC acknowledges the "differentiated responsibilities and respective capabilities" (UNFCCC, Preamble) of different member States, and for this reason not all member States are asked to respond to the same commitments. The *raison d'être* of this principle stands behind "both historical responsibility of states and differing capacities of states to address climate change" (McManus 2009, p.2) . However, such distinction has been built statically, and it does not allow states to shift automatically from one category to another. Consequently, if an Annex II State Party does experience a severe and long-lasting economic crisis it must continue to be bound to the stricter commitments of Annex II Parties, while a non-Annex Party that experiences a terrific economic growth over the years (e.g., the Popular Republic of China) can continue to comply with much less stringent commitments.

2.4. The Parties' commitments

As long as the commitments of all Parties (Annex and non-Annex countries) to the UNFCCC are concerned, Art. 4.1 requires all states, *inter alia*, to cooperate in the "transfer, of technologies, practices and processes that control, reduce or prevent anthropogenic emissions of greenhouse gases […] in all relevant sectors, including the energy, transport, industry, agriculture, forestry and waste management sectors" (4.1.c), to promote the "sustainable management […] of sinks and reservoirs of all greenhouse gases not

controlled by the Montreal Protocol, including biomass, forests and oceans as well as other terrestrial, coastal and marine ecosystems" (4.1.d), and to "cooperate in preparing for adaptation to the impacts of climate change; develop and elaborate appropriate and integrated plans for coastal zone management, water resources and agriculture" (4.1.e). Having said this, it is worth to observe that, even though in the entire UNFCCC text the word 'agriculture' appears just twice and there are only four references to forestry, the three just cited subparagraphs make both two references to agriculture (*i.e.* the 100% of the references to agriculture present in the whole Convention) and two references to forestry. As a matter of facts, at Article 4.1 both agriculture and forestry (to wit: activities related to the AFOLU sector) are explicitly identified as "relevant sectors" for the mitigation of GHG emissions, the relevance of forests as natural sinks of GHG is officially recognized, and then the focus is drifted towards the importance for agriculture to adapt to climate change. On the one hand, it should be noted that the commitments related to the AFOLU sector which are listed in Art.4.1 are directed to all parties to the Convention, and not just to more developed countries: it is recognized then, that the AFOLU sector has a major role to play in the fight against climate change, and it cannot be a matter of interest for Annex-Parties only. Moreover, by including agriculture and forestry in the list of the relevant sectors, the UNFCCC could put the basis for a subsequent focus of the international community on the AFOLU sector. On the other hand, the significance of the references to the AFOLU sector that appear in Art.4.1 should not be overestimated neither. In fact, in line with the approach followed by the entire UNFCCC text, Art.4.1 does not refer to any reduction target, neither in terms of quantity of GHG emitted, nor in terms of timeframe within which it will be necessary to intervene. The paragraph does not even make reference to any best practice that should be considered in the regulation of the AFOLU sector and, in conformity with the further commitments which are mentioned in the Convention, it does not introduce any binding obligation to the parties. The lack of any binding obligation in Art.4, as well as in the whole UNFCCC text, represents a main shortcoming of the Convention, and it was mainly due to the will of the US to avoid the creation of a treaty encompassing some binding reduction commitments (Kuyper et al. 2018).

About the commitments of Annex-I Parties, which are listed in Art.4.2, the only elements that can be worth mentioning, given the aim of this research, are present in Art.4.2.a and Art.4.2.b. Indeed, while Art.4.2.a states that: "each of these Parties shall adopt

national policies […] by limiting its anthropogenic emissions of greenhouse gases and protecting and enhancing its greenhouse gas sinks and reservoirs", Art.4.2.b posits that "each of these Parties shall communicate […]periodically […] information on its policies and measures referred to in subparagraph (a) above, as well as on its resulting projected anthropogenic emissions by sources and removals by sinks of greenhouse gases". Therefore, Art.4.2 can be reconducted to the AFOLU sector, and in particular to forestry, through its references to GHG sinks. However, such connection to the AFOLU sector is merely indirect, and all the shortcomings that were already present in Art.4.1 (i.e. no identification of precise objectives to be achieved, no reference to best-practices, no binding obligation) do also apply to Art.4.2.

When it comes to the commitments of Annex-II Parties listed in Art.4.3, it emerges that the expenditure of further financial resources is required to developed states, with the aim to "meet the agreed full costs incurred by developing country Parties in complying with their obligations under Article 12, paragraph 1 [*i.e.* in the process of communication of information to the Conference of the Parties]" (Art.4.3). Even though not any direct or indirect reference to the AFOLU sector is present in Art.4.3, this paragraph is directly linked to Art.4.1 as it states that: "Parties included in Annex II […] shall also provide such financial resources, including for the transfer of technology, needed by the developing country Parties to meet the agreed full incremental costs of implementing measures that are covered by paragraph 1 of this Article". Evidently, always in line with the principle of common but differentiated responsibilities, this paragraph requires developed states to assist less developed countries in achieving their commitments. Furthermore, among the commitments of Annex II Parties, there is the duty to support less developed (non-Annex) State Parties to comply with the duties listed in Art.4.1, which is directed, *inter alia*, at mitigating the emission of GHG coming from the agricultural sector, and which is aimed at a sustainable management of forests. If, on the one hand, it might be argued that the provision present at Art.4.3 may underline the urgence of achieving the objectives fixed at Art.4.1, on the other hand, it should be observed that the language of Art.4.3 tends at reducing the already modest responsibilities of developing states, by framing them as not completely accountable for the output of their climate policies. This point is even clearer when it comes to the "implementation conditionality" that emerges at Art.4.7 which says that: "The extent to which developing country Parties will effectively implement their

commitments under the Convention will depend on the effective implementation by developed country Parties of their commitments". In addition to this, another factual problem emerges from Art.4.3, and it has to do with the exacerbation of the questionable distinction that has been made between Annex and non-Annex Parties to the Convention. As a matter of facts, it is important to underscore that, as it is framed, Art.4.3 requires states as Greece and Turkey (Annex II Parties) to support through financial resources and transfer of technologies states as China, India, South Korea, and Brazil (non-Annex Parties).

2.5. A Mother Convention

Furthermore, two more articles that it is important to analyse are Article 7 and Article 17 of the UNFCCC. These two articles do not make any mention to the AFOLU sector; however, they present those characteristics that really define the UNFCCC as a Framework Convention. In fact, they establish "the Conference of the Parties [COP], as the supreme body of this Convention"(Art.7.2), and also state that "the Conference of the Parties may, at any ordinary session, adopt protocols to the Convention" (Art.17.1). Indeed, as it has been showed by now, the UNFCCC has plenty of shortcomings when it comes to the protection of global climate, and even more when it comes to the mitigation of GHG produced by the AFOLU sector. Nevertheless, the characteristic of the UNFCCC that allows it to contribute more to the fight against climate change stands in the fact of being a "Mother Convention" (Van Asselt 2007, p.17), that could stimulate an increasing and continuous dialogue among the members of the international communities within the framework of periodically hold Conferences of the Parties, some of which have also produced new protocols to the Convention. The two protocols that were produced within the UNFCCC framework are the Kyoto Protocol of 1997 and the Paris Agreement of 2015. Such pieces of legislation introduced new rules for approaching the climate crisis and for the regulation of the AFOLU sector, and they will be analysed in the following paragraphs of this research.

2.6. The creation of the SBSTA

Finally, before moving to the Kyoto Protocol, there is a last element of the UNFCCC that deserves particular attention given the aim of this research. As a matter of facts, given

its role of Mother Convention, the UNFCCC establishes a number of bodies that support its operations, to wit: the Secretariat (Art.8), the Subsidiary Body for Scientific and Technological Advice (Art.9), the Subsidiary Body for Implementation (Art.10), and the Financial Mechanism (Art.11) (Harmsen 2018). Also in this case, despite not being directly related to the AFOLU sector, article 9 in particular presents one of the most important and characterizing features of the UNFCCC, as it establishes the "Subsidiary Body for Scientific and Technological Advice" (SBSTA) to provide the COP with "information and advice on scientific and technological matters relating to the Convention"(Art.9.1). The introduction of the SBSTA as a permanent body for the Convention is significant at least for two reasons. First of all, it makes evident that the discussions within the Conferences of the Parties cannot be merely political or economic in their nature, but they have to rely on consolidated and regularly updated scientific knowledge. Nonetheless, it should be noted that the SBSTA also presents some important limitations in this sense: its powers are particularly limited, being it just an advisory body with no decisional power; moreover its reports cannot entirely get rid of any political influence, given that the SBSTA "shall comprise government representatives competent in the relevant field of expertise" (Art.9.1). Second of all, the SBSTA has played an important role as a permanent body that has complied to its duty to "report regularly to the Conference of the Parties on all aspects of its work" (Art.9.1). Indeed, the SBSTA produced a number of reports from 1995 onwards and, interestingly, the work of the SBSTA started to focus on the role of agriculture, especially after the Decision taken at the COP 17 (hold in Durban in 2011), which requested "the Subsidiary Body for Scientific and Technological Advice to consider issues related to agriculture" (decision 2/CP.17, 2012), and after the Decision of COP 23 (hold in Bonn in 2017), which established the "Koronivia Joint Work on Agriculture".

2.7. Conclusion

In conclusion, the UNFCCC is the first Universal Climate Treaty, it reached universal ratification and it is a mother convention, i.e. a convention from which new international climate treaties as the Kyoto Protocol and the Paris Agreement could emerge. The UNFCCC put the accent on the necessity to regulate sinks and reservoirs of GHG and, after explicitly identifying agriculture and forestry as relevant sectors for the mitigation of GHG emissions, it requires all State Parties to the Convention to take into account the

relevance of the AFOLU sector. The Convention also established the formation of periodic Conferences of the Parties, as well as the creation of a Subsidiary Body for Scientific and Technological Advice. However, the UNFCCC also presents some main weaknesses: no binding target or obligation is introduced for any party to the Convention, the principle of Common but Differentiated Responsibility remains central, and the distinction between Annex I, Annex II, and non-Annex Parties is statically constructed. These elements are also evident when it comes to the lack of any specific target or quantified emission reduction to be applied to the sector of sinks and reservoirs of GHG. Besides, despite the introduction of the SBSTA represents an interesting characteristic of the Convention, the Body still lacks any effective power. Lastly, it should be noted that the objective of the Framework Convention itself is anything but far-reaching, and it presents food production as a sector that we need to protect from climate change, instead of framing it as a main contributor to the climate crisis.

3.

3.1. The Kyoto Protocol of 1997

The Kyoto Protocol was the first Protocol to the UNFCCC. It emerged from the COP-3, which was held in Kyoto in 1997. If, on the one hand, the Protocol maintains some features that resemble the approach adopted by the UNFCCC, on the other hand, it also presents some distinguishing innovative points. Indeed, as well as the UNFCCC, the Protocol makes great distinctions between Annex and non-Annex Parties to the Convention in terms of commitments, it uses a top-down approach, and it is the product of a negotiation of political (instead of scientific) nature. However, differently from the Convention, the Kyoto Protocol establishes some binding targets, it heavily relies on economic instruments (e.g. emissions trading, and clean development mechanism), and it gives greater attention to the sector of "Land-Use, Land-Use Change and Forestry" (LULUCF).

The Protocol entered into force in February 2005, i.e. ninety days after the date in which not less than 55 Parties to the Convention and all Annex B Parties had deposited their instruments of ratification, in accordance to Article 25. At present day there are 192 parties to the Kyoto Protocol; however, the Protocol presents important absentees among

Annex B Parties, to wit: the United States of America (which signed but never ratified the treaty), and Canada (which withdrew from the Protocol in 2011, before the beginning of the first Commitment Period). The absence of such major Annex B GHG emitters (the US was the main emitter of GHG until 2004 (World Resource Institute, 2020)), together with the lack of binding targets for non-Annex Parties to the Convention, are elements that is important to consider in order to understand the reasons for the failure of the Protocol of 1997.

3.2. A pragmatic approach

As a protocol to the Framework Convention, the Kyoto Protocol adopts a more pragmatic approach than the UNFCCC and it does not introduce any new specific global objective or principle. As a matter of facts, in its preamble the Protocol refers to the "pursuit of the ultimate objective of the Convention as stated in its Article 2" [i.e. the stabilization of GHG concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system], as well as to the necessity of "being guided by Article 3 of the Convention" [i.e. by the principles of the UNFCCC] (Preamble of the Kyoto Protocol, 1997). Nevertheless, it is Article 3 of the Protocol to fix the objectives for Annex I Parties to the Convention, and it is Article 2 to identify the measures that need to be adopted in order to reach such objectives.

Art.2.1.a. presents a list of "policies and measures" that "each Party included in Annex I, in achieving its quantified emission limitation and reduction commitments under Article 3 [and] in order to promote sustainable development" shall implement or further elaborate. This subparagraph is important given the aim of this research as it makes reference to the "protection and enhancement of sinks and reservoirs of greenhouse gases not controlled by the Montreal Protocol" (Art.2.1.a.ii), and to the "promotion of sustainable forms of agriculture in light of climate change considerations" (Art.2.1.a.iii). Evidently, these two measures are a clear expression of the necessity to act on the AFOLU sector in order to mitigate GHG emissions. Nevertheless, as it will emerge by the analysis of subsequent parts of the Protocol, it is the case to point out that, while the sector of "sinks and reservoirs of greenhouse gases" will be a main object of regulation for the Protocol (notwithstanding all its limitations also due to the complexity of the issue), the sector of agriculture, despite being mentioned by Art.2.1.a.iii, is not regulated by any specific

reduction target, and this has led many states not to include agriculture in their emissions trading schemes (Alabrese 2021).

3.3. The Parties' commitments and the role of LULUCF

It is the long and complex Article 3 of the Kyoto Protocol to specify the commitments of Annex I Parties. However, before moving to this article, it is necessary to have a look at Annexes A and B to the Kyoto Protocol, as they are frequently referred to in Art.3. Annex A makes a list of the greenhouse gasses, as well as of the categories of sectors and sources that have to be considered in order to comply with the Protocol's objectives. The first three climate-altering gasses that are mentioned in Annex A are carbon dioxide, methane, and nitrous oxide, being them the GHG which are main responsible of climate change (Rafferty 2021; International Gas Union 2017). Furthermore, and more importantly, agriculture is one of the five emitting sectors that are listed in Annex A, which makes reference to particular agriculture-related sources of GHG as enteric fermentation, manure management, rice cultivation, agricultural soils, prescribed burning of savannas, and field burning of agricultural residues. Annex B to the Protocol, then, provides a list of the thirty-six Annex I Parties to the Convention, and it presents the emission limitation or reduction commitment undertaken by each of these countries.

The first paragraph of Article 3 requires Annex I Parties to the Convention to reduce the emissions of GHG listed in Annex A in order to comply with the emission limitations listed in Annex B. The emissions shall be reduced of at least 5 per cent below the 1990 levels in the first commitment period, i.e. from 2008 to 2012. It is in this "5 per cent" threshold imposed on all Annex I Parties that it is possible to identify the basis of the top-down approach adopted by the Protocol of 1997. It is in the context of the first commitment period, moreover, that the members of the European Community decided to comply with a more ambitious 8 per cent target, and the "EU has emerged as the main actor among industrialised countries to push the process forward under the UN Convention" (Fischer & Geden 2015, p.2). Furthermore, it is important to observe that such particular targets were not identified under the suggestion of the scientific community, nor in compliance with the recommendations of the IPCC, but just as a result of political processes of negotiation. A similar political negotiation led to an 18 per cent reduction commitment "in the eight-year period from 2013 to 2020; nevertheless, the

composition of Parties in the second commitment period is different from the first" (United Nations 2021, p.1).

Art.3 of the Kyoto Protocol is particularly important also because of the main emphasis it puts on the sector of Land-Use, Land-Use Change, and Forestry (LULUCF). Despite not being explicitly mentioned with the label "LULUCF", the LULUCF sector plays a central role in the framework of the Kyoto Protocol, it has been object of numerous disputes among scientists and policymakers (Savaresi et al 2020), and it is particularly important for the object of this research. As a matter of fact, it must be acknowledged that "the AFOLU category includes LULUCF and Agriculture. Indeed, in the context of mitigation, 'Agriculture' – in accordance with IPCC terminology – includes emissions from enteric fermentation, manure management, rice cultivation, prescribed burning of savannas and grassland, and from soils (i.e. agricultural emissions), [while] emissions related to forest and other land use are covered under LULUCF" (FAO 2017, p.17). The LULUCF sector is qualitatively different from the other sector which are regulated by the Kyoto Protocol, as it is the only sector to be capable of GHG removals (Schlamadinger et al, 2007). Moreover, peculiar characteristics of the sector that should be taken in mind when it comes to regulate it are: saturation (i.e. the limit for the carbon storage potential of the available land), non-permanence (the carbon sequestration of GHG in the biosphere is reversible), and the influence of natural effects and control by humans (human capacity to manage the stock of GHG in the biosphere is strongly constrained by natural phenomena that are not under human control) (Schlamadinger et al, 2007).

Having said this, it is important to acknowledge that the rules and guidelines provided by the Protocol to regulate the LULUCF sector are multiple and complex (Alabrese, 2021), and for this reason it is the case to carry out an analysis of the relevant articles.

Art.3.3 introduces the duty, for the Annex I Parties to the Convention, to account for the emissions and removals of GHG due to "human-induced land-use change and forestry activities, limited to afforestation, reforestation and deforestation since 1990". The definition of "afforestation, reforestation and deforestation" are provided by the Marrakech Accords of 2001, which clarifies that the afforestation is a "human-induced conversion of land that has not been forested for a period of at least 50 years to forested land", the reforestation is "the direct human-induced conversion of non-forested land to

forested land", while deforestation is "is the direct human-induced conversion of forested land to non-forested land" (Marrakech Accords 2001, Annex A). These three activities are mandatorily reported by the Annex I Parties, and they will be registered as credits or debits for the first commitment period depending on the fact that they contribute to the storage or emission of GHG.

Article 3.4 does not specify other binding LULUCF elements that Annex I Parties decide to consider for the accounting of GHG emissions and removals. However it states that "the Conference of the Parties […] shall, at its first session or as soon as practicable thereafter, decide upon modalities, rules and guidelines as to how, and which, additional human-induced activities related to changes in greenhouse gas emissions by sources and removals by sinks in the agricultural soils and the land-use change and forestry categories shall be added to, or subtracted from, the assigned amounts for Parties included in Annex I". It was in the context of the Marrakech Accords that such "additional human-induced activities" were identified and disciplined. The accords distinguish between "cropland management, grazing land management and revegetation" on the one hand, whose anthropogenic GHG emissions by sources and removals by sinks "shall be equal to anthropogenic greenhouse gas emissions by sources and removals by sinks in the commitment period, less five times the anthropogenic greenhouse gas emissions by sources and removals by sinks resulting from these eligible activities in the base year of that Party" (article C.9), and "forest management" on the other. In the latter case, Annex I Parties "may account for anthropogenic greenhouse gas emissions by sources and removals by sinks in areas under forest management under Article 3.4, up to a level that is equal to the net source of emissions under the provisions of Article 3.3" (article C.10).

The accounting system used for Cropland Management, Grazing land Management, and Revegetation has been usually labelled as a "net-net accounting system" as it compares the emissions and removals during the commitment period to the removals on the base year; conversely, the system used for forest management has been described as a "gross-net accounting system": it accounts for any new emission or removals, and it requires states to take forest management related emissions and removals in consideration to comply with their reduction commitment (Schlamadinger et al. 2007, pp.296-297). The main pitfall of Art.3.4 is that it does not introduce any binding target during the first commitment period for Annex I Parties related to cropland management, grazing land management,

revegetation, and forest management. As a matter of fact, the decision to consider these elements in the first commitment period is based on a voluntary basis, while it will be binding just "in the second and subsequent commitment periods" (Kyoto Protocol Art.3.4). Unfortunately, the Doha Amendment to the Kyoto Protocol (of 2012), which was adopted for a second Commitment period, never entered into force, as it did not reach the minimum number of ratifications; moreover, among the Parties that committed to emission reductions for the second commitment period there are important Annex I absentees as US and Canada (which did not even commit to emission reduction for the first period), but also Russia, Japan, and New Zeeland (which had binding targets for the first commitment period, but did not commit to any reduction for the second). In addition, many scholars and scientists have criticized the reliance over two different kinds of accounting system for the regulation of different subsectors of the LULUCF sector: such differentiation has been considered as arbitral and based on unclear definition of the subsectors (Schlamadinger et al. 2007).

Then, another controversial paragraph of Article 3 of the Kyoto Protocol is Paragraph 7. According to this paragraph, Annex I Parties to the Convention "for whom land-use change and forestry constituted a net source of greenhouse gas emissions in 1990 shall include in their 1990 emissions base year […] the aggregate anthropogenic carbon dioxide equivalent emissions by sources minus removals by sinks in 1990 from land-use change for the purposes of calculating their assigned amount". There are two direct consequences of Art.3.7: firstly, it establishes two different accounting regimes between states for whom land-use change and forestry constituted a source of GHG emissions in 1990, and states for whom land-use change and forestry represented carbon removals; secondly, it allows the first category of states to include the emissions coming from land-use change in the calculation of the 1990 baseline (United Nations 2000), so to enlarge the baseline and to reduce the emission limitation for the commitment periods.

Furthermore, it is important to look at Article 10 of the Protocol. Indeed, while the above discussed articles focus on the emission limitations of Annex I Parties, Art.10 shifts the focus of attention on "all Parties", and it requires them, among the other things, to "formulate, implement, publish and regularly update national and, where appropriate, regional programmes containing measures to mitigate climate change and measures to facilitate adequate adaptation to climate change"(Art.10.b). Interestingly for the purpose of

this research, Article 10 specifies that "such programmes would, *inter alia*, concern […] agriculture, forestry and waste management" (Art.10.b.i). This article surely goes in the right direction as long as it requires both Annex and non-Annex Parties to make the emission of GHG coming from the AFOLU sector more transparent and predictable. However, it should be reminded that such provision remains a non-binding one for non-Annex I Parties, and it reaffirms the centrality of the principle of "common bud differentiated responsibilities".

3.4. The Clean Development Mechanism and the Emission Trading System

Finally, it is the case to make a quick reference to both article 12 and 17 of the Protocol. Article 12 introduces the so-called Clean Development Mechanism (CDM), whose aim is to "assist Parties not included in Annex I in achieving sustainable development […], and to assist Parties included in Annex I in achieving compliance with their quantified emission limitation and reduction commitments under Article 3". The CDM was initially supposed to be accompanied by a "clean development fund", proposed by Brazil but not included in the text of the Protocol (United Nation 2000), and it tried to promote sustainable development among non-Annex Parties, led by the intervention of Annex I Parties. Then, Article 17 introduces the Emissions Trading System (ETS). A mechanism of cap-and-trade that gave parties the possibility to "participate in emissions trading for the purposes of fulfilling their commitments under Article 3". The creation of a global ETS did never materialize, and the only structured emission trading regional market emerged in the EU. In addition, the creation of an ETS in the EU made more evident the problems at the basis of the creation of a cap-and-trade system, *i.e.* the difficulty to quantify and allocate carbon quotas, as well as to cover all the GHG emitters (the EU ETS just covers the 40% of its GHG emissions) (EU Commission 2021).

3.5. Conclusion

In conclusion, the Kyoto Protocol has been capable of identifying the GHG as well as the economic sectors that are responsible for the main changes in global climate. In particular, it has officially identified the sector of agriculture as a main GHG emitter (also making reference to the role of enteric fermentation and manure management), and it tried for the first time also to discipline the LULUCF sector. Moreover, the Kyoto Protocol has

been a place of experiment for the use of new instruments (CDM and ETS) to tackle climate change and it has been the first international climate treaty to introduce binding targets for State Parties. However, as it has been noted, the static distinction between Annex and non-Annex Parties to the Convention has been a main shortcoming, also given the dramatic economic growth of many non-Annex State Parties. This point makes clear that the Kyoto Protocol gave more importance to the historic responsibility of states (in terms of emissions) than on the necessity to effectively tackle the climate crisis. Furthermore, major Annex Parties did not even commit to any emission reduction as the US did not ratify the Protocol, and Canada withdrew from it in 2011 (before the first commitment period had finished). It should also be noted that some ratifying Annex Parties did not commit to any emission reduction, indeed Australia promised not to increase its GHG of more than 8% in its first commitment period, and Iceland committed to a maximum increase of 10% with reference to the 1990 base year. Finally, further shortcomings of the Kyoto Protocol shall be found in the incapacity to build a working ETS at the global level (maybe due to the fact that a system based on cap-and trade is unfit to regulate the global emissions of GHG) as well as in the impossibility to identify a common, clear and homogeneous regulation of the LULUCF sector, in a context in which, the delineation and respect of clearer schemes of regulation have been postponed to subsequent sessions of the conference of the parties, and to subsequent commitment periods. Furthermore, State Parties should acknowledge that to excessively rely on the removals from the LULUCF sector can be dangerous and counterproductive as humans do not have full control over plants carbon storage (Fung et al., 2005); therefore, to increase the LULUCF storage of carbon should not allow states to feel free to emit more.

4.

4.1. The Paris Agreement of 2015

The Paris Agreement was the second international treaty to be produced within the UNFCCC framework, and it was adopted at COP 21, which was held in Paris in 2015. As it has been pointed out by scholars as Prof. Savaresi, already the legal form of the treaty is quite ambiguous as some State Parties considered it as a Protocol to the Convention of 1992, while others (as the US) wanted the form of the Treaty to be left undetermined

(Savaresi 2016). For sure the Agreement makes a number of references to the Convention of 1992 but, interestingly, it does not ever mention the Protocol of 1997. What remains out of question is also that the Paris Agreement is a legally binding International Treaty on Climate Change (UNFCCC 2021) whose objectives are coherent with those of the Framework Convention of 1992. However, differently from the Kyoto Protocol, the Paris Agreement fixes a new global objective of result (at Art.2), it adopts a bottom-up approach with the introduction of Nationally Determined Contributions (at Art.3), and it gets rid of the strict distinction between Annex and non-Annex Parties to the Convention. Moreover, the Paris Agreement is the first International Environmental Treaty to make reference also to human right obligations (Savaresi 2016) and to dedicate space to the issue of loss and damage (Art.8). It is also important, given the aim of this research, to underscore that the Paris Agreement presents very few references to any activity related to the AFOLU sector. As a matter of facts, the Agreement never refers to agriculture, and it merely refers once to "food production" (Art.2) but it does so with the function of underlying the need to defend it from climate change, completely overlooking the impact of food production on atmospheric contamination. Furthermore, the role attributed to carbon sinks and to the value of forests is much more limited in the Agreement of 2015 than in the Protocol of 1997.

It is also important to observe that, while it almost took eight years for the Kyoto Protocol to enter into force, the Paris Agreement become effective already in November 2016 (i.e. less than one year after its adoption), to wit: thirty days after the date in which at least 55 State Parties to the convention accounting for at least the 55% of global GHG emissions had deposited the ratification to the treaty (in accordance with Art.21 of the Agreement). Up until now, the Agreement has been signed by 195 states, and it has reached 191 ratifications. The almost universal ratification of the Agreement risked to be seriously undermined when the US, under the Trump administration, withdrew from the treaty on the 4th of November 2019. However, it was under the Biden administration that the US could come back on their original position and deposit their ratification as soon as on the 20th of January 2021 (United Nations 2021).

4.2. The Agreement's objective

As it has been said, the Paris Agreement fixes a new clear global objective of result that is: "to strengthen the global response to the threat of climate change" and to "[hold] the increase in the global average temperature to well below 2°C above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5°C above pre-industrial levels" (Art.2.1.a). Therefore, the objective of the Agreement is clearer and stricter than the one identified at Art.2 of the UNFCCC which just mentioned the necessity to avoid "dangerous anthropogenic interference with the climate system". However, even though a precise global objective of result has been identified by the Agreement, it still does not fix any binding obligation to individual State Parties, as the Kyoto Protocol does with Annex Parties to the Convention. The Paris Agreement requires instead all State Parties to play a role in order to reach the 1.5° objective through their nationally determined contributions (Art.3).

4.3. The role of Nationally Determined Contributions

The Nationally Determined Contributions (NDCs) were firstly conceptualized at COP 19 which was held in Warsaw in 2013. Looking at the Treaty of 2015, it emerges that NDCs are initially identified at Art.3 and they represent the backbone of the bottom-up approach envisaged by the Paris Agreement. Undoubtedly, it is important to observe that, although the principle of "common but differentiated responsibilities" is mentioned in the Agreement, no discrimination between Annex and non-Annex Parties to the Convention is present in terms obligations to State Parties when it comes to NDCs. As a matter of facts, Art.3 asserts that "all Parties are to undertake and communicate" their NDCs. This is an important step forward from the Kyoto Protocol, as the Agreement acknowledges that it is important to include developing states, since they have become more prominent GHG emitters. Moreover, the elimination of the strict divide between Annex and non-Annex Parties is also relevant for the purpose of this research, as the demand for bigger efforts from developing countries could allow the AFOLU sector to acquire a more prominent role (indeed, the AFOLU sector activities represent the main source of emission in developing countries) (IPCC 2014). Nevertheless, two issues in particular deserve to be discussed about NDCs, to wit: firstly, whether they involve any binding obligations for

State Parties or not and, secondly, which role the AFOLU sector assumes in the context of the NDCs.

As long as the bindingness of NDCs obligations is concerned, it is important to observe that most of the Paris Agreement's rules related to the adoption of NDCs are binding in their nature. As a matter of facts, Article 4.2 clearly states that "each Party shall prepare, communicate and maintain successive nationally determined contributions" and that "Parties shall pursue domestic mitigation measures". The stringent verb "shall" also emerges from Article 4.8 ("in communicating their NDCs, all Parties shall provide the information necessary for clarity, transparency and understanding"), Article 4.9 ("Each Party shall communicate a nationally determined contribution every five years"), and Article 4.13 ("Parties shall account for their nationally determined contributions"). Furthermore, these provisions clearly assign binding duties to "all Parties", even though it must be acknowledged that the main burdens remain on developed states as indicated by the use of the verb "should" in Art.4.4 ("Developing country Parties should continue enhancing their mitigation efforts"), as well as by the obligations imposed on developed states to assist developing countries in preparing and achieving their nationally determined contributions (i.e. Article 4.5 states that "Support shall be provided to developing country Parties for the implementation of this Article").

A major problem of NDCs is that, notwithstanding their draft and periodic submission is substantially binding for all parties, and although they aim at achieving the objective fixed at Art.2, no kind of emission reduction or threshold related to NDCs is fixed by the Paris Agreement. The Agreement maintains a more flexible approach than the Kyoto Protocol, and it balances the global obligation of result (limit the temperature increase to 1.5°C above pre-industrial levels), with binding obligation of conduct (the NDCs), and no individual obligation of result. All this risks to undermine the achievement of the global objective fixed at Article 2 of the Agreement, also considering that State Parties end up with the submission of a number of NDCs that are drafted by following different rules, and that are then particularly difficult to compare with each other (Jernnäs et al. 2019), especially when the regulation of the LULUCF sector is concerned (Krug 2018).

4.4. NDCs and the AFOLU sector

Moving to the relationship between the NDCs and the AFOLU sector, it must be primarily underlined that no direct mention to the AFOLU sector is present in the Paris Agreement. In fact, as it has already been said, the Agreement never refers to agriculture, it frames food production as a sector to be shielded from climate change instead of framing it as a sector to be regulated in order to cut GHG emissions, and it hardly makes reference to the role of forests and carbon sinks. Indeed, the role of forests, which is exclusively mentioned in Article 5, is not connected to nationally determined contributions. Article 5 does not involve any obligation for states, as parties, both at the international and at the European level, had difficulties in establishing rules and methodologies for reporting emissions and removals from LULUCF activities (Savaresi and Perugini 2020). Therefore, the Article just posits that "Parties should take action to conserve and enhance, as appropriate, sinks and reservoirs of greenhouse gases […] including forests" (Art.5.1), and that "Parties are encouraged to take action to […] reducing emissions from deforestation and forest degradation, [by taking into account] the role of conservation, sustainable management of forests and enhancement of forest carbon stocks in developing countries" (Art.5.2).

The only obligation of the Paris Agreement concerning the AFOLU sector can be identified at Article 13.7.a, stating that "each Party shall regularly provide […] a national inventory report of anthropogenic emissions by sources and removals by sinks of greenhouse gases". Such "inventory report", that shall be prepared by "using good practice methodologies accepted by the Intergovernmental Panel on Climate Change" (Art.13.7.a), plays an important role in the context of reviewing the "adequacy and effectiveness" (Art.7.14.c) of the NDCs that have been undertaken and communicated. Then, unsurprisingly, this binding element emerges from Article 13, which is the Article that establishes the so called "enhanced transparency framework". This is a clear case of how the Treaty tries to compensate the lack of any individual binding obligation of result, through the introduction of unedited transparency and compliance rules. This peculiar *modus operandi* is also supported by Art.14, which introduces further measures to periodically assess the progress carried out by State Parties, and by Art.15 which introduces a "mechanism of compliance".

Interestingly, the Treaty does not say anything about the accounting techniques and methodologies that State Parties have to adopt in order to measure the amount of GHG emissions related to their sinks, and it leaves the identification of these (and other) technical issues to the Rulebook of the Paris Agreement (Cogswell et al. 2019). On the one hand, this kind of fluid approach, which should have incentivized and allowed the involvement of the largest possible number of states, is presenting some main shortcomings as it took three years to have a first (uncomplete) draft of the Rulebook at COP 24 in Katowice (Marcu et al. 2019) and, up to date, although almost five years have passed from the entrance into force of the Agreement, the Paris Agreement Rulebook has not been completed yet. On the other hand, it must be recognized that up until March 2021, 191 Parties have submitted their first NDCs, and 8 Parties have submitted their second NDCs (NDC Registry 2021), and this shows that, despite the problems concerning both the conclusion of the Rulebook and the identification of clear accounting standards have not been settled yet (e.g. the issue of double counting (Schneider et al 2019)), the Paris Agreement succeeded in its aim of involving both developed and developing countries.

Nevertheless, it is not just the quantity of the NDCs presented by the Parties to the Agreement to be relevant, but also their quality and, given the aim of this research, the amount of NDCs that made reference to the AFOLU sector. Therefore, it is also necessary to point out that, as underscored by Jernnäs et al., up to the 30th of July 2018, 173 Parties had presented their nationally determined contributions and, out of these Parties, only 78 (i.e. the 45% of the total) referred to "change of practices of natural resource management in order to cope with climate changes, e.g. through switch to climate smart agriculture, [and] ending deforestation" (Jernnäs et al. 2019, p.1243). Consequently, it is quite evident that notwithstanding the involvement of a great number of parties, the NDCs system, which is flexible by definition, has not been effective in assigning the right emphasis on the role of the AFOLU sector, and this led the majority of State Parties not to consider the role of "Agriculture, Forestry and Other Land Use" in their Nationally Determined Contributions.

The Paris Agreement has not increased the role of the SBSTA in the UNFCCC framework, but it presents some significant innovations as the emphasis on the connection between climate change mitigation and human rights protection in the Preamble, the

establishment of a new framework for the adaptation to climate change (which unfortunately does not make any reference to the sector of agriculture) at Art.7, and the inedited reference to the issue of "loss and damage" at Art.8. However, as long as the regulation of the AFOLU sector aimed at mitigating climate change is concerned, there is no further innovation introduced by the Agreement that is worth to be mentioned.

4.5. Conclusion

In conclusion, as long as the object of this research is concerned, the Paris Agreement does not introduce any significant improvement to the framework established by the Kyoto Protocol. Quite on the contrary, although a binding global obligation of result has been established, no binding individual obligation of result has been identified, but merely some binding obligations of conduct. Such obligations of conduct, moreover, do not make any reference to the sector of agriculture, and they just impose the regular draft of "inventory reports" that shall account for the "anthropogenic emissions by sources and removals by sinks" of GHG (Art.13.7.a). To be even more precise, it should be observed that not only the regulation of activities related to the AFOLU sector, but also the regulation of those activities related to other polluting sectors which were mentioned by the Kyoto Protocol (e.g. energy, industrial processes, waste, etc.), is absolutely absent in the Paris Agreement text. Given the absence of the Agreement on the clarification of which human activities are polluting and in need of being regulated and, given the absence of any reference to the Protocol of 1997, it can be said that the Agreement of 2015 remains silent not only on the individual obligations of result, but also on the legal identification of sectors that can be considered as polluting and in need of regulation. Therefore, the Agreement seems to identify a challenging collective obligation of result, without establishing a proper framework for its achievement. The explanation for the flexible and sometimes excessively malleable framework emerging from the Paris Agreement can be maybe found in two distinguished causes. First of all, the Parties in 2015 were quite conscious of the limits of the previous Kyoto Protocol (i.e. insufficient commitment of states in the first and, even more, in the second commitment period; too strict distinction between Annex and non-Annex Parties to the Convention; difficulty in the identification of common rules for the regulation of the LULUCF sector). Probably, in the Parties' view, such limits could be overcome by the adoption of a bottom-up approach that could leave

each state with more margin of manoeuvre, and by enhancing it through the identification of a number of transparency and compliance rules. Secondly, it should not be overlooked that after the great failure of COP 15, which was held in Copenhagen in 2009, and which was not able to produce a new protocol to the Convention, Parties had an even bigger pressure upon them, and could not afford the failure of another negotiation process. Therefore, the adoption of a new treaty in the framework of the UNFCCC which involves both the participation of developed and developing countries, but remains vague on the binding obligation of results, and completely silent on the identification of the sectors that need to be regulated, must have seemed like the least bad solution to both overcome the limits of the Kyoto Protocol, and to avoid a failure as the one of Copenhagen.

5.

5.1. The International Climate Legal Regime

The three international treaties analysed above, are the only International Treaties on Climate Change to have reached an (almost) universal scope of application. Each treaty had a peculiar objective and, although these treaties have reached some important results, they all present some structural limits that can be reconducted to the fact of being the product of diplomatic and political process which have seen the interaction of sovereign independent states.

The main objectives of the UNFCCC were to establish a mother convention for the protection of global climate, and to reach the largest possible number of State Parties. It can be said that such objectives have been achieved by the Convention of 1992, that was also able to stress the importance of the AFOLU sector in terms of GHG mitigation. However, the Convention reached this aim at the expenses of fixing no ambitious global target, by creating a strong divide between Annex and non-Annex Parties, and by remaining silent on any binding obligations of result.

Next, the Kyoto Protocol's main objective was to establish clear targets and binding obligations of result for State Parties, and also to clarify the economic sectors whose regulation is more urgent and the type of GHG that must be considered more responsible for the contamination of the atmosphere. Also in this case it is possible to affirm that the Treaty's objectives have been reached, and it is also important to underscore that the

Protocol has vehemently reaffirmed the relevance of the AFOLU sector for the mitigation of climate change. Nevertheless, the Kyoto Protocol has encountered some main problems in terms of ratification, as well as difficulties in providing clear regulation of the LULUCF sector. Besides this, it maintained the static distinction between developed and developing countries that already characterized the Convention of 1992.

Finally, the Paris Agreement tried to go beyond the rigid distinction between Annex and non-Annex Parties, without repeating the unsuccessful experience of Copenhagen. The Agreement of 2015 was actually able to meet this target, and it did so by also establishing a new binding global obligation of result, that could ultimately go beyond the unambitious objective fixed by the UNFCCC. Unfortunately, the achievement of such diplomatic result, required State Parties to sacrifice, during the draft of the Paris Agreement's text, the identification of any binding individual target of result. Besides this, the Agreement remained silent on the role that the AFOLU sector can play in order to reach the 1.5°C objective.

Therefore, although some elements related to "Agriculture Forestry and Other Land Use" can be identified in the treaties which constitute the basis of the International Climate Legal Regime, the current system of regulation of the AFOLU sector emerging from the establishment of the three Universal Climate Treaties is still far from being satisfactory. Two main issues need to be solved in order to establish a proper system of global governance allowing the AFOLU sector to be properly regulated in order to mitigate GHG emissions and, consequently, in order to mitigate climate change.

First of all, it is necessary to make the negotiation process which led to the establishment of new climate treaties, as well as the discussions held by the Conferences of the Parties, more based on scientific facts and less on political interests. As it has been previously pointed out, the UNFCCC had already established a Subsidiary Body for Scientific and Technological Advice (SBSTA). Nonetheless, the UNFCCC merely envisaged the SBSTA as an advisory body, and its power were not enlarged over time. To increase and expand the role of scientific committees in the evaluation of the effectiveness of climate policies and international climate treaties will be fundamental in order to establish a proper system of climate governance which also considers and regulates the activities of the AFOLU sector.

Last but not least, the climate crisis, as well as its relation with the AFOLU sector, will never be effectively treated and addressed until the dogma of an international system composed of sovereign independent states will not be overcome. As a matter of facts, provided that it is a long time now that the World is getting always more complex and interdependent (Keohane & Nye 1987) it is necessary to build systems of a global governance that also envisage the devolution of some sovereign powers to supernational structures and organizations. This change of heart and political habits becomes particularly urgent, especially when some peculiar phenomena, which are transnational in nature by definition, (as the protection of the goal climate and the efficient production of an amount of food that is sufficient food to feed the whole humanity) are concerned. As a matter of facts, not only the emergence of transnational phenomena touches upon a number of aspects of global politics and human security, (e.g. transnational terrorism and transnational migration could undermine both food security and energy security), but a number of scholars have warned that global warming in particular cannot be prevented by any state acting alone (Lowe 2007) and, as the Scholar Kannan Ambalam stated, "no crisis in world history has so clearly demonstrated […] the increasing interdependence of governments and other stakeholders as the contemporary global environmental crisis" (2014, p.145). Therefore, the environmental and climate crisis result being the quintessence of a World system characterized by transnational phenomena and interdependent actors. To find efficient ways to manage the limited resources we can use to feed humanity, by also drastically cutting environmental contamination and GHG emission before it is too late, is a challenge that goes well beyond the capabilities of the stereotyped "sovereign independent states", and it will require a completely new approach and conceptualization on the role of states in World Politics, as well as a major role of International and Transnational Law.

Evidently, further research need to be conducted over these issues.

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