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# On the Brink of a Federal State? The Decentralisation Model of the Peruvian Constitution

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## Abstract

In 2001, constitutional amendments significantly changed the Peruvian Constitution's chapter on decentralisation. A distribution of competencies was introduced and various organic laws were enacted in this domain. More than a decade later, the decentralisation process is still work in progress. In this article, I will analyse the relevant case law of the Constitutional Court and the most important constitutional and organic provisions in the field of decentralisation to highlight the most crucial problem areas of the decentralisation process. I will examine the question of whether Peru is a unitary or a federal state by means of comparative standards of federalism and through references to other decentralised systems.

## Key-words

Federalism, comparative constitutional law, decentralisation, South America, Peru



## 1. Introduction

Since obtaining independence, South American states have found themselves in a constant process of decentralisation and (re)centralisation<sup>I</sup>; Venezuela, Brazil & Argentina are federal states, others such as Ecuador & Chile are decentralised but still unitary states (Penfold 2009: 123; Justiniano Talavera 2004: 75 ff; Schilling-Vacaflor 2009: 24). Historically, Peru has had a predominately centralised system with occasional short periods of decentralisation (Ugarte del Pino 1978; Gutierrez Paucar 1990: 20 ff).

During the last decade, after President Fujimori left power, problems which mainly arose out of inequalities<sup>II</sup> between the rural parts of the country and the metropolitan region of Lima (Guerrero Figueroa 2003: 13 ff) led to a reconsideration of former (hypercentralistic) politics (Dammert Ego Aguirre 2003: 68 ff). As a consequence, Peru once again became a decentralised state as Regional councils were elected and competencies transferred to the regional and local level (Goedeking 2001: 198; Degregori 2003: 220).

The paper focuses on the constitutional and legal position of the regions, to answer the question of whether Peru is still a (purely) unitary state or if it can already be seen as a regionalised, or even a federal state. I will first give an overview of the relevant constitutional provisions in the context of decentralisation. Second, I will analyse the relevant law on decentralisation and the case law of the Constitutional Court with regard to comparative standards of federalism.

## 2. Decentralisation and Constitution

The classification of the Peruvian state as a unitary, regional or federal state in constitutional terms depends on the analysis of both constitutional provisions and certain organic laws on decentralisation. The criteria guiding this analysis draws from comparative studies on federal systems (Watts 2008; Kincaid 2005). Comparative standards of federalism include the distribution of competencies which vests the constituent states with legislative and constitution-making powers, a second chamber or other intergovernmental institutions, and financial resources (Watts 2008: 18 f.; Kincaid 2005: 416 ff; Gamper 2010:



83 ff). The distinction between unitary, regionalised and federal states, however, is gradually coming to depend on the quantity of the criteria met and the quality of their implementation. The more criteria are met, the more likely it is that a state will be classified as a federal state and vice versa.

The Peruvian decentralisation process is primarily laid down in Art. 188<sup>III</sup>, but Art. 43 also mentions decentralisation as a characteristic of government.<sup>IV</sup> More specific provisions can be found in several organic laws that deal with the decentralisation process: the organic law on decentralisation<sup>V</sup>, the organic law on the regions<sup>VI</sup> and the organic law on the municipalities<sup>VII</sup>.

Art. 188 entrenches some general principles from which doctrine derives guidelines for the decentralised system (see below). Art. 189 addresses the division of the territory of the Peruvian republic. Art. 190 lays down norms regarding the process of the formation of new regions and Arts. 191 to 193 contain relevant provisions concerning the regions, whereas Arts. 194 to 197 entrench similar provisions that refer to the municipalities. Art. 198 deals with the status of the capital city of Lima while Art. 199 determines mechanisms of supervision over the regions and municipalities.

## 2.1. Principles of Decentralisation

The principles guiding the decentralisation process stem from the Constitution, but are spelt out in the organic law on decentralisation.

First and foremost, Art. 43 states that the Peruvian state shall be one and indivisible, a unitary and decentralised state. Therefore, Art. 43 fosters not only decentralisation but also the unitary state, which invites the question of which principle should prevail. The wording of Art. 43 is clear on the fact that Peru should stay a unitary state; the decentralisation process has to stop where Peru would no longer be classified as a unitary state.

The Peruvian process of decentralisation has to be seen as continuous on-going and open-ended (Art. 188, Art. 4 para. a) organic law on decentralisation; Chiclayo Tello 2007: 75). Nonetheless, this principle could be changed by a constitutional amendment.<sup>VIII</sup>

According to the present Constitution, it is prohibited to step back from the decentralisation process and reverse it (Art. 188, Art.4 para. c) organic law on decentralisation). The principle of continuity has to be seen as a result of prior, unsuccessful attempts to achieve an effective decentralisation process. Moreover, according



to the Constitution, the decentralisation process has a dynamic design (Art. 188 , Art. 4 para. b) organic law on decentralisation), which means that it should be divided into different phases in order to guarantee an adequate allocation of competencies and formation of regions (Chiclayo Tello 2007: 78; Elguera Valega 2006: 41).

Dynamism and gradualness are two closely linked principles; some authors argue that the process of decentralisation has to be determined by a chronological step-by-step plan (Chiclayo Tello 2007: 81; Elguera Valega 2006: 42). This plan is legally stipulated in the II transitory provision of the organic law on decentralisation and is often criticised (Azpur 2005: 5 f) due to the fact that one phase of the plan does not have to be completed in order to continue with the next step. This approach helps accelerate the decentralisation process, but also causes problems, because it is incoherent<sup>IX</sup>.

Decentralisation is also regarded as a holistic process (Art. 188, Art. 4 para. e) organic law on decentralisation). Accordingly, the state as a whole has to take part in this process; this involves all levels of government and bodies and institutions of the state.

Finally, democracy is constitutionally entrenched as a guiding principle for the decentralisation process (Art. 4 para. d) organic law on decentralisation):<sup>X</sup> The people, particularly those who live in the rural regions far from Lima, should have more (direct) access to participation procedures (Comité Operativo Grupo Propuesta Ciudadana 2006: 70 f.).<sup>XI</sup> This should help ensure a more efficient and transparent decentralisation process (Chiclayo Tello 2007: 89 f.).

Apart from these explicit principles laid down in the Constitution, norms on transparency and good governance were enacted.<sup>XII</sup> Implicitly, subsidiarity is another relevant principle since several provisions in organic and ordinary laws and moreover the Constitutional Court refer to the principle — although not the Constitution itself.<sup>XIII</sup>

## 2.2. Territorial Organisation – Regionalisation without Regions

Art. 189 contains provisions on the territorial division of the state. Accordingly, the territory is divided into regions, departments, provinces and districts. The respective departments are placed under the jurisdiction of the regional government, provinces and districts under that of the local government. Whereas provinces, districts and departments already exist, regions have as yet not been established despite their constitutional entrenchment.<sup>XIV</sup> Therefore, the regional governments' sphere of influence is their



respective departments. The situation of having regional governments for departments is inconsistent, which is due to the planning of the decentralisation process. According to the Constitution, the decentralisation process had to be initiated by the election of regional governments in the respective departments. The formation of regions was planned only afterwards, via referendum; to date no region has been constituted and it does not seem likely at the moment that new efforts will be made to realise new, larger regions.<sup>XV</sup>

### 2.3. Lima – Municipality or Region?

Art. 198 relates to the status of the capital. The capital is not part of any of the regions, but has a special status which is entrenched in the Constitution. The territorial realm of the *Municipalidad Metropolitana de Lima* is understood as coinciding with that of the province of Lima, and the Metropolitan Municipality of Lima is empowered to perform tasks of regional and local character. According to Art. 33 organic law on decentralisation all the provisions regarding the regions are applicable to the Metropolitan Municipality of Lima as well. Therefore, Lima holds the same competencies as the regions and the following thoughts apply equally.

### 2.4. Organisational Structure of the Regions

Art. 191 determines the organisational structure of the regions: a regional council (*consejo regional*) shall have mainly “normative”<sup>XVI</sup> functions, whereas the regional president (*presidente regional*), relying on the administrative authorities of the region (in particular the so-called *gerencias regionales*), has executive functions. He is advised by the regional coordination council (*consejo de coordinación regional*) that consists of the mayors of the provincial municipalities and representatives of civil society.<sup>XVII</sup> Elections for the regional council and the presidency are to be held every four years.<sup>XVIII</sup>

### 2.5. Distribution of Competencies

Art. 192 explicitly enumerates the competencies of the regions. From a regional perspective, the mere fact that the distribution of competencies is laid down in the Constitution is advantageous, since constitutional provisions are less subject to changes than organic laws or ordinary acts of parliament. From an overall perspective, however, both Art. 192 and the organic laws on decentralisation are less *region-friendly*.



The competencies of the regions are laid down in ten paragraphs which include competencies such as the enactment of norms concerning the organisational structure and budget of the region (Art. 192 para. 1), the joint elaboration of a regulatory plan with municipalities and civil society concerning regional development (Art. 192 para. 2), the administration of the regions' properties and their earnings (Art. 192 para. 3), the regulation and concession of permissions, licences, privileges and rights concerning services of regional responsibilities (Art. 192 para. 4), the promotion of the socio-economic development of the region and the execution of the corresponding regulatory plans (Art. 192 para. 5) and the promotion of competition, investment and financing for the implementation of infrastructural projects of regional impact and scope (Art. 192 para. 8). Moreover, regions are competent to pass "norms" that are required for regional administration (Art. 192 para. 6) and they may table legislative initiatives in Congress, insofar as they concern matters of regional competencies. Art. 192 para. 10 concludes with a provision that allows regions to exercise any other function in accordance with laws.

One of the most important paragraphs concerning the distribution of competencies in the regional context is Art. 192 para. 7, and this is due to its content: it is almost the only paragraph that enumerates spheres of competence, such as agriculture or commerce, and is therefore of significant practical relevance, whereas the other paragraphs listed above state more abstract and "technical" competencies such as the passing of bills or the elaboration of plans. The article states that it is a regional competence to foster and regularise activities and/or services in different subject matters (agriculture, fishery, industry, agroindustry, commerce, tourism, energy, mining, transportation and traffic, communication, education, health and environment) in accordance with laws.

Art. 192 para. 7 is noteworthy not only because of its broad content but also because, together with numeral 10, it is the only subject matter that contains the clause "in accordance with laws". The wording "in accordance with laws" refers to organic or ordinary laws of the central level. Regional norms cannot fall under the term "laws" used in Art. 192 para. 7, para. 10, as they are named "ordinances" and neither the Constitution nor the organic laws that develop the relevant provisions on decentralisation ever use the term "regional law" or "law" in lieu of "regional ordinance". The clause "in accordance with laws" weakens the position of the regions considerably, as it prevents them from enacting laws unless a national law empowers them to do so.



Moreover, the distribution of competencies suffers from severe systemic weaknesses:

Firstly, the lack of distinction between legislative and executive competencies is highly problematic, and the Constitution does not provide such a distinction, so one could assume that either only executive competencies are distributed or that a competence matter always encompasses legislative and executive functions.

For the Constitutional Court, one of the core aspects of the Peruvian decentralised system is the political autonomy of the regions that entails normative (legislative)<sup>XIX</sup> authority; however, the assumption that a competence matter always encompasses legislative and executive functions – as is the case in Spain, where the exclusive powers of the autonomous communities entail legislative and administrative functions (Argullo and Bernadí 2006: 248) – cannot be (and actually is not) the case in Peru, since the distribution of competencies laid down in the Constitution explicitly states that the competence matters listed in Art. 192 para. 7 can only be exercised “according to laws”. This means that the Constitution partly delegates the regulation of the competence matters to the central legislator (Congress). A glance at the respective laws shows that they clearly state which functions are regional functions and which functions are the responsibility of the central level, but do not distinguish between legislative and executive functions, either. Hence, both levels are competent with regard to different functions, which are listed in the organic law on the region yet do not entail “legislation” or “execution”, but rather are described as “planning”, “promoting” or “fostering”. As a consequence, since the organic laws developing the distribution of competencies mention different types of competencies, the role of the regions (legislative and/or executive) in each type of competence has to be examined through an analysis of its functions.

Secondly, the Constitution neither distinguishes between exclusive and shared respectively concurrent competencies nor explains how to interpret the non-exclusive competencies. This is especially relevant for the competence matters laid down in Art. 192 para. 7 as they can only be exercised “in accordance with laws” and therefore cannot be exclusive competencies. The distinction between exclusive and shared competencies is laid down in the respective organic laws, based on Art. 192; those competencies mentioned in the Constitution itself are classified “constitutional competencies” (Art. 9 organic law on the regions) and part of them (excluding those with the clause “according to laws”) is – although in different wording – listed again as “exclusive competencies” of the regions





(Art. 10 para. 1 organic law on the regions, Art. 35 organic law on decentralisation). According to Art. 10 para. 2 organic law on decentralisation the exclusive competencies of the regions cannot be restricted by either the (central) legislative power or the (central) executive power.

Those paragraphs which include the clause “in accordance with laws” – that is, Art. 192 para. 7 and 10 – are listed as “shared competencies” (“*competencias compartidas*”, Art. 10 para. 2 organic law on the regions, Art. 36 organic law on decentralisation). Still, there remain doubts on how to interpret the so-called *competencias compartidas*, especially if they have to be seen as either concurrent or shared competencies. Where shared competencies are competence matters where different levels are empowered to exercise different roles, the character of concurrent competencies is different; both levels possess the power to realise a certain competence matter (Watts 2008: 87 ff).

The organic law on the regions enumerates the relevant specific functions of the regions for each of the competencies laid down in Art. 192 para. 7 t, but often remains cryptic by using terms like “planning” without providing an explanation of what “planning” should entail. Frequently it is not clear to what these terms refer, but at least it is apparent that through the allocation of different functions to the different levels of government the latter are empowered to assume different roles in a certain subject matter. Thus, the *competencias compartidas* do not constitute concurrent, but shared competencies.

There remains the question of if, and to what extent regions are empowered to exercise legislative functions in regard to shared competencies. The respective provisions in the organic law on the regions are not clear on that, listing e.g. in the field of education different specific functions – none of them is referring to regional laws or legislation, but rather using terms like “develop”, “to phrase policies”, “stimulate” (Art. 47 organic law on the regions). In the absence of a clear legal provision on how to understand shared competencies, especially with regard to possible legislative and/or executive functions, other concepts for determining those functions have to be applied. As the Constitution and the organic law on the regions both are silent on the question of (competence) interpretation, the case law of the Constitutional Court is of high importance. In the past, the Court developed the competence test and applied the loyalty principle (introduced by the Constitutional Court, but also widely spread in full-fledged federal systems<sup>xx</sup>) and the so-called principle of competence.



Finally, Art. 192 is – as already mentioned – further developed by two organic laws:<sup>XXI</sup> the organic law on decentralisation and the organic law on the regions. Art. 106 states that only certain matters, like matters regarding the organisation of the state, are subject to organic laws. Whereas the Constitution can only be amended in the rather complicated procedure laid down in Art. 206<sup>XXII</sup>, organic laws are subject to the same procedural rules that apply to ordinary laws<sup>XXIII</sup>. From a regional point of view, this has positive and negative aspects; both sets of rules (constitutional provisions and organic law provisions) are passed by the central level. From the regional perspective if norms are region-friendly, it is preferable that they are laid down in the Constitution; if they are not, it is probably more advantageous if they are laid down in organic laws, as changes are easier to realise and therefore more probable. However there is the risk of a worsening of the situation of the regions as well.

## 2.6. Residuary Clause

While the Peruvian Constitution does not explicitly regulate for residual competencies, the Constitutional Court makes deductions based on Art. 4 organic law on the executive branch, which provides that all competencies, functions and attributions which are not attributed to the regional or local level are to be considered as belonging to the competence sphere of the executive branch. The Constitutional Court takes from this provision that the competencies of the subnational governments are exhaustively listed (*case no. 0020-2005-PI/TC*, recital 49). Moreover the Court holds that the residuary clause could be used as an indicator in order to find out whether a state is a federation (*case no. 0020-2005-PI/TC*, recital 46). Therefore, according to the Court, Peru does not rank among federal states, as the residuary clause is not favourable to the regions. This seems highly problematic for several reasons.

Firstly, the allocation of residuary powers at constituent state level is only true for the majority of federations (and also for the established South American federations, namely Argentina, Mexico and Brasil [Blanco Valdés 2012: 206 ff]), but does not constitute an indispensable characteristic of a federal system (Watts 2008: 89). Without doubt states such as India and Canada are federal systems – although the residual authority is retained by the federal government (Watts 2008: 89).



Secondly, a residuary clause in favour of the central level would have to be stated in the Constitution or in an organic law concerning decentralisation. As will be shown, the Constitutional Court assumes that regions are vested with legislative authority. Therefore, a residuary clause that should not only entail executive but also legislative functions cannot be laid down in the organic law on the executive branch as the organic law on the executive itself states that it applies only to the executive branch (and therefore not to the legislative branch). However, a residuary clause would have to be valid for the executive and the legislative branch.

Thirdly (and closely linked to the aforementioned problem), the wording should be changed, e.g. into “*corresponde al gobierno nacional*” or “*corresponde al Estado*” instead of “*corresponde al Poder Ejecutivo*”, since – if we follow the case law of the Constitutional Court as well as doctrine – not only executive but also legislative competencies are transferred to the local and regional level.

## 2.7. Legislative Authority and Constitution-Making Powers

It is highly questionable whether regions are vested with legislative authority or whether their “*ordenanzas*” can only be qualified as secondary legislation. According to Art. 192 preamble, all competencies always have to be exercised in harmony with national plans and policies. This phrase restricts the regions’ margins of action.

Additionally, regional “norms” are named “ordinances” instead of “regional laws”, etc. This gives the impression that regional norms are not laws but rather administrative regulations.<sup>XXIV</sup> Nonetheless, the conclusion cannot be drawn that the use of the term “ordinance” automatically excludes the possibility of the existence of a (regional) law, similar to the so-called “*décrets*” and “*ordonnances*” issued by the parliaments of the Communities and the Regions of Belgium which – despite their names – are considered laws (De Becker 2011: 255; Gamper 2004: 208 f.).

Art. 192 and the relevant organic laws use the cryptic term “*norma*” or “*norma*” and “*ordenanza regional*” when dealing with regional norms that are issued by the regional councils. In addition, ordinary laws do not seem to mention the term “law” or “legislative functions” in regard to the regions. Likewise, the Constitutional Court seems to avoid terms like “legislative” or “regional laws” in this context, but has used it in a number of cases on decentralisation. In a case from 2004<sup>XXV</sup>, the Peruvian Constitutional Court used



the term “legislative” in order to clarify that the distribution of competencies implied a restriction of the legislative power at the central level.<sup>XXVI</sup> In perhaps the most famous case on decentralisation issues, the so-called *boja de coca* decision<sup>XXVII</sup> of 2005, the Court quoted Fernando Badia<sup>XXVIII</sup>, according to whom autonomy always implies legislative competencies, an argument that was affirmed by the Court. At the same time, it stressed the importance of the principle of loyalty; regions were not allowed to legislate<sup>XXIX</sup> if it was against national interests.

Probably the strongest argument in favour of legislative authority of the Peruvian regions is Art. 200 para. 4; which lists different norms as having the status of an Act of Parliament, among them “regional norms of general character”.<sup>XXX</sup>

Hence, the Peruvian Constitutional Court deduces regional legislative functions from constitutional provisions (Art. 200 para. 4 and Art. 191) and the concept of autonomy. Nonetheless, the Constitutional Court does not say so openly.

It is already problematic that the constitutional and legal provisions are not clear on the question of whether regional legislative authority shall be conferred or not; however, the case law of the Constitutional Court warrants further critical examination. Since it can only be assumed that the Court approves the concept of regional legislative authority (and not the opposite), it is unclear why the Court does not openly say so. On account of such vague legal provisions, a clearer case law of the Court would be of great importance and could have a positive impact on the entire process of decentralisation as it could balance the vague legal provisions and serve as a stabilising factor.

The deduction of legislative authority from the concept of autonomy is not unheard of in the continent; the Bolivian Constitution, for example, clarifies in Art. 272 that autonomy implies (amongst other functions) the possibility to exercise legislative functions. Art. 272 of the Bolivian Constitution could therefore serve as a prototype for a possible future Peruvian constitutional provision.

Given that the regions possess legislative authority, the next question – whether the regions have constitution-making powers – arises. According to Art. 192 para. 1, regions are empowered to regulate their own organisation. For this purpose, each region has a statute, the so-called ROF (*reglamento de organización y funciones*<sup>XXXI</sup>), enacted by regional ordinance, but without any particular formal requirement which could justify the assumption that the ROF would be equivalent to a regional constitution. Here, the Bolivian



Constitution could once again serve as a prototype: Art. 275 declares the statute of each subnational level (*Estatuto* or *Carta Orgánica*) to be passed by a 2/3-majority vote and to constitute the “institutional basic norm of the territorial entity”. In the case of Peru, neither the Constitution nor other laws allow the conclusion that regions are vested with constitution-making power. Still, some regional ordinances possess a partly constitutional character that refers to constituent statehood, which is indicated by regional symbols or hymns, for example.<sup>xxxii</sup> To date, nobody has claimed that those ordinances could be unconstitutional and the Constitutional Court therefore has not had the possibility to scrutinise these ordinances.<sup>xxxiii</sup>

## 2.8. Interpretation of Competencies

In the context of the distribution of competencies, problems arise from missing rules (and an absence of clear rulings) on methods of interpretation of competencies<sup>xxxiv</sup> and other rules to solve misunderstandings created by the distribution of competencies - an example is the loyalty principle which the Constitutional Court developed in its case law<sup>xxxv</sup>.

The competent umpire to decide on the interpretation of the Constitution is the Peruvian Constitutional Court. The prototype of a Constitutional Court was set up in Peru in 1979. Since 1993 there has been a proper Constitutional Court; however this Court – instituted by Art. 201 still faces some institutional problems (e.g. in regard to the proportionality test Rubio Correa 2011: 127).

Similar to other Latin American countries, constitutional review is constructed as a so-called “hybrid system” (Frosini and Pegoraro 2008: 50), which means that norms can be declared unconstitutional and repealed *erga omnes* by the Constitutional Court on the one hand, but can also be declared inapplicable by a judge of an ordinary court (*inter partes* effect) in a concrete case on the other hand. According to Art. 202 para. 3, the Constitutional Court is competent to decide (amongst others) on conflicts of competence and, under Art. 200 para. 4, to decide on the constitutionality of regional ordinances.

In the context of decentralisation, two concepts developed by the Constitutional Court are of importance: the first is referred to as the “*bloque de constitucionalidad*” (block of constitutionality).<sup>xxxvi</sup> In the event that the constitutionality of a norm is doubtful, the Constitutional Court not only examines the relevant constitutional provisions but also



organic and ordinary laws in order to determine whether the norm is unconstitutional. However, the block of constitutionality is not a static concept; depending on the respective case, the norms that form it may vary. Furthermore, it is not only important with regard to the topic of decentralisation but also in considering other cases. For instance, if it is doubtful whether a regional ordinance or an ordinary national law based on a shared competence laid down in Art. 192 para. 7 is in line with the Constitution, the organic law on the regions and the organic law on decentralisation have to be taken into account for its interpretation. But, as the Constitutional Court holds, in some cases it might be necessary to consider other provisions as well. Therefore, in order to know if a regional ordinance is in line with the constitutionally laid-down allocation of competencies, a considerable number of legal provisions have to be taken into account.<sup>xxxvii</sup>

The second is the concept of the “*test de competencia*” (competence test)<sup>xxxviii</sup>, which was indeed introduced for issues arising mainly out of the decentralisation process. This test consists of several principles that help determine whether or not a norm exceeds the competence on which it is based, as outlined below.

## 2.9. A More Detailed Look at the Competence Test

To determine which body is vested with the power to exercise a certain competence, the Constitutional Court applies its “*test de competencia*” (competence test) which entails, amongst others, a principle known as the “competence principle”<sup>xxxix</sup>. This principle states that regional ordinances are not inferior to ordinary laws of the central government. If a conflict between a national and a regional norm arises and it is questionable whether the regional norm should regulate a certain matter, this conflict shall be solved by examining whether the region is competent to issue that norm.<sup>xl</sup>

The competence test consists of several principles, such as the principle of unity (consisting of the sub-principles of cooperation and solidarity, of enumeration and residuality, and the principle of control) and is of importance especially when shared competencies come into play. After testing the principle of unity, the principle of competence (consisting of the principle of competence in the narrow sense and the concept of the “block of constitutionality”) has to be applied. Other principles such as the principle of efficiency<sup>xli</sup> of implicit powers and the principle of progressive transfer of



competencies also come into play. The Constitutional Court deduces (and further develops) these principles from constitutional provisions, especially Art. 188.

In a next step, the Constitutional Court applies the competence test as explained above. It is often confusing, since the competence test and its principles are applied by the Court only *in abstracto*. The deliberative steps taken by the Court are not elaborated upon; the Court mentions the steps of the competence test but does not match them with the concrete facts. Hence, although these principles play a certain role in the consideration of the Constitutional Court, their relevance and the exact extent to which they are taken into consideration are left open. This raises another problem in that it is not clear how to proceed in the event that the application of two principles leads to different results; which principle has more weight, and which principle should prevail?

Although the competence test and its principles must be understood as guiding criteria to determine whether the competence is in line with constitutional requirements or not, it cannot be seen as proper method of interpretation (generally Gamper 2012: 110 ff). As it is unlikely that the legislator will reduce uncertainties by stating clear legal provisions, it can be assumed that the conclusion Rubio Correa (2011: 107) draws with regard to the proportionality test is also true for the competence test; as long as the Peruvian Constitution (and its system of constitutional control) is still not consolidated, the Constitutional Court should help create clarity and legal certainty through the improvement of the application of this test by a stable case law.

### **Excursus no. 1: Distribution of Competencies in the Mining Sector – an Example**

The complexity of the distribution of competencies can be illustrated through an examination of the situation of the mining sector. The most important cases brought before the Constitutional Court in recent years concern the regional ordinances which prohibit mining – not directly, but in roundabout ways. In the case of a regional ordinance prohibiting a mining project<sup>XLII</sup>, the Constitutional Court had to determine whether mining was an exclusive or concurrent competence of the regions. For this purpose, it used the *test de competencia* and the *bloque de constitucionalidad*.<sup>XLIII</sup>

Mining is one of the subject matters mentioned in Art. 192 para. 7, but the Article only provides that mining falls within the competence of the regions according to the law. From the formulation “*according to the law* [respectively laws]”, it can be deduced that Art. 192



para. 7<sup>XLIV</sup> has to be understood as a shared competence, partly executed by the regions and partly by the central government. As laid down above, the law in this case refers to the organic laws that implement the Constitution, but, depending on the case, it could also imply ordinary acts of parliament.

Concrete functions in the field of mining are enumerated in the organic law on the regions as so-called ‘specific functions of the regions’, and contain a clause which states that regions must always take into account national plans when exercising their functions. The latter clause is nothing but a manifestation of the loyalty principle, binding in this case the regional government to respect the national plans. Art. 59 of the organic law on the regions contains the respective provisions on mining; according to its para. c, regions are empowered to foster and monitor activities of “small mining” and artisanal mining (*pequeña minería* and *minería artesanal*), and furthermore support activities of exploration and the exploitation of mining resources of the region according to law.

As a consequence, by reviewing all laws that somehow regulate the competence matter of mining, it is possible to establish which functions the region is empowered to exercise in this competence. Moreover, Art. 59 para. f. organic law on the regions empowers regions to grant mining licenses for “small mining” and artisanal mining in the region. To illustrate the interpretation of these laws the ‘Conga’ and ‘Cusco’ cases are cited below.

In the ‘Conga’ case the mining project was not a project of small mining or artisanal mining which would have fallen under the competence of the regional government in accordance with Art. 59 para. 7. Although the central level was in favour of the project, in order to protect its population, the region tried to prohibit the project indirectly by declaring it “infeasible” because of environmental problems.

The regional ordinance in question in the ‘Cusco’ case prohibited the issuing of mining licenses in the whole region of Cusco. As large scale mining (*gran minería*) is not listed as a competence of the regions, it is to be construed as a competence of the central level. Therefore, the regional ordinance which declared the project infeasible in the Conga case was unconstitutional. In the Cusco case, the Court, similarly to the Conga case, argued that since “large scale mining” was a national competence, the region was not competent to declare that no mining licenses could be issued, since it indirectly interfered with a national competence.





The examples show the weak position of the regions, as not only mining, but all the subject matters listed in Art. 192 para. 7 suffer from similar difficulties.

As a consequence, regions are limited in exercising their functions; as more national plans are elaborated, and the more detailed they become, the less leeway regions possess. Moreover, national plans do not have to be organic laws, but can also be “ordinary laws“, decrees, ordinances or resolutions.

### Excursus no. 2: Regional Identity

Interestingly, regional ordinances on “cultural issues”, e.g. concerning regional hymns and symbols, typical food, etc., are becoming increasingly common. For example, Art. 6 para. a) of the organisational statute of the region of Apurímac states that one fundamental aim of the region is the construction of a united community with its own cultural identity (“*Son objetivos fundamentales del Gobierno Regional, los siguientes: a) Construir una comunidad integrada, unida y con identidad cultural, [...]*”).

Whereas regional ordinances dealing with economically relevant subject matters are often brought before the Constitutional Court, ordinances regarding cultural issues without any economic background have not been challenged. However, it may well be the case that some of these regional norms might not always be in line with the Constitution, as the following example of a regional ordinance issued by the region of Cusco illustrates.

Based on the shared competence of “education” as laid down in Art. 192 para. 7 and the respective laws further developing it<sup>XLV</sup>, the region of Cusco introduced, in Art. 4 of the regional ordinance 025-2007-CR/GRC.Cusco that “in the future” any authority and public official of the region would have to have basic skills in Quechua. At least with regard to the relevant constitutional norms, it seems questionable whether the competence on which the region bases Art. 4 of the ordinance covers the requirement of additional skills for public employees in the region of Cusco, since Art. 2 para. 2 prohibits discrimination *inter alia* based on language and Art. 2 para. 19 2<sup>nd</sup> sentence guarantees every national the right to interact with authorities in his or her language via an interpreter. The competence of education and its functions (deriving mainly from Art. 9 and 10 law on the regions) empowers regions to introduce norms on bilingual and intercultural education so as to foster the use of original languages in the region, but does probably not provide a



basis for the requirement of a basic knowledge of Quechua for public officials in the region, as the regional ordinance itself declares.

The Constitution is silent on the question of regional identity. Questions concerning cultural issues are partly covered by provisions on education and are partly a local competence according to Art. 195 numeral 8. It remains to be seen how the strengthening of regional identities will influence the aim of building larger regions – and whether there will be any reaction of the central government in regard to the growing amount of regional ordinances concerning cultural issues.

## 2.10. The Role of the Subsidiarity Principle

Although the principle of subsidiarity is of considerable importance the principle itself is ambiguous – it is explicitly prescribed in laws concerning decentralisation in Peru (Art. 4 para. f. and Art. 14 organic law on decentralisation), various regional norms refer to it and – moreover, some regional organisation statutes (*ROF*) contain a clause on subsidiarity.<sup>XLVI</sup> The role of this principle, which often “takes on particular salience in periods of institutional transformation” (Follesdal 1998: 191), is not clear at all, though. Therefore, some important issues of this principle in the present context require examination.

One problem is whether the subsidiarity principle can justify legislation of regional governments in matters laid down as shared competencies or if it can only be understood as guidelines for the legislator while elaborating the distribution of competencies. In the preamble of its ordinance regarding the ‘Conga’ case above, the region of Cajamarca pointed out that as a result of the application of the subsidiarity principle, the level of government that is the most suited<sup>XLVII</sup> to perform a competence should be the one empowered to actually exercise the competence. In this case the region invoked the subsidiarity principle to pass an ordinance based on a function of a shared competence (specifically: large scale mining) that was assigned to the central level.

As discussed above, according to the Constitution (and the respective provisions) and case law, the competencies known as “*competencias compartidas*” have to be understood as shared competencies (where each body is exercising different roles) and not as concurrent competencies. Functions assigned to the different levels of government through the organic laws and acts of parliament are different ones and do not allow both levels to perform the same action in the same subject matter. Therefore, in the case of shared



competencies the subsidiarity principle can only be understood as guiding the legislator while elaborating the distribution of competencies. and hence the subsidiarity principle cannot justify legislation of regional governments e.g. in the field of mining known as large scale mining<sup>XLVIII</sup>, as the functions are already clearly laid down in the relevant provisions.<sup>XLIX</sup>

As many (and probably the most important) subject matters are equally laid down in Art. 192 subpara 7 the conclusions of the above mentioned case also apply to those competence areas. This leads to the question of the extent to which the subsidiarity principle is relevant, if at all. An examination of case law leads to the conclusion that it is indeed the establishment of the distribution of competencies that is a field of application of the subsidiarity principle.

In the ‘Mufarech’ case<sup>L</sup>, the Constitutional Court linked the subsidiarity principle to the principle of proportionality.<sup>LI</sup> According to the Court, the role of the principle of proportionality is to limit the application of the subsidiarity principle – or, in other words, to determine whether the allocation of a competence to the lower level of government really constitutes a benefit for the population. Three criteria of the proportionality principle have to be met; first, the allocation of the competence has to be in line with the aims of the Constitution; second, the allocation envisaged has to be the most efficient and “mildest” solution; and third, the allocation must not be against the interest of any other level of government or restrict the capacity to act of any other level of government. To invoke the proportionality principle might help determine the most effective allocation of competencies.

The Court seems to use the term in a way which would suggest that the application of the principle of subsidiarity always requires the allocation of a power at the lowest level of government. Subsidiarity, however, does not necessarily imply this. Rather, it implies that if the lower level is capable of exercising a certain competence more efficiently than the other levels of government, the lower level should be competent. The principle of subsidiarity always has to be applied when competencies are allocated. Once competencies and functions are distributed it does not make sense to invoke the subsidiarity principle.

The subsidiarity principle thus does not play a big role in the Peruvian decentralisation process. Nonetheless, the consideration of the principle in the process of allocating competencies and functions can only be recommended, as this could improve the



efficiency of the decentralisation process. Nonetheless the application of the subsidiarity principle is no panacea; as the experiences of other federal states and the EU have shown, the translation of the subsidiarity principle into a justiciable rule of law is not easy at all (for Germany Taylor 2009).

### 3. The Second Chamber or Other Mechanisms to Participate in the Decision-Making Process at the Central Level

A bicameral system where regions are represented in the second chamber allows subnational entities to influence decisions made by the central level (Russell 2001). However, this depends on factors such as the selection (or election) of the members (or powers) in relation to the first chamber (Watts 2008: 147 ff). In the era of president Fujimori, the former bicameral system in Peru was changed into a unicameral system (Salcedo Cuadros 2009: 271 ff; Estrada Choque 2008: 675 ff). Several bills on the reestablishment of a second chamber have been introduced in Congress since then – so far without any success.<sup>LII</sup> Still, there remain some possibilities for regions to directly participate at the central level; in several subject matters, regions are authorised to propose bills directly in Congress.<sup>LIII</sup>

### 4. Fiscal Powers

In the field of fiscal competencies, regions hold only little power. Art. 192 does not list tax powers as regional competencies, or even as a shared competence (“according to laws”). Art. 192 numeral 3, in connection with Art. 193 numeral 3, is the only reference to regional taxes: the former empowers regions to administrate their properties and earnings, and the latter lists taxes created through (national) laws in favour of the regions, as regional income. This means that, without a national law, regions are not allowed to “create” taxes, but that the national legislator could empower them to do so via (ordinary or organic) law. Therefore, as long as there is no such law the regions depend on transfers by the central government and certain quotas on royalties<sup>LIV</sup>.

Furthermore, Art. 74<sup>LV</sup> must be taken into consideration as it authorises regions and municipalities to create, alter and cancel charges and fees in their respective jurisdiction and



within the limits provided by law. This wording<sup>LVI</sup> raises the question whether regions and municipalities are allowed to decide on their contributions and fees as long as there is no (central) law, as long as their norms do not exceed a (central) law or if a (central) law is prerequisite for regional and local norms (Ruiz de Castillo Ponce de León). The wording of Art. 74 would seem to support the view that regions and municipalities can determine their contributions and fees without a national law empowering them to do so, but respecting national laws that could eventually set certain limits which could be extensive. However, this view is not shared by doctrine and the Constitutional Court; accordingly, they share the opinion that regions cannot directly determine the amount of fees and contributions (*case no. 0012-2003-AI/TC*).<sup>LVII</sup>

## 5. Coordination and Cooperation

The importance of coordination in the horizontal as well as the vertical sense has been steadily increasing, not least due to case law of the Constitutional Court. The Court has held that not only the regions but also the central level of government have to consider the principles of cooperation and solidarity when exercising their respective competencies (*case no. 00011-2008-PI/TC*). The most important institution for cooperation is the National Council on Coordination. This council unites representatives of the central, regional and local level and is expected to represent regional and local interests at the central level, however the regions in particular criticise its limited sphere of influence, since it can only give recommendations and not enact binding decisions. Therefore, regions and local governments have created their own institutions and are now represented in associations that operate jointly at the central level. The association of regions in particular seems to work successfully via informal meetings with representatives of the central level, by coordinating e.g. proposals for bills in Congress and by joint statements on day events.<sup>LVIII</sup> Although the very existence of the National Council on Coordination as a (formal) institution of cooperation — is a positive it would be advantageous if it had more weight. It could further the decentralisation process and better serve as a platform of communication for the different levels.<sup>LIX</sup> When compared to federal states the status quo in Peru is not surprising; very often actions of cooperation and coordination are exercised by informal means (Watts 2008, 118).



## 6. South American Federalism?

Federal systems can be found all over the world and in states with very different socio-political circumstances, histories and needs (Blanco Valdés 2012: 11 ff). This raises the question of whether we require different parameters from the (North-) American and European standard to determine if states on the South American continent are federal or not. The literature does not support this assumption (Armenta López 2010: 83 ff; Fernández Segado 2003: 4; Blanco Valdés 2012). For example, Watts (2008) considered Latin American states like Argentina, Brazil, Mexico and Venezuela in his comparative research, while Kincaid and Tarr (eds. 2005) included chapters on Brazil and Mexico and Saxena (2011) included states like Brazil, Canada, India, Malaysia, Spain and Sri Lanka in her “Varieties of Federal Governance”. Blanco Valdés (2012: 15) distinguishes between the classic federations (United States, Switzerland, Australia and Canada), the Ibero-American federations which are to be classified as federal systems (Argentina, Mexico and Brazil) and, lastly, what he calls the “practical totality” of European federal states (Russia, Germany, Austria, Belgium and Spain), and conducts a comparative analysis of their (federal) structure.

For Watts (2008:18) “federations have exhibited many variations in the application of the federal idea”, and whilst there are “certain structural features and political processes common to most federations” it is certain that “[t]here is no single ‘ideal’ or ‘pure’ form of federation” (ibid). Nonetheless, Latin American states do have their common grounds; e.g. in Argentina, Brazil and Mexico the idea of federalism has a rather long tradition<sup>LX</sup> and their Constitutions were (at least in regard to the federal idea) strongly influenced by the U.S. Constitution. Therefore, even if it is doubtless that Ibero-American countries do have their peculiarities, this is not reflected in a specific theory of federal states.<sup>LXI</sup>

## 7. A Federal Design for the Peruvian Constitution – Still a Long Way to Go?

First, the fact that the distribution of competencies is laid down in the Constitution has to be seen as positive from a regional point of view. In addition, the regions are not only



referred to in *abstracto*, but each region is explicitly mentioned in the Constitution; the abolition of a single region would need a constitutional amendment, which grants a certain stability.

Second, the primary problems of the norms on decentralisation of the Peruvian Constitution, and more specifically of the distribution of competencies, arise from the missing distinction between legislative and executive competencies and the use of highly ambiguous language; terms like “competence”, “function”, etc., are used in different contexts and it is difficult to arrive at a clear definition. The most recent demonstration of this ambiguity is a bill proposed in August 2013<sup>LXII</sup>, which was lodged by a member of Congress in order to empower the Presidency of the Ministers Council to determine the scope of transferred competencies (shared competencies). Irrespective of the question of whether the Presidency of the Ministers Council was indeed competent, it shows that Peruvian politicians have become aware of the deficiencies of the decentralisation process.

Third, to prevent conflicts like those presented in the cases concerning mining, it could be beneficial to entrench a constitutional distinction between legislative and executive competencies. It could, for instance, be helpful to provide that in matters of shared competence, the central government is competent to legislate and the regional governments are competent to execute those laws or to enact their own laws (ordinances) in the framework of central laws. Since the functions laid down in the organic laws on the regions are not explicit on the question of whether they allocate executive or legislative competencies of the respective government, such clarification would help prevent competence conflicts.

Fourth, the question whether regional ordinances are laws or just bylaws remains unanswered. The wording of the Constitution and the organic laws that develop the relevant constitutional provision are not clear on that question. On the one hand, doctrine and the constitutional court seem to assume that regional ordinances are laws or at least are treated like laws. On the other hand, part of doctrine (Apac 2005) draws the conclusion that ordinances are just secondary legislation. Supporters of the latter opinion particularly argue that any regional norm has to be in line with national laws and plans. It would be highly advisable to clarify this via a constitutional amendment or an organic law.

Fifth, the methods used by the Constitutional Court are often opaque. The best example in this context is probably the test of competence, as it remains unclear how it



shall be applied *in concreto*.

Finally, as mentioned above, the Constitutional Court is still a comparatively recent addition to the institutional landscape of Peru. Rules of constitutional interpretation are not laid down in the Constitution and have, as yet, not been developed by the Constitutional Court in a predictable manner. Written rules of constitutional interpretation could therefore help balance some of the problems the Peruvian Constitutional Court is still facing (generally Gamper 2012: 310 f.) and could further democratic legitimacy, and increase the predictability of and standardise the interpretation of legal norms (Gamper 2012: 89). At the very least, they could pave the path to a consistent<sup>LXIII</sup> – albeit possibly still centralistic – case law on the subject of decentralisation.<sup>LXIV</sup>

Still, the question remains; is Peru a federal state? If we follow the criteria of federal states, the answer can only be in the negative. Despite recent (positive) developments showing that Peruvian politicians are aware of the variety of problems (distribution of competencies, the absence of a second chamber/mechanism to participate in the decision-making process on national level, fiscal policy, etc.), the reality of the situation suggests that Peru is to be qualified as a decentralised, respectively regionalised, but still unitary state.

Compared to the South American trend, this is no surprise. Whereas the established federal systems on the continent, including Argentina, Brazil and Mexico, are not expected to undergo significant changes towards unitary systems, decentralisation is an important issue for most of the unitary states. Bolivia's 2009 Constitution and the new Ecuadorian Constitution both install a decentralisation scheme that, at least in the Bolivian case, should not be underestimated. For example, Bolivia's subnational entities are even (at least partly) vested with legislative authority (Art. 272 Bolivian Constitution), and are empowered to pass their own statutes with increased formal requirements (2/3<sup>rd</sup> majority). Similarly, Chile and Colombia have experienced at least small steps towards decentralisation; in Chile, a law on regional governance and administration was implemented in 1993 (*Ley orgánica constitucional sobre gobierno y administración regional*<sup>LXV</sup>; Arenas 2009: 34) and in Colombia, the 1991 Constitution introduced a concept of autonomy for certain territorial divisions (Art. 1 Colombian Constitution; Ordonez Santo 2012).

To conclude, it can be asserted that decentralisation is a general trend on the continent, primarily in the context of democratisation and the distribution of economic resources (González 2008: 212, 213). Very often, these processes are not only influenced by





developments in neighbouring states but also by European developments and the case law of European Constitutional Courts on the topic of federalism and regionalism. For example, the Peruvian constitutional court referred to Spanish and Italian literature on decentralisation (e.g. in *case no. 0002-2005-AI*, *00031-2005-AI*, *00010-2008-AI* and *00011-2008-AI*) and to the Spanish, Italian and German situation concerning federalism and regionalism in general (e.g. in *case no. 0002-2005-AI* and *0020-2005*, *0021-2005-AI*) numerous times. Hence, trends of Spanish and Italian regionalism in particular might also influence the Peruvian decentralisation process. A federal design for the Peruvian Constitution thus remains unfinished business – at present.

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<sup>I</sup> Lately, most Latin-American constitutions have intensified their decentralisation processes (Uprimny 2011: 1595 f.).

<sup>II</sup> One of the as yet unrealised aims of the decentralisation process is therefore to reduce such inequalities (Art. 4 para. c organic law on decentralisation) and to provide the population with better public services (Palacios and Roca 2000).

<sup>III</sup> All references to Articles are to the Peruvian Constitution unless otherwise indicated.

<sup>IV</sup> Cf. Gamper 2010: 103 ff.; Watts 2008: 95 ff.

<sup>V</sup> Law No. 27783, *Ley de Bases de la Descentralización*, as amended.

<sup>VI</sup> Law No. 27867, *Ley Orgánica de Gobiernos Regionales*, as amended.

<sup>VII</sup> Law No. 27972, *Ley Orgánica de Municipalidades*, as amended.

<sup>VIII</sup> The Peruvian Constitutional Court has qualified certain principles as “*nucleo duro*” of the Constitution, which cannot be changed (a concept similar to the German eternity clause). These principles are determined by the jurisprudence of the Constitutional Court; however, decentralisation has not yet been mentioned as such an “eternal” principle. Interestingly, e.g. the Spanish Constitution also aims to reconcile two opposing principles, similar to the Peruvian ones: the unity of the Spanish nation on the one hand and the guarantee of autonomy of nationalities and regions on the other hand (Art. 2 Spanish Constitution; Argullol and Bernadí 2006: 250). Other constitutions deal with similar (seemingly opposing) principles, e.g. Art. 1 of the Bolivian Constitution guarantees autonomy, but also clearly states that Bolivia is a unitary state, comparable to Art. 1 of the French Constitution. Similarly, the Romanian Constitution lays down that Romania is a unitary state (Art. 1 para. 1 Romanian Constitution) that is administratively organised in counties, towns and municipalities (Art. 3 para. 3 Romanian Constitution).

<sup>IX</sup> E.g. the second step of the plan (2<sup>nd</sup> transitory provision of the organic law on decentralisation) requires the elaboration of a plan for regionalisation and certain actions to support the construction of regions. As the creation of bigger regions failed (politically), instead of attempting a second time, it was decided to proceed with the third step, which consisted in the transfer of certain so-called sectorial competencies.

<sup>X</sup> Another aim is to stabilise and strengthen democracy by fostering involvement of the population (Dargent 2010: 79). This is also true in regard to federalism and democracy in Latin America in general (Blanco Valdés 2012: 74.)

<sup>XI</sup> Other Latin American countries presently also seek to involve their population to a greater extent, cf. Kaufmann (2008: 9 ff.).

<sup>XII</sup> Law no. 27806, *Ley de transparencia y acceso a la información pública*; cf. *Chiclayo Tello* 2007: 93.

<sup>XIII</sup> See below.

<sup>XIV</sup> See Art. 190 PConst and Art. 28 and 29 organic law on decentralisation. A 2005 referendum on the question whether new regions should be established was not successful. In 2006, three regional governments decided to establish a “pilot region”, as the national government had encouraged such ambitions. However, since the national government did not initiate the required law, the three regions submitted a bill in Congress themselves (law no. 29768, *Ley de Mancomunidad Regional*). As yet, no “new” region has been established, although legislation was passed that made it attractive for departments to amalgamate into bigger regions.



- XV It is remarkable that “existing” regions seek to gain and strengthen identity through regional symbols, festivals, public holidays, etc. See below.
- XVI Regarding the term “normative”, see below. Since the Peruvian Constitution and organic laws use this term instead of the more precise term “legislative”, it shall be used here as well.
- XVII Art. 191 PConst is developed mainly through the organic law on the regions.
- XVIII Art. 11 organic law on the regions.
- XIX See below.
- XX For Austria cf. Gamper 2010: 95.
- XXI This seems to be similar to the case of Belgium: According to Art. 39 of the Belgian Constitution, it is up to special majority laws to develop the competencies of the regions (Dumont et al 2006: 41).
- XXII Constitutional amendments are passed by a majority of 2/3 in Congress in two consecutive annual sessions or by means of an absolute majority in Congress followed by a referendum (Art. 206 PConst and Art. 81 para. a parliamentary rules of procedure).
- XXIII Art. 81 para. b parliamentary rules of procedure.
- XXIV It has to be noted that in other recently regionalised or federalised systems, terms like the one mentioned above are also rather avoided, for Italy, e.g., cf. Gamper (2004: 266).
- XXV *Case no. 00047-2004-AI/TC*, recital 119.
- XXVI “[...] in regard to the national government it has to be remarked that it is not completely free to regulate any subject matter, but rather has to follow the distribution of competencies as it is laid down in the Constitution and the laws. Therefore, the distribution of competence is a material and competential limit to the exercise of the legislative function [of the national government]”, *case no. 00047-2004-AI/TC*, recital 119.
- XXVII This case dealt with three regional ordinances, all of which declared the coca leaf to be a part of the cultural heritage of the nation and legalised its cultivation, which violated national norms.
- XXVIII *Case no. 0020-2005-AI/TC, 0021-2005-AI/TC*, recital 40.
- XXIX In the Courts’ words: “*dictar normas*”.
- XXX Art. 200 para. 4 PConst states: “The action of unconstitutionality that proceeds against norms that have the status of laws: laws, legislative decrees, decrees of urgency, treaties, standing rules of Congress, regional norms of general character and municipal ordinances that contradict the Constitution formally or materially.”
- XXXI Statute on organisation and functions.
- XXXII See e.g. ordinance no 03-2012-GRP/CRP, which stipulates provisions on the regional emblem and flag of the Puno region.
- XXXIII See e.g. Art. 8 ROF *Ayacucho*, ordinance no. 004-07-GRA/CR, which underlines *inter alia* the importance of cultural identity in the improvement of the situation of the regional population.
- XXXIV Generally (and not surprisingly [cf. generally Gamper 2012: 89]) the PConst does not explicitly mention rules on constitutional interpretation. The *Código Procesal Constitucional* statutes in Art. V that constitutionally guaranteed rights have to be interpreted in accordance with the Universal Declaration of Human Rights, other human rights treaties and decisions on human rights applying to treaties of which Peru is a part, decided by international tribunals. For interpretative methods, cf. Díaz Revorio 2004: 233 ff.
- XXXV See e.g. *case no. 00024-2007-PI/TC*; nonetheless the Court does not always apply the loyalty principle in the same way (e.g. *case no. 0020-2005-PI/TC*, recital 42–45 and *case no. 00011-2008-PI/TC*, recital 27).
- XXXVI The “block of constitutionality” is not an exclusively Peruvian concept. In Spain, “[t]he statutes and the laws pertaining to delimitation of powers lack constitutional status, but they are a necessary complement to the Constitution. For this reason, they along with the Constitution, are considered to form part of the so-called ‘block of constitutionality’ – the complex set of regulations that the Constitutional Court must consider in order to determine the validity or invalidity of state and/or Autonomous Community regulations.” (Argullol and Bernadí 2006: 244).
- XXXVII *Case no. 0001-2012-PI/TC*, recital 19 ff.
- XXXVIII See e.g. *case no. 0013-2003-CC/TC*.
- XXXIX The opposing principle is the so-called “hierarchy principle”. According to the Court, the application of this principle means that regional ordinances are inferior to ordinary laws of congress. The Court stated several times that in the context of decentralisation the competence principle (and not the hierarchy principle) had to be applied (*case no. 00005-2012-PI/TC*, A/. recital 10).
- XI. The opposing principle would be the principle of hierarchy. According to this principle, a national law always prevails over a regional ordinance.



<sup>XL1</sup> It seems strange that the principle of subsidiarity, although mentioned as a principle guiding the distribution of competencies and to some extent linked to the efficiency principle, is not at all included in the competence test.

<sup>XLII</sup> Cf. *case no. 0001-2012-PI/TC*, the so-called Conga Case, named after the mining project (regional ordinance declaring a special area an “environmentally protected area” and therefore rendering a previously approved project illegal), *case no. 00009-2010-PI/TC*, the so-called Cusco Case, named after the region of Cusco, which issued the ordinance in question (regional ordinance declaring the whole region as an area free of large scale mining) and *case no. 008-2010-PI/TC* (municipal ordinance prohibiting the issuing of licenses for mining). The last case (*no. 00005-2012-PI/TC*) is peculiar, because the regional ordinance in question was not equivalent to a prohibition of mining, but rather tied companies to national laws aimed at protecting the environment which stipulated that private investments were in the regions’ interest and necessary for them, establishing certain obligations for these activities in the region. The Constitutional Court again applied both the *competence test* and the *bloque de constitucionalidad*, but could not find any violation to the Constitution. The Constitutional Court admits that the reference to “obligations” without any specification could imply that the region elaborated on norms which were not in conformity with the distribution of competence. However, it did not find the regional ordinance in its actual version unconstitutional (*case no. 00005-2012-PI/TC*, § 2 A/).

<sup>XLIII</sup> *Case no. 0001-2012-PI/TC*, § 5, *case no. 00009-2010-PI/TC*, recital 10.

<sup>XLIV</sup> Of course, all competence matters listed in Art. 192 PConst which include the clause “*according to the laws*” are shared competencies.

<sup>XLV</sup> The region is referring to Art. 2 para. 19 PConst which recognises the personal right of ethnic and cultural identity and Art. 48 which states that Spanish and – in regions with a predominantly indigenous population – the indigenous languages are the official languages.

<sup>XLVI</sup> So the ROF of Apurímac (Art. 9 para. j), Ancash (Art. 8) or the ROF of Cusco (Art. 10 para. 10).

<sup>XLVII</sup> This means the level which can exercise the competence in the most efficient way.

<sup>XLVIII</sup> However, in the field of what is referred to as “*minería artesanal*” (traditional mining), regions are competent to legislate.

<sup>XLIX</sup> It is always the individual that acts as the point of reference when applying the subsidiarity principle (Höffe 1994: 30 f.; Isensee 2002: 135). In the Mufarech ruling the Court confirms that it shares this (common) point of view (see *case no. 0002-2005-AI/TC*, recital 52: “That means a materia can only be assigned to the government that is closer to society if an analysis of the competence in discussion shows that the population benefits from such a distribution”). Nonetheless, the region could have taken action against (national) laws distributing the functions in the field of mining, claiming that these laws violated certain provisions of organic laws (Art. 14 law on decentralisation, Art. 4 f. organic law on the regions) and therefore the Constitution by non-consideration of the subsidiarity principle.

<sup>L</sup> See *case no. 0002-2005-AI/TC*, recital 52: “[...]subsidiarity is only constitutionally valid if it is linked to the principle of proportionality and necessity, which mean that the action of the state must not exceed what is necessary to achieve the aims of the Constitution. That means a materia can only be assigned to the government that is closer to society if an analysis of the competence in discussion shows that the population benefits in a threefold way of such a distribution – the proposed distribution needs to be in line with the aims of the Constitution and with the basic principles of decentralisation – the solution in discussion has to be the most effective and adequate possible, which means that the most ‘benign’ means have to be chosen – the determination of content must not affect the functioning of any of the governments”.

<sup>L1</sup> According to Isensee (2002: 172 ff.) the principle of proportionality complements the subsidiarity principle. The Protocol on the application of the principles of subsidiarity and proportionality to the Lisbon Treaty of the EU (Official Journal, C 83/201, 30<sup>th</sup> March 2010) also shows the close relation between these concepts. On the development of the jurisprudence on the subsidiarity principle and its application in Peru cf. Rubio Correa (2011).

<sup>LII</sup> The latest bill dates from August 2011 (Bill no. 0007/2011-CR) and is currently being examined by different commissions of Congress. Yet, the proposed second chamber is not conceived as a second chamber in a federal sense but rather as a *chambre de réflexion*, where regions would not be represented. So even if the proposal is realised, Peruvian regions will not count on representation, but the situation could be compared to that of Spain, where the senate is not construed as a “real house of territorial representation” (Argullol and Bernadí 2006: 252).

<sup>LIII</sup> From 2011 to date, regions have proposed 24 bills, see <http://www2.congreso.gob.pe/Sicr/TraDocEstProc/CLProLey2011.nsf> (last accessed May 16, 2014).



<sup>LIV</sup> Depending on the resources regions have at their disposal, the financial resources gained out of royalties are significant. However, problems are caused by price fluctuations on raw materials on the global market. Moreover, regions with few resources are deprived of this source of income.

<sup>LV</sup> “Regions and municipalities are empowered to create, change and abolish contributions and fees, or exempt from them, in their respective area and within the limits of the law [respectively laws]”.

<sup>LVI</sup> The problem lies with the question of whether „conforme ley“ (according to law [respectively laws]) is equivalent to „con los límites que señala la ley“ (“within the limits of the law [respectively laws]”).

<sup>LVII</sup> Fees and contributions are charged for the delivery of a certain service, e.g. waste collection. Taxes, on the contrary, are paid without receiving a direct service.

<sup>LVIII</sup> Cf. the homepage of the association [www.angr.org.pe](http://www.angr.org.pe) (last accessed May 16, 2014).

<sup>LIX</sup> Currently, a process of restructuring of the National Council on Coordination is taking place. In March 2013, a Commission with the objective of creating a proposal on a new decree on the National Council on Coordination was created. In April 2014, the President of the Council of Ministers announced the restructuring of the National Council on Coordination, cf. Secretaría de Descentralización/Presidencia del Consejo de Ministros 2014: 120 ff.

<sup>LX</sup> Argentina and Brazil were initially unitary states but changed into federal systems more than a century ago (Hernandez 2006: 8 f.; Souza 2005: 79), Mexico became a federal state after gaining independence with a short interruption in the 19<sup>th</sup> century (Gutiérrez González 2005: 210).

<sup>LXI</sup> Moreover, recent decentralisation processes take the Spanish and Italian developments as model, not least for practical linguistic reasons (Carrión M. 2002: 120 f.). The reception of ideas from foreign countries also often depends on how active (constitutional) courts act, for Colombia cf. Cepeda-Espinosa 2004: 557 ff.

<sup>LXII</sup> *Proyecto de Ley N 2538/2013-CR, Proyecto de Ley que incorpora la cuarta disposición complementaria a la ley de bases de la descentralización.*

<sup>LXIII</sup> Due to the vagueness of the distribution of competencies on the one hand and the rule that the national level is (exclusively) competent to elaborate general policies of the state on the other hand, the Constitutional Court seldom decides in favour of the regions.

<sup>LXIV</sup> However, Peru is not the only state facing the problem of an imbalanced case law. For Brazil cf. Arretche 2012: 142.

<sup>LXV</sup> Law no. 19175, re-proclaimed 8.8.2005.

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