The Principle of Separation of Powers in Crisis: Intergovernmental Relations in Comparative Perspective

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Abstract Every decentralized state has got the problems about the relationships between the different institutional levels. One kind of relationships can be expressed by the Senate, but in some decentralized States the Second Chamber is no longer perceived as an effective mechanism of representation of the regional (or federated) entities.

Therefore, interstate federalism can be preferred to intrastate federalism, increasing the role of government branch as to legislative assemblies.

The co-operation among institutional levels gives birth to a tight network of relation between the different levels of government and is substantiated with a variety of involved actors and concrete procedures. To have a classification of these relations, the doctrine referred to institutional and functional cooperation. The first drove to the creation of some organs that gather both state bodies and regional and local ones. The "State–Regions" Conference is a significant example, together with the Conferencias sectoriales in Spain or the Joint committee in the U.K. Hereafter, our attention will move to the co-operation forms between government levels from which acts and procedures arise. Such acts and procedures are a result of the meeting between the different representatives of the administrations. This helps to speed up the administrative process and to improve, then, the public performance quality. For instance, we can cite the Austrian *öffentlich-rechtliche Verträge*

In conclusion, I'd like to underline two points: One, there is an increase of intergovernmental relationships in the decentralized States. This trend can be explained with the reason to give the regional level a collective voice in the national policy process, especially, where no regional second chambers exist. The second point is: the institutions of intergovernmental relationships are clearly important for the development of coherent policy, but they can reduce the legislative role. The intergovernmental institutions operate in a space between the region and the Member state levels, and as the decisions reached are a compromise between

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executives, neither the member state parliament nor the regional legislature will be responsible for the decisions taken. Despite this, they may be obliged to follow these decisions.

Keywords Judiciary power • Legislative power • Multilevel state

Federal States–Regional States: Different Origin, Common Destiny?

From the point of view of the relationship between sovereignty and territory, states can be divided into centralized and composite ones, with the latter being formed, in turn, by regional or federal states.

The assignment of competences between the central government and the centralized units is usually carried out through a normative act that determines a list of subjects. This technique provides legal certainty and guarantees the autonomy of the territorial communities. However, while bearing in mind that it is not possible to completely put aside the necessary existence of lists of competences, history compels us to realize that these lists represent inadequate tools since the boundaries of the areas of competences are necessarily mobile. Firstly, notwithstanding the comprehensive vocation of these lists, the economic, social, and technological developments create new areas that challenge traditional classifications. Secondly, it is worth bearing in mind that these lists identify subject matters using linguistic expressions not consistent or in tune with their legal meaning, especially in light of the fact that, from a normative standpoint, it is not possible to define a single subject matter but only to identify a group of norms that connect different functions, activities, and institutions. Thirdly, notwithstanding the tendency to draft these lists in a comprehensive way, the Constitution at the same time hosts general definitions that work as safety clauses for the crystallization of the division of competences.

Therefore, the competences can be effectively implemented only through a joint and coordinated action of the multiple institutional levels that share common profiles in the various areas. This cooperative action is increasingly often carried out by means of intergovernmental relations conducted through relations between representatives of the executive branch, which can be either horizontal (if the members of the executive branch belong to the same institutional category) or vertical (if the relation involves government members of different territorial areas) (Rolla 2011).

The emergence of this tendency has two consequences: the first affects the legislature, while the second affects the judiciary.

With regard to the first aspect, a phenomenon of competition/subsidiarity in the intergovernmental relations with the territorial Senate has emerged. Indeed, historically, at the beginning cooperation between the center and the periphery was established through the creation of a legislative assembly representative of the

territorial communities. This solution was consistent with the liberal view that looked at legislative power as the center of the whole system, built around the concept of statutory law as the main source of law. However, the development of composite States has shown some critical profiles connected to the functioning of the High Chamber of territorial inspiration. Firstly, it has been underlined how the Senate cannot be any longer identified with a Chamber of the States since the representatives elected therein are now more responsive to party logics than to territorial interests; secondly, since modern States perform a higher number of functions, they also need that the competences pertaining either to the central State or to the decentralized entities be clearly spelled out; this process of identification, however, would not be completely compatible with the characters of generality and abstractness typical of legislation.

Indeed, it is possible to be a witness to the consolidation of interstate federalism dynamics, according to which the relation between center and periphery is declined through the action of the executive and is based on negotiation processes (Ruggiu 2006).

However, this tendency upsets the balance between the executive and legislative powers to the advantage of the executive powers (both State and Regional) and to the detriment of the role of the legislative assemblies.

This phenomenon is usually associated to a more recent one, according to which members of the executive powers are also vested with the power to solve the conflicts of competence in which they happen to be involved. Indeed, the parties to the conflict would be inclined to find mechanisms to solve the conflict among themselves in order to avoid recourse to a jurisdictional procedure, traditionally considered a safeguard for the autonomies. This tendency shows at least two elements: The first concerns the role of Courts and the downgrading of the parameters of judicial legitimacy in solving controversies; the second element concerns the general approach to controversies, which brings about the disappearance of an impartial—or at least equally distant from the parties—subject, to rely exclusively on the parties themselves.

Examples of Cooperation in Comparative Law

After addressing this tendency, it is now necessary to classify the intergovernmental relations, whose manifestation may give raise to the form of institutional cooperation and to the establishment of bodies or functional forms of cooperation, that is, the improvement of acts and procedures. Furthermore, the cooperation can be either horizontal or vertical.

Composite systems have not developed final choices within this area, being drawn mainly towards the establishment of various types of intergovernmental relations, whose outcome is dependent more upon the peculiarities of the single countries than on the quality of one type against another. What is worth emphasizing is that this is a tendency that is absolutely shared by all composite systems.

Outside of Europe, the Australian and Canadian experiences are worth mentioning. In the former, the example is represented by the Council of Australian Governments, established in 1992 and composed of the Prime Minister, by States Premiers, by Territory Chief Ministers, and by the President of the Australian Local Government Association. Its functions consist in carrying out joint actions and politics between the different levels of government within the defined areas: health, education and training, Indian reform, early childhood development, housing, microeconomic reform, climate change and energy water reform, natural disaster arrangements. With regard to Canada, the negotiation between the two institutional levels that finalized the solution and clarification of the exercise of each level's competences appears to have become a dominant methodology, so much that it has been said that "[m]ore than other federations, Canada relies on intergovernmental negotiation to help resolve political differences" (Magnet 1993).

The negotiation is articulated on different levels, in which not only the Prime Ministers of the provinces and the federation are involved—that is, the subjects in charge of the Ministries of the territorial entities and of the central State—but also, and mainly, provincial and federal public officials with overlapping responsibilities. The agreements emerging from this process usually represent a complex series of compromises that cannot be changed without completely falling apart. Consequently, these agreements are presented to the federal Parliament and the provincial legislative bodies exclusively for ratification, reducing therefore the possibility of detailed examination and robust public debate.

Among the most relevant areas in which intergovernmental relations have played a primary role, it is possible to identify that of the international relations pertaining to foreign commerce, an area of competence assigned to the federation. Indeed, before ratifying international agreements, whose implementation would bring about consequences in areas falling within the exclusive competence of the provinces, the territorial communities actively participated to the signing of the international agreements through a series of meetings between the members of their own executive bodies and the federal negotiators. This process has become an example of a system of core-periphery relationship suitable to safeguard the autonomy of the decentralized instances and in a way qualitatively equivalent to a centralized representative body (Feldman and Gardner Feldman 1984).

It is mostly due to worldwide processes of economic globalization that the division of competences between the central State and the autonomies is affected, since it is the increasing tendency to establish international organizations operating in areas falling within the purview of the sub-national units' reserved competences that can create a "centripetal" movement. It is worth noting, for instance, that this phenomenon upsets the systems of divisions of competences as established by Constitutions and shifts the attention from the owner of the competence to the articulation of the decisional processes. The decentralized States of the European continent face a process of supranational integration that, on one hand, appears to be centripetal with regard to the EU institutional bodies and, on the other hand, puts under strain the division of competences between the core and the periphery codified in the Constitutions.

It is not by chance, therefore, that the intergovernmental relations focus part of their efforts in the attempt to find a forum for consultative policies between central and local authorities within the EU area.

In this respect, it is possible to refer, as examples, to three different systems: the Italian, the British, and the Spanish ones.

Italy, by way of Legislative Decree no. 281/1997, attempted to the rationalize the activity of as many as three intergovernmental Conferences: the State–Regions and Autonomous Provinces Conference, the State–Cities Local Autonomies Conference, and the one resulting from the unification of the two previously mentioned ones – the State–Regions–Autonomous Provinces–Cities Local Autonomies Conference. The liaison activity is mainly conducted by the State–Regions and Autonomous Provinces Conference, which can promote and sign understandings and agreements to further the harmonization of State and Regional legislation, the achievement of shared positions, and the achievement of goals common to the central Government and the Regions (D'Atena 2007).

All the more so, it is within this very Conference that the governmental actions of guidance and coordination abolished by a 2001 constitutional reform have resurfaced and are currently conducted in a consultative manner within the Conferences. The various institutional levels are therefore jointly responsible for the integrated and functional exercise of their respective competences and must act consistently with the principle of loyal cooperation. In addition to the function of connection and coordination, the State–Regions Conference carries out important tasks with regard to the relationship with the European Union. More specifically, when a draft Community normative act falls within the area of competence reserved to the Regions, the Government convenes the State–Regions Conference in order to reach an agreement; at the same time, it is possible to request the Government to make mandatory a review by the Council of Ministers. Furthermore, a Communitarian session of the Conference is foreseen, devoted to the analysis of those aspects of the Community policies that are of Regional interest. Finally, Law no. 131/2003 and Law no. 11/2005 have left some room for an intervention both in the rising and in the descending phases of the Community's normative acts addressing horizontal cooperation through the Conference of the Presidents of the Regions (Parodi and Puoti 2007).

This European Community-related aspects enjoy primary importance also in the United Kingdom, where the institutional and functional cooperation is regulated by the Memorandum of Understanding and Supplementary Agreements, an agreement entered into on 1 October 1999 by the British, the Scottish, and Welsh Governments and, in 2000, agreed to also by the Northern Ireland Government, whose aim is to clarify "the principles which underlie relations" between the different institutional levels. The Memorandum expressly establishes that the Memorandum itself and the agreements based upon it are not binding. However, it is worth pointing out that the clauses of the Memorandum have been complied with, given the general perception of these tools as useful in making more flexible the functioning and implementation of the processes of decentralization.

This is consistent with a recurring factor in the British legal system, that is, the central role played by so-called "soft-law". The mandatory character of the Memorandum is therefore conditioned upon the willingness of the parties to abide by it, in a view that can be likened to compliance with the principle of loyal cooperation.

The Memorandum has foreseen the establishment of the Joint Ministerial Committee, a body composed of the Prime Minister (or his representatives), the Scottish and Welsh First Ministers, the Northern Ireland First Minister and Deputy First Minister, and the Secretaries of State for Scotland, Wales, and North Ireland.

The Committee is assigned the task to monitor the implementation of the concordats and of the Memorandum and has jurisdiction over issues that may arise with regard to both matters delegated and not delegated to the regions and, most importantly, with regard to those areas where these matters overlap. This collegial body may also represent a place to establish and keep under review liaison arrangements between the UK Government and the territorial autonomies and exchange information between the administrations. Furthermore, it is worth highlighting that the UK position within the EU Council of Ministers is formulated within the Committee, a circumstance of special interest for the devolved administrations.

The Memorandum also addresses forms of functional cooperation through concordats. These arrangements are instrumental to a uniform application of the law in certain given areas and further administrative cooperation and exchange of information and represent the mechanisms through which the UK system has tried to address problems in the cooperation between various institutional levels at a post-devolutionary stage. In a most effective way, these arrangements have been defined as the "glue of a reinvented Union State" (Rawlings 2000). The Memorandum identifies the need to adopt four main concordats in as many areas where the need for coordinate action and consistency is deemed of primary importance, which are the coordination of EU policy and implementation, financial assistance to industry, international relations touching on the responsibilities of the devolved administrations, and statistical surveys.

Other specifying arrangements, holding a hierarchically subordinate status, can join the abovementioned typologies and can be entered into bilaterally (Poirer 2001).

A further element of significant importance for regional autonomies is provided by the common attachment to the concordat on international relationships, which establishes the general prerequisites for the international activity of the decentralized institutional levels in the areas falling under their competence, in cooperation with the Foreign Common Office. The Office must be consulted before taking actions from which an international responsibility could arise. In those cases in which, conversely, the negotiation between States falls within the area of competence of the Regions, the concordat foresees the possibility that representatives from the Regions can join the national delegation.

The theme of intergovernmental relationships is also present in the Spanish system, which currently foresees mechanisms of institutional cooperation like the Conference of the Presidents, composed of the Presidents of the Government and of

the Autonomous Communities; or like the Multilateral *Sectoriales Conferencias* where the heads of the executive bodies with subject-matter competence participate in the meetings and those of functional cooperation declined through *convenios* (Ridaura Martínez 2009).

The rationale underlining the existence of the *convenios* is opposite to the one at the basis of the conferences; indeed, the latter are multilateral bodies to which all the Autonomous Communities participate equally. The establishment of *convenios*, conversely, is inspired by the principle of bilateralism, according to which each Autonomous Community negotiates directly with the central State, without the need or concern to find a common position with the other Communities. The most immediate and positive consequences of the multilateral bodies with regard to the *convenios* are represented by the establishment of a unified place for debate, where the most "autonomous" positions are moderated during the phases of negotiation to the advantage of the general safeguard of the system (García Morales 2009).

With more specific regard to the theme of the participation of the intra-State entities to the supranational process of integration, it is worth underlining the establishment in 1992 of the *conferencia sectorial para los asuntos relacionados con la Union Europea* and, most importantly, the more recent creation of *consejos consultivos* within the respective sectional conferences, whose activity is finalized to the determination of the Spanish position within the Council of Ministers of the European Unión (*consejo consultivo de política agricola*, de política medioambiental, de política pesquera). These latter bodies have recorded the highest number of meetings in the past year, compared to all the other conferencias sectoriales: a testimony, of the rising sensibility devoted to this matter.

The Para-Jurisdictional Negotiation

Another function carried out by these cooperative bodies is the subsidiarity function conducted with regard to the traditional jurisdictional bodies competent to address controversies.

A forerunner system, in this respect, is the Belgian one, which, with the Law of institutional reform of 9 August 1980, has established a consultative committee. This body is composed of the President and five representatives of the federal Government, the President and a member of the Flemish government, the President of the francophone community, the President of the Walloon community, the President (normally a francophone) and the first member of the other linguistic community of the Bruxelles region. The committee is vested with the task to prevent the conflicts of competence and interests between the different institutional levels. In the first case, whenever a draft statute or decree is deemed to encroach on the competences, the Council of States submits the controversy to the committee that, within forty days, must address the conflict; in the event the conflict is not solved by the committee, the draft statute or decree can again be considered for approval. In case of conflicts of interest, if an assembly deems that a draft statute or

decree is vitiated in the merits, 3/4 of the members can ask that consideration of the draft be suspended in order to seek a compromise with the other assembly. If these attempts prove unsuccessful, the Senate will invite the consultative committee to an attempt of mediation, which must conclude within 30 days; in this case as well, in the event an agreement is not reached, the draft statute or decree can again be considered for approval. In the exercise of this function, the Committee must reach its decisions unanimously, and therefore each member is vested wtih veto power. The analysis of this procedure furthers a few reflections. It should be underlined that the subjects that enter into a State–Region and Communities agreement are formally on an equal footing; that is, there is not hierarchical relationship between the various institutional levels involved in the process, especially since each subject has veto power.

With regard to the controversies on the implementation of close cooperative agreements among the various institutional levels, the *loi spéciale de réformes institutionnelles* of 8 August 1990 introduces the possibility to establish an arbitration board, where each of the parties to the agreement elects a board member and the board has competence over the interpretation and abidance to the agreement's provisions by the contracting parties. The decision of the board is final, and its content is enforceable. These bodies with a clear intergovernmental origin are assigned the task to decide conflicts of competences on a political basis in order to limit jurisdictional recourses. This also appears to be the purpose of the bilateral commissions of cooperation between the State and the autonomous communities in Spain, on the basis of Organic Law no. 1 of 2000 of the Constitutional tribunal, which established that in case of conflict between the State and the Autonomous Communities over a law or an act with the force of law, the term within which a recourse must be filed is extended from three to nine months in case a conciliatory procedure before the bilateral Commission of cooperation is activated by the parties (Tornos Mas 2002). In analogy with the Belgian consultative committee, the members of the bilateral Commission are the representatives of the executive bodies of the respective institutional levels, and analogously, the Spanish body has the task to activate a conciliatory procedure between the parties in order to avoid a controversy before the Constitutional Tribunal. However, in the Spanish case, in analogy to the Belgian one, if the bilateral Commission of cooperation is not able to adequately solve the conflict, the parties can always resort to the possibility to activate the procedure before the constitutional court. In the United Kingdom as well, the Joint Ministerial Committee has taken on extrajudicial competences, thanks to the Protocol for avoidance and resolution disputes attached to the Memorandum of Understanding. More specifically, it is worth highlighting an aspect that emphasizes the difference between recourse to the classic jurisdictional avenues and recourse to intergovernmental bodies. While the former provides a motivated decision on the legitimacy of the act or action, the latter, conversely, takes into account also the merits of these acts; indeed, the Protocol establishes that the application can be filed whenever "circumstances, particularly those arising from differences in political outlook" are deemed to be present.

The Protocol details a six-step procedure, ranging from bureaucratic consultations to an exam by the heads of the various governments in a plenum meeting of the Committee. In case an agreement is not reached, the jurisdictional avenue remains available.

Therefore, the Committee has a complementing-subsidiary function that applies to conflicts among different powers, with the purpose to avoid or limiting disputes.

Conclusions

The expansion of the intergovernmental relations as operative units of decentralized States, beyond the actual methods through which they are carried out (multilateral, bilateral, functional, institutional), highlights the progressive establishment of a relational—as opposed to hierarchical—system. This undoubtedly contrasts with the established and traditional core-periphery relationships previously conducted in a manner consistent with the principle of supremacy, with the State at the higher level of the hierarchy. This process has two corollaries: The first concerns the role of soft-law sources of law, while the second addresses the preservation of the constitutional rigidity.

With regard to the former aspect, it is possible to witness the progressive permeation of soft-law sources into the system, that is, acts that increasingly affect the division of competences established in full-fledged normative acts. Therefore, it is not just the hierarchical setting of the institutions that is abandoned but that of the sources of law as well.

This statement leads therefore to reconsideration of both the civil law principle mandating tipicity of legal acts and—especially—of the principle of legality. In the end, civil law systems should reconsider the role of those conventional sources of law that, in common law systems, significantly contribute to the fluidity of the relations between different territorial levels.

With regard to the latter aspect, it is worth pointing out how the higher degree of deliberation involved in co-decisional procedures contributes to the blurring of the legal parameters of the division of competences defined in normative sources. Indeed, composite legal systems try to supplement the jurisdictional avenues with merit-based (rather than legitimacy-based) mechanisms of composition of conflicts. Indeed, when a competence-based conflict is solved within consultative bodies, it cannot be excluded that the final outcome may actually be in violation of constitutional provisions, therefore mitigating the rigidity of the constitution. Figuratively, this new face in the prism of intergovernmental relations appears to represent a further declination and development of the subsidiarity principle, no longer limited to administrative functions but now applying also to the jurisdictional ones (Ruggeri 2011).

The constitutional division of functions between the State or and the territorial communities, on the other hand, has already been put under strain by the EU process of supranational integration that, in eroding the sovereignty of the, also

affects devolved entities (D'Ignazio 2011). This centripetal process is able to explain in part the reason for the vocation of the intergovernmental relations with the international-communitarian landscape. Indeed undoubtedly, Community law exerts a perilous re-modulation of the areas of decentralized autonomy connected to the international responsibility of the central State. In conclusion, we would like to emphasize how inter-institutional cooperation downsizes the role of the legislative power, which, through an efficient system of bicameral representation of the communities, could represent an element of cohesion of the whole federal system (Allegretti 1996). However, it is undeniable that we are witnessing, in the majority of the democratic systems, the predominance of the executive bodies in the determination of the general policy; within this landscape, the intergovernmental relations represent the tangible aspect of this alteration in the relations between different State powers. In order to overcome the abovementioned critics, it appears more useful to modify a few aspects pertaining to the implementation of the intergovernmental relations, trying to engage more significantly the representative bodies and enhancing transparency of the collective body.

In this view, it is worth mentioning the experience of the German *Bundesrat* that, like a two-faced Janus, on one hand, is part of the legislative power and, on the other, is composed of members of the executives of the Landers and that, therefore, can represent—at least theoretically—a well-designed synthesis of these two different profiles.

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