CENTRO STUDI SUL FEDERALISMO
PERSPECTIVES ON FEDERALISM

ISSN: 2036-5438

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

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

by

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Perspectives on Federalism, Vol. 12, issue 2, 2020

Abstract

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

Key-words

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

1. Introduction

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

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

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

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

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

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

2. The model of judicial federalism in the United States

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

V On this matter we can refer to Comba 1996.

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

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

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

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

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

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

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