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Federalism and institutional structure

by

Giacomo Delledonne *

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As I am writing these lines, institutional developments on both sides of the Atlantic have shown, once again, how complex the interplay of federalism and democracy is.

In the European Union, the European Parliament election in June 2024 marked the beginning of the 2024-2029 institutional cycle. The results of the latest European election are not easy to decipher. On the one hand, in several member states, including France and Germany, the vote resulted in a major setback for the ruling political parties, with obvious implications on the political authority of some national leaders within the European Council and during the post-election negotiations. On the other hand, the overall result of the European elections throughout the twenty-seven member states did not point to a major shift in the voters' preferences. The three-party alliance which had supported Ursula von der Leyen during her first term as President of the European Commission, made up of the European People's Party, the Socialists and Democrats, and Renew Europe, 'was substantially confirmed as the only feasible [coalition], although by a narrower margin' (Lupo 2024: 20). Still, an arithmetic majority within the European Parliament is something different from a workable majority. Von der Leyen's moves prior to her re-election on 18 July 2024 testify to the need to expand her political base within the supranational assembly in Strasbourg and Brussels. In the following months, however, von der Leyen had to take into account opposing expectations and concerns in distributing portfolios to the members of her college of commissioners in the making. In so doing, she was confronted with the thankless task of reconciling the traditional three-party coalition – which, meanwhile, had expanded to The Greens/European Free Alliance – with the intergovernmental balance of power. The controversies that preceded and followed the confirmation hearings with Executive Vice-President nominees Raffaele Fitto and Teresa Ribera Rodríguez are a prime example of the dual logic that underlies the functioning of the EU's form of government. For the first time since 1999, no nominee has been rejected during the confirmation hearings. Critics have decried 'a step backwards for the Parliament, which has typically kept a check on the Commission's hold on power by rejecting or sending back a nominee for further questions in years past' (Griera and Wax 2024). In my opinion, assessments of this sort hit the mark only partially. There is no doubt that the European

Parliament has seen its leeway reduced by the disagreements among the European political families and among the national governments. However, the attitude of the European Parliament can also be explained in the light of the ongoing transformation in the form of government of the European Union, with a 'strengthened dialectic relationship' between the Parliament and the Commission[I]. If this is true, the supranational institutions will clearly depart from a separation-of-powers model (see Kreppel 2009), and there will be less room for hard-fought confirmation hearings.

In the run-up to the presidential election in the United States, debates about the Electoral College and its outdatedness occasionally reemerged. One of the historical political safeguards of federalism (Wechsler 1959), the Electoral College has been criticised for facilitating the election of demagogues to the Presidency in recent times (Schor 2024). Since the election results were known, this debate has somewhat been dampened. Meanwhile, we can wonder about the evolution under a second Trump administration. Donald Trump's first term of office was marked by the rise of punitive federalism, that is, an approach to federal decision-making 'characterized by the federal government's use of threats and punishments to suppress state and local actions that run contrary to its policy preferences' (Goelzhauser and Konisky 2020: 312). Punitive federalism has emerged against the background of increasing partisan polarisation, a trend that was already visible under President Barack Obama. Democratic governors have already formed groups in the aftermath of the presidential election to coordinate efforts and resist federal policies (Epstein 2024), and punitive federalism may well resurface in the next few months.

The contents of this issue

The essays that compose this issue cover a variety of topics and jurisdictions. In the first essay, Gábor Gulácsi and Ádám Kerényi discuss the much-explored conflict between the Hungarian government and the European Union. After pointing to the combination of economic convergence and democratic backsliding in the years following the eastward enlargement, they describe the enforcement of rule of law conditionality vis-à-vis Hungary as a turning point. Based on that, Gulácsi and Kerényi suggest that several scenarios can be

imagined for the next few years. The conflict over the rule of law is most likely to continue, with limited room for institutional or political innovation. Other scenarios, most notably, a fully-fledged Hungarian Huxit or a restoration of the rule of law and constitutional democracy, are less likely to come true. Despite some differences, this concluding assessment resonates with a line of scholarship that has focused on an alleged *authoritarian equilibrium* within the EU (Kelemen 2020).

The subsequent piece provides a relevant contribution to the knowledge of a federal system that has not attracted great scholarly attention at the international level. Nisrine Abiad presents some of the basic features of the federal order of the United Arab Emirates. In his view, the dominant feature in this federal system is its inherent flexibility; therefore, it is difficult to categorise the constitutional order of the United Arab Emirates, let alone ascribe it to well-established theoretical and comparative models. Abiad identifies the supremacy clause in Article 151 of the Constitution and the gradual expansion of democracy and civic participation as crucial factors in the evolution of the system.

A piece by Cristian Altavilla discusses the state of the art of subnational constitutional law scholarship in Latin America, with specific focus on provincial constitutions in Argentina. Altavilla considers the federal-provincial balance throughout the constitutional history of the country, with alternations of periods of innovations propelled by the subnational layer, on the one hand, and the re-emergence of homogenising trends, on the other hand. In the concluding paragraph, his piece advocates an 'intelligent, courageous and innovative' approach to the subnational constitutional space.

Francisco Pereira Coutinho discusses approaches to secession within the European Union, a particularly topical issue that has resulted in significant academic contributions in recent times (see e.g. González Campañá 2024). In his piece, Pereira Coutinho highlights a paradoxical development: European integration contributed to preventing the collapse of national statehood in Europe after the end of World War II, but may have fuelled centrifugal tendencies in the last three decades or so. In this author's view, the federal principle should play a key role in the political and academic conversation about 'independence in Europe', with the EU supposed to protect the ongoing political existence of its Member States.

Finally, Jock Gardiner and Silvia Talavera Lodos engage critically with a judgment rendered by the High Court of Australia that declared the policy of indefinitely detaining non-citizen, non-visa holders to be unconstitutional. The two authors discuss the relevant aspects of this judicial decision, in which the High Court resorted to structural arguments to protect the fundamental rights of non-citizens. Moreover, Gardiner and Talavera Lodos highlight the possible implications of the Australian case in comparative perspective, with strong emphasis on the supranational courts in Luxembourg and Strasbourg.

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*Associate Professor of Constitutional Law and Public Law, Scuola Superiore Sant'Anna, Pisa, Italy. Email address: giacomo.delledonne@santannapisa.it. delledonne@csfederalismo.it

[I] Constitutional Court of Italy, judgment no. 239/2018 (see Delledonne 2019: 384-385).

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Hungary and the European Union: the drift towards disintegration

by

Gábor Gulácsi[I] and Ádám Kerényi[II]

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Abstract

By the autocratic transformation of its political system (with the establishment of the System of National Cooperation), then by its fierce promotion of national identity, and furthermore by the unorthodox action it has taken against the Union's federal policy of closing ranks in the face of the Russian-Ukrainian state of war, the Hungarian government, which achieved a two-thirds majority, sufficient to alter the constitution, in 2010, has turned away from the European Union. For a considerable length of time the EU's existing mechanisms for dealing with crises were insufficient to respond effectively to the behaviour of its Hungarian member state, which not only endangered the Union's fundamental values and the rule of law, but also posed a high risk that the use of Union funds would be affected by corruption. Finally, in 2022, following several attempts and a decade after the first report of the European Parliament on the decline of democracy in Hungary, by activating the 'rule of law conditionality regulation' for the protection of the Union budget and by prescribing the fulfilment of 'horizontal enabling conditions', the European Commission suspended Hungary's access to a wide range of Union funds, and made such access subject to the implementation of reforms restoring the rule of law. In consideration of the theoretical questions that can be raised relating to the case study of the deteriorating Hungary-EU relationship this paper focuses on the conceptual explanation for the measures taken by the Union in response to the decline of democracy in Hungary and Hungary's failure to maintain adequate rule of law. Moreover, in the concluding section, we will attempt to outline possible scenarios for the future development of the conflict.

JEL codes: F02, F51, F53, P20.

Key-words

multi-speed Union, sanctions, disintegration, political economy of international organisations, post-socialist transformation, autocratisation

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Introduction

In this paper we examine the Hungarian government's growing political separation from the European Union, which started in 2010 and has already been manifested in repeated confrontations since 2022, and the responses given by the EU. Although we share the point of view of those researchers who claim that the decline of democracy in Hungary and the simultaneous decline in Poland were not independent of one another, our analysis is limited to the relationship between Hungary and the European Union.[III] In our paper, of the concepts concerning EU integration and the analytic conclusions, we rely mainly on the following: a) the European Union "*will be truly forged through crises – as a result of the solutions adopted for those crises*" (*Monnet* [1978] p. 416); b) according to the economists of the World Bank, after the Eastern-Central European countries joined the EU, a so-called "convergence machine" emerged in Europe (*Gill-Raiser* [2012]); however, the Union had to face the fact that the successful catching up of Eastern-European countries was accompanied by democratic backsliding and autocratisation in two countries: Hungary and Poland (*Kornai* [2015], *Sadurski* [2019], *Holesch-Kyriazi* [2022]); c) the European Union, which we have so far considered – using Jacques Delors' terminology – as a political system incomparable to anything else, which can only be interpreted in itself, a so-called 'unidentified political object' [...], has lately become even more differentiated, and so the existing theoretical explanations are often out of date. (*Koller* [2019] p. 61).

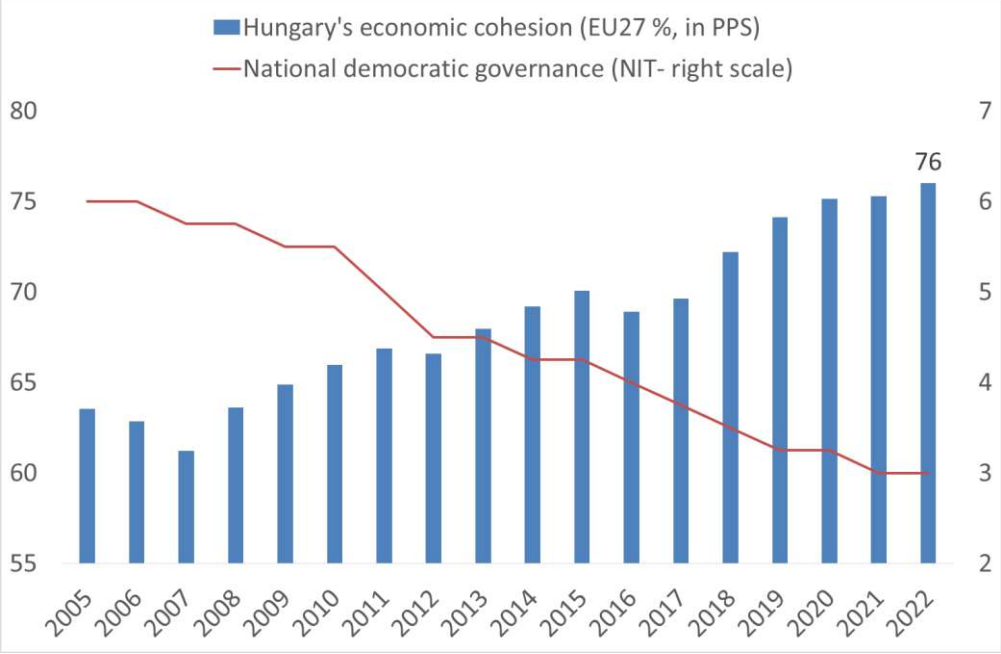
Towards the end of his life, János Kornai articulated his diagnoses about the decline of democracy in Hungary in his public and academic essays (*Kornai* [2011], [2015], [2016], [2017]). With a few years' delay, various institutions and bodies of the European Union arrived at similar evaluations concerning the transformation of the Hungarian political system. Seeing how these changes clash with the fundamental values of the European Union (*Tavares* [2013], *Venice Committee* [2013], *Taylor* [2015], *Sargentini* [2018], *European Commission* [2020]), with long reaction times certain 'immune reactions' of the EU also kicked in. The Hungarian government's increasingly confrontational stance towards the EU further encouraged the EU to deploy counter-measures, which were brought into being with great difficulty.

1. The economic convergence of Hungary and the deterioration of the democratic features of its political system

The paths taken by countries joining the Union as it expanded eastwards, first in 2004, then in 2007 and 2013, follow two basic patterns. In the great majority of cases vigorous economic development was accompanied by a slight erosion of the level of democracy that prevailed at the time of accession. In the cases of Hungary and Poland, however, economic development was accompanied by serious degradation of political democracy. (*Holesch-Kyriazi* [2022])

Figure 1 provides a graphic representation of the dual nature of Hungary's development in the 2010s: after 2012 economic development was rapidly approaching the EU27 average, while the democratic nature of its governance was declining year by year.

Figure 1. Hungary's economic catching-up and the decline of the democratic aspects of its governance (GDP/head PPS and NIT-index)



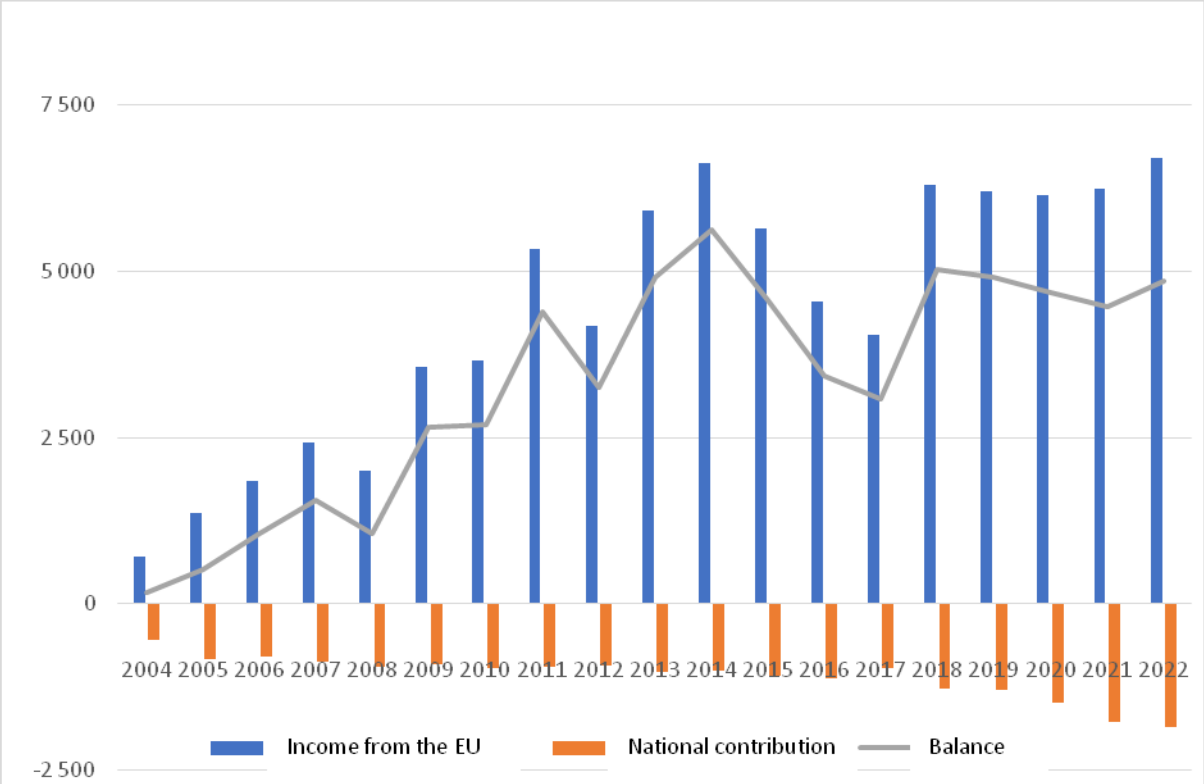
Source: Authors' own figure based on the combined indices of Eurostat [2023] and Freedom House [2023a].

Following the wasted decade between 2002 and 2012, the Hungarian economy, like that of other countries in the region, set out on the fast track towards Union convergence, as is indicated by the gross national product measured against purchasing power parity per head

in the EU27 average. The government, having applied unorthodox measures as well, completed the stabilisation of the macro-economy between 2010 and 2012, reduced the budget deficit, then drew all the available Union support funds that could be distributed. Furthermore, it took advantage of the unusually favourable opportunities provided by the boom in the world economy to import working capital and expand employment. Thanks to internal growth and hundreds of thousands of Hungarian guest workers finding employment in EU countries, as well as the large number of people employed in public works schemes, unemployment was reduced to a minimum.

Union membership created a double convergence machine for the Hungarian economy. On the one hand, the single market of the Union attracted investments – based on labour arbitrage - that boosted employment. On the other hand, the EU budget provided Hungary with funds equivalent to 2.4-5.3 percent of the annual Hungarian GDP. In the period under investigation, between 2010 and 2022, as a net beneficiary, Hungary received the third largest net sum of Union funding.[IV] In this period stretching over 13 years, the EU assisted Hungary with an average annual transfer of 4.3 billion Euros, for a net total of 56 billion Euros *(Figure 2)*, a fund of economic-historical significance comparable to the recovery aid provided for post-WWII European countries within the framework of the Marshall Plan.

Figure 2. Hungary's balance in the annual budget of the EU (million euros)



Source: Authors' own figure based on data from the of the European Commission Representation in Hungary

The 'convergence machine' pushed all the countries which joined after 2004 forward on the path of convergence. In this group of countries Hungary did not excel in achieving catch-up: the only country that did worse was Slovakia. Furthermore, when describing the Hungarian path to growth it should also be noted that the elements which make up the structural changes of the real economic catch-up, which took place between 2012 and 2022, were usually exhausted in the industrial assembly capacity which required living labour and Shared Service Centres, established by foreign working capital. In the 2020s, however, the internal labour resources dried up, and the macro-economic balance was upset yet again by the Corona virus epidemic and the new version of an unorthodox economic policy, the pro-cyclical, so-called 'high-pressure economy'. With regard to the Maastricht Convergence Criteria on financial stability, a transitional phase of convergence was followed by a predominantly divergent phase, and the country shifted further away from joining the economic and monetary union (EMU) and the introduction of the Euro (*Kertész* [2022], *Medve-Bálint et al* [2022], *Oblath* [2013]).

The 2010 elections proved to be a watershed, and in their wake, unlike in economic matters, there were no more changes in direction in the Hungarian political sphere. Having secured a two-thirds majority, the victorious coalition of FIDESZ and Christian Democrats immediately launched a far-reaching transformation of the political system: the establishment of the System of National Co-operation (in Hungarian *Nemzeti Együttműködés Rendszere*, or *NER*), which was, by its own standards, unequivocally successful (*Orbán* [2023*b*]). The main stages of the transformation of the Hungarian political system have been documented frequently and in great detail; here we only allude to the following relevant papers: *Ádám* [2019], *Ágh* [2019], [2022], *Bárd* [2023], *Bottoni* [2023], *Bozóki–Hegedűs* [2018], *Bugarič [2014], Buzogány* [2017], *Buzogány–Varga* [2019], *Fleck et al.* [2022], *Halmai* [2015], *Kornai* [2017], *Körösényi et al.* [2020], *Krasztev–Van Til* [2015], *Schöpflin* [2017]. In the following section, we will summarise only the international evaluations of these changes.

Regarding the normative view of this study, it must be emphasized, that Hungary joined the European Union having reinforced the parliamentary decision with a referendum, so as long as it remains a member state of the Union, the most important international evaluations are those which apply the value system of the Union. Such are the independent surveys in which the main aspect of evaluation and international comparison is the democratisation of the system. Naturally, the reports drafted by Union organisations themselves belong here as well (*Tavares* [2013], *Venice Committee* [2013], *Sargentini* [2018], *European Commission* [2020].

From 2010 onwards, the annual reports of organisations evaluating the democratic features of political systems in the international context: Freedom House and the V-Dem Institute at the University of Gothenburg (Nations in Transit; Democracy Reports), identified the decline of democracy and an unambiguous autocratization as the main tendency in Hungary. According to their criteria, by now the Hungarian political system has drifted a very long way from the liberal democratic systems of the European Union.

Table .1 Data regarding Hungary between 2005 and 2022 from Nations in Transit

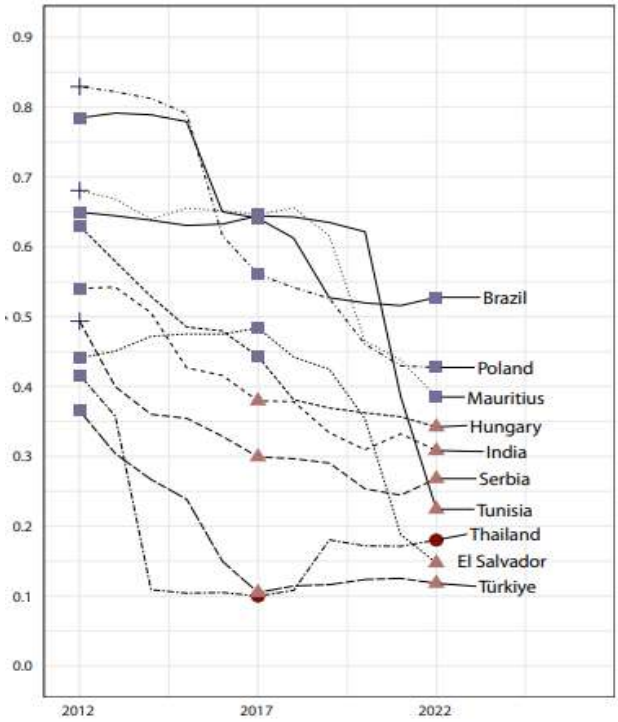
	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017	2018	2019	2020	2021	2022
National Democratic Governance	6.00	6.00	5.75	5.75	5.50	5.50	5.00	4.50	4.50	4.25	4.25	4.00	3.75	3.50	3.25	3.25	3.00	3.00
Electoral process	6.75	6.75	6.25	6.25	6.25	6.25	6.25	5.75	5.75	5.75	5.25	5.25	5.00	4.75	4.50	4.25	4.25	4.25
Civil society	6.75	6.75	6.50	6.50	6.25	6.25	6.00	6.00	5.75	5.75	5.50	5.50	5.25	5.00	4.50	4.50	4.25	4.25
Independent media	5.50	5.50	5.50	5.50	5.50	5.25	4.75	4.50	4.50	4.50	4.25	4.25	3.75	3.50	3.25	3.25	3.25	3.00
Local Democratic Governance	5.75	5.75	5.75	5.75	5.50	5.50	5.50	5.50	5.25	5.25	5.00	5.00	5.00	5.00	5.00	4.75	4.25	4.25
Judicial Framework and independence	6.25	6.25	6.25	6.25	6.25	6.00	5.75	5.25	5.50	5.50	5.25	5.00	5.00	5.00	4.75	4.75	4.25	4.25
Corruption	5.25	5.00	5.00	5.00	4.75	4.50	4.50	4.50	4.50	4.25	4.25	4.00	3.50	3.25	3.25	3.00	2.75	2.75
Democracy score	**6.04**	**6.00**	**5.86**	**5.86**	**5.71**	**5.61**	**5.39**	**5.14**	**5.11**	**5.04**	**4.82**	**4.71**	**4.46**	**4.29**	**4.07**	**3.96**	**3.71**	**3.68**

Source: Freedom House [2023a]. Note: The ratings are based on a scale from 1 to 7: the higher the rating, the more democratic the conditions are. Between 5.01 and 7 the status is labelled 'Consolidated Democracy', between 4.01 and 5 'Semi-Consolidated Democracy', between 3.01 and 4 it is called a 'Transitional/Hybrid Regime', between 2.01 and 3.00 a 'Semi-Consolidated Autocratic Regime', between 1.00 and 2.00 it is a 'Consolidated Autocratic Regime'.

The above table, based on the "Nations in Transit" reports from Freedom House illustrates how, step by step, Hungary achieved "autocracy" status in the various sub-categories. In 2020 Hungary was already placed in the group of autocracies in terms of the corruption sub-category. According to the 2022 figures, Hungary has sunk to the same level in two more sub-categories (national democratic governance and independent media); however, the so-called 'democracy score' still appears in the transitional/hybrid category.

The composite index of the Democracy report issued by the widely recognised V-Dem Institute (University of Gothenburg) indicates a similar tendency; however, according to their terminology Hungary in 2023 is no longer a 'hybrid system', but an '*electoral autocracy*'. The 2023 Democracy report published a table of the countries where in the last ten years autocratization has taken place in the most significant way. In this somewhat unedifying list, of EU member countries Hungary and Poland appear; among the candidate countries Türkiye and Serbia. (Figure 3)

Figure 3.



Source: V-DEM Institute (2023) p.23. Note: In this figure Thailand appears as a 'Closed Autocracy', Hungary and Turkey as 'Electoral Autocracies', and Poland as an 'Electoral Democracy'.

In the next section we will review the debates and conflicts that were caused in the European Union (Commission, Parliament, Council) by the democratic decline/autocratization of the Hungarian political system after 2010.[V]

2. A short chronology of conflicts between the post-2010 Hungarian government and the EU

The relationship between the Hungarian government formed after the 2010 elections and various institutions and individual member states of the European Union quickly became laden with conflicts.

May 2010 – April 2015

The first serious clash took place immediately after the 2010 change of government. The European Commission turned down the new Hungarian government's petition to increase

the 2010 budget deficit. By this time, Hungary had been under the excessive deficit procedure for six years. Its budget had to be drafted under the strict control and prescriptions of the Commission, which submitted its evaluations to the Economic and Monetary Council (Ecofin), and if the prescribed deficit targets were exceeded, the Commission could even propose withholding cohesion funds. The deficit procedure was the only real means of coercion in the hands of the EU, which normally directs through consultative channels. Thus, it is hardly surprising that the second Orbán government subjugated its economic policy to the need to escape from this situation. It brought harsh, so-called unorthodox measures intended to balance the state budget; these included introducing special sectoral corporate taxes declared to be temporary, reducing subsidies, freezing prices, levying taxes retrospectively, directing savings from private to state pension funds, etc. As a result of these, the Economic and Financial Council abrogated the excessive deficit procedure against Hungary in June 2013 (*Laczkó* [2015]).

At the beginning of 2011, Hungary, then holding the rotating EU presidency, received "sharp criticism from France, the United Kingdom and Germany over the passage of a law which placed the dissemination of public news under the supervision of a state authority [...], according to which private media organisations can be fined heavily for not reporting current events in a 'balanced' way. But at this point [...] due to pressure from European diplomats [...] the Hungarian prime minister, Viktor Orbán said that he would be willing to modify the law, should the executive power of the EU oblige him to do so" (*Reuters* [2011]), although, according to the prime minister "it does not contain a single element which would not occur in some EU member states" (*Bruxinfo* [2011]).

As for the Union, the European Parliament was the first institution that put the issue of the decline of democracy in Hungary on the agenda and as early as *February 16, 2012 it adopted a resolution on the 'latest political developments in Hungary*', which both sounded the alarm and set certain tasks. (*European Parliament* [2012])[VI]

In response to this, next year the European Parliament's Committee on Civil Liberties, Justice and Home Affairs (henceforth LIBE Committee) indeed drafted a report on the situation of fundamental rights in Hungary, (this is what we call the *Tavares Report: Tavares* [2013]).[VII] *Observing the provisions of the Treaty on European Union (TEU), it reached extremely critical conclusions on the issues under discussion, and made recommendations* to the European Council (the European Council "cannot remain inactive"), to the Commission and to the Hungarian

authorities. Finally, it initiated the setting up of a new mechanism to enforce Article 2 of TEU effectively.

In summer 2014, the Hungarian Prime Minister gave a speech, which then became notorious, in which he put his criticism of the European Union, something he had never tried to hide, into a political framework, causing international outcry. This was because the examples he set for Hungary to follow were no longer EU countries, but 'internationally more competitive' illiberal states ('Singapore, China, India, Russia, Turkey'), which, according to him, were not only not liberal, but 'maybe not even democracies' (V. Orbán 2014). By marking out this target, a new fault line, which had been unimaginable up to that point, emerged between the EU member states with liberal, democratic establishments, and Hungary, soon to be accompanied in its rejection of liberalism by Poland.

Finally, by the middle of the decade, the view that something was amiss with how Union funds were used in Hungary was reinforced among institutions responsible for the Union Budget and net contributor countries. On the basis of the conclusions drawn by the Union audit (noting the systematic irregularities and shortcomings of government supervision and documenting the overpriced tenders (*Vitéz* [2018]) and some events which received great publicity,[VIII] they evaluated the risk of corruption as unacceptably high and they criticised the lack of efficiency in the use of Union funds.

May 2015-April 2022

In 2015 a serious migration crisis erupted, which found both the Union leadership and the Hungarian government unprepared. For a while, member state governments (including Hungary) and EU leaders only followed the escalation of the crisis passively, but then they arrived at sharply conflicting points of view. *The Hungarian government considered the issue as one of public security, while the German government and the Commission tried to manage the crisis as a humanitarian affair*. The Hungarian government executed a significant about-turn compared to their previous migration policy, in which nothing serious was at stake. It implemented a legal and physical border closure, it rejected the plan to distribute and take in refugees according to quotas; furthermore, it organised a blocking minority from the Visegrád Group (V4). *It was at this point that the Hungarian prime minister's sense of mission - against migration - in the Union was formed*, something that placed him in direct confrontation with the views held by the union's majority.[IX]

The year 2015 proved to be a watershed from another aspect as well. In the autumn of that year PIS, the leading right-wing populist and national-conservative political party in Poland, which had promised a nationalist turn, won a decisive victory at the elections. Although they came nowhere near a majority strong enough to modify the constitution, PIS quickly got down to weakening the democratic system of checks and balances. In its conflict with the EU, the Hungarian government gained its strongest yet supporter among member states with the PIS-led Poland. A year later, the leaders of the two countries did indeed proclaim a cultural counter-revolution to transform the EU at their first joint public appearance. Viktor Orbán, describing the strength of their alliance, said that together they could even steal horses, to which Jaroslaw Kacynski added that there were some stables from where horses could be stolen, the EU being an especially large one (*Foy at al* [2016]). This announcement rang alarm bells in Brussels, where it could not be considered a mere innocent joke (*Pawlak-Strupczewski* [2016]).

While its political struggles 'against Brussels' were intensifying, from 2015 onwards, as a result of unfavourable Union audits, the Hungarian government implemented several damage-limitation modifications to its arrangements for using EU funds. The Elios projects[X] were taken out of the Union funding package, the outsourcing of the supervision of public procurements stopped, and more attention was paid to the development of some corruption risk indicators (e.g. the high proportion of single-tender public procurements). However, one thing that did not change was that companies owned by 'chums' had far better chances of winning public procurements than other companies (*Tóth* [2016])[XI]. Furthermore, the new Union audit also pointed out that the winning tenders were overpriced (Vitéz [2018]).

In 2018, after the Commission had revised several drafts, the motion of the LIBE Committee (the *Sargentini* report) was brought before the European Parliament. It called on the European Council to *declare that Hungary was seriously jeopardising the basic values that the Union was founded on, and to launch the procedure set out in Article 7 of the TEU in order to restore democracy*. On September 12, 2018 the motion was passed by the required two-thirds majority (disregarding abstentions) in Parliament.[XII] After the Parliamentary vote, however, the procedure according to Article 7 was suspended indefinitely, because in order to impose sanctions the unanimous decision of the European Council would have been necessary. Poland and Hungary, both involved in the procedure according to Article 7, each made it very clear that they would veto a resolution in the Council against the other country.

Having recognised the lack of instruments for protecting fundamental values and the accountable use of union funds, the Commission started to develop new measures and institutions as early as the first half of the 2010s. After several attempts and the introduction of legal means of questionable efficiency, by 2020 new instruments for defending budgetary interests by setting conditions were ready for adoption. As the first step in the introduction of these, the European Council issued its 'Conclusions' in a special session in July 2020 (*European Council* [2020*a*]), in which it stated that a "regime of conditionality shall be introduced to protect the 2021-2027 budget and NextGeneration EU," and for this purpose "the Commission shall propose measures in case of breaches for adoption by the Council by a qualified majority."

One of the new instruments consisted of *institutionalising* the so-called '*horizontal enabling conditions'*. As a precondition for the implementation of the 2021-2027 shared management Union programmes, it was prescribed that only those member states can receive their full share from the Union budget which, while using these funds, meet the four horizontal conditions[XIII], which include, crucially, meeting the requirements of the EU Charter of Fundamental Rights (the legal system and the way in which the authorities operate must respect EU fundamental rights and ensure the independence of the jurisdiction). This was published as a joint regulation of the Parliament and the Council in 2021 (*EU* [2021).

By this time, in a parallel initiative, the Commission's draft regulation on the rule of law procedure had been known for two years. (*European Commission* [2018]). This specifically recommended the institutionalisation of the available actions against member states whose problems with the rule of law endangered the financial interests of the Union. The draft regulation provoked the Hungarian and Polish governments into heated protests and indirect threats of veto, which the Council, consisting of member state representatives, could only overcome by promising a judicial review and compromises postponing practical implementations.[XIV] In the end, on December 16 2020, *the resolution of the European Parliament and Council on a general regime of conditionality for the protection of the Union budget* (*EU* [2022]) was ready for publication. Soon enough Hungary and Poland initiated procedures for the annulment of the resolution, but on February 16, 2022 the Court of Justice of the European Union fully dismissed their actions. Simultaneously, the Committee elaborated the directives on the rule of law mechanism, and *following the Hungarian parliamentary elections*, on April 5,

2022 Von der Leyen *announced officially that the rule of law procedure against Hungary would be launched.*

After April 2022

Following the activation of the rule of law procedure, at the request of the Commission, the Hungarian government drafted remedial measures to restore rule of law. The Commission found that these measures proposed by the Hungarian government did not meet the requirements. In November 2022 it proposed the suspension of funding for 65 percent of *three operative programmes* for the 2021-2027 budget cycle. At the same time, it proposed the adoption of a plan of restoration, but yet again within the framework of the enabling conditions. After inter-governmental discussions, where several issues were negotiated in one package, the rate of suspension of the operative programmes was reduced. First the *Council* insisted that *the funds (5.8 billion Euros) for the adopted Hungarian restoration plan be released only after the 27 so-called super milestones were passed* (*European Council* [2022*a*]). Then, a country specific subset of the horizontal enabling conditions (restoration of the judicial independence) were introduced as general prerequisite for all Hungarian cohesion program payments. And ultimatelly, in the Council Implementing Decision of 15 December 2022, on measures against breaches of the principles of the rule of law in Hungary, as its primary element, it suspended 55% of the budgetary commitments under three operational programmes of the 2021-2027 cycle (6.3 billion Euros), and made its release conditional on completing further reform measures to meet rule of law regulations and to decrease the corruption risks connected with the utilisation of EU funds. (European Council [2022b], *Czina* [2023]). As a further consequence, the Committee sent a letter to the national authorities appointed to manage funds, informing them that based on the Council's implementation decision of December 15, former state universities which had been transferred to so-called public interest trusts, could not be granted legal commitments related to the Horizont and Erasmus+ programmes until rule of law conditions were met *(Halmai* [2023]).

Finally, a brand new battlefield opened up between the Hungarian government and the EU when, with respect to the Russian invasion of Ukraine which began on February 24, 2022, the Hungarian government implemented a very unconventional policy, which was *in sharp contrast with the concerted foreign policy adopted by the other member states*, who implemented a

series of anti-Russian sanctions, while supporting Ukraine with shipments of weapons. *This hindered and delayed common European decision-making. According to the Euronews summary, between 2016 and 2022 Hungary was responsible for 60 percent of all Union vetoes. During this period, there were 30 vetoes concerning foreign affairs, and of these in 18 cases it was Hungary that made a common decision impossible* (*Gál* [2023]).

To sum up, by 2023 a wide range of support mechanisms included in the treaties between the Hungarian government and the EU – except for agrarian support and the final financial items concluding the previous budget cycle - had been suspended as Hungary failed to meet conditions for rule of law. While the Hungarian government is continually working on fulfilling the horizontal enabling conditions and reform measures to restore rule of law, in the cases of migration, national identity policy and the Russian-Ukrainian War it exacerbates the conflict. The Hungarian Government's relationship with the European Union is now characterised by mutual lack of trust.

Having provided a summary of the situation that has emerged, we can form our questions more precisely.

- Which behavioural patterns exhibited by member states trigger integration conflicts, and how does the EU handle these? Where do we place the conflicts concerning Hungarian rule of law among conflicts generated by member states?
- What were the challenges in response to which the treaty clauses and institutional solutions protecting the fundamental values of the Union emerged? In the case of Hungary, how did the EU arrive at these countermoves?
- How much of a fall in the standard of living of its member states might be caused by the disintegration of the Union?
- What are the main scenarios for the conflicts between Hungary and the EU?

In the following sections we will seek answers to these questions.

3. Behavioural patterns exhibited by member states which trigger integration conflicts, and how they are handled in the EU

Handling a variety of conflicts was an integral part of the European Union's daily affairs. In order to place the integration conflicts caused by the new direction which Hungarian

politics took and to understand their nature it is worth looking briefly at the complete spectrum of conflicts caused by member states.

As shown in Table 2, conflicts generated by member states can be divided into three groups:

Table 2. Recurring EU-Member state conflicts involved in the functioning of the Union, with typical conflict management strategies.

Types of member state–EU conflicts	**Specific member state-EU conflicts**	**EU responses**
Recurring conflicts manageable within the existing framework	In cases requiring unanimous decisions, veto or threats of veto (e.g. vetoing the common budget)	Compromise
	Member state legislation and measures that are in conflict with EU legislation	Launching infringement procedure
	Violating macro-financial limits	Launching excessive deficit procedure
	High risk that member state projects with EU funding will not be accountable	Reducing support by not funding non-accountable projects
Member state behaviour endangering EU integration, requiring special measures	Distinctly non-conformist policy going against the majority (e.g. the French 'empty chairs')	Council negotiations, settling conflicts among core countries
	Immediate danger of bankruptcy of EMU member state (e.g. Greece)	Bailout programmes for member states conditional on austerity measures to ensure stabilisation
	Announcing intention to leave the EU (e.g. Brexit)	Negotiating terms of exit contract with strict conditions
Conflicts stemming from member states related to differentiated integrations	Member state decision to opt out of EMU	EU-member state agreement on exemption from obligation to join
	Delay in fulfilling conditions for EMU accession or indefinite postponement of obligation to join	Maintaining obligation to join without deadline
	A member state preventing the addition of new countries to the Schengen Area	EU fund to create the conditions for becoming part of the Area and repeated application to join

Source: Author's own table

Recurring conflicts manageable within the existing framework

Of these, the so-called infringement procedures are the most numerous, and it is in these cases that the Commission fulfils its most important role as the 'guardian of treaties', since

indeed it regularly takes steps against each and every member state, without exception, to enforce the single market and rule of law.

According to the statistics of the European Union available online, up to August 2023 nearly 22 thousand infringement procedures had been launched. Of these, 716 were started against Hungary (almost 3 percent of all procedures, and in the group of states that have joined since 2004 Hungary and Poland are almost at the top of the list, preceded only by Czechoslovakia).

Infringement procedures are the oldest and most effective means that the EU has at its disposal to oversee member states' compliance with Union law. However, they are not directly linked to the protection of democracy and the fundamental values of the EU, and the Commission "was not over-keen either to take the procedure further in this direction" (it can be applied in cases of specific infringement of laws; if it is taken to court, it takes a very long time; and sanctions involving fines are not an appropriate way to protect fundamental values). Furthermore, some member states failed to act on rulings of the Court of Justice of the European Union which were the result of infringement procedures (e.g. Poland, in the case of the ruling on reforms to the judiciary system), or they acted in such a way that the original conditions could not be restored (e.g. Hungary, in the case of the forced termination of judges' contracts of service), or they created a floating legal situation (e.g. Hungary in the case of transit zones). (*Czina* [2023] p. 8.)

The composition of infringement procedures launched against Hungary by the *Commission* is shown in Table 4.

Table 4. Infringement procedures against Hungary up to August 2023 (number, %)

Department	Infringement procedures	
	number	%
Health and Food Safety	160	22%
Internal Market, Industry, Entrepreneurship and SMEs	138	19%
Environment	104	15%
Mobility and Transport	103	14%
Taxation and Customs Union	53	7%
Energy	36	5%
Home Affairs	31	4%
Fundamental Rights and Union Citizenship	22	3%
Communication Network, Content and Technology	21	3%
Financial Stability, Financial Services and Capital Markets Union	16	2%
Employment, Social Affairs and Equal Opportunities	15	2%
Climate Action	7	1%
Agriculture and Rural Development	4	1%
Competition	2	0%
Other	2	0%
Economic and Financial Affairs	1	0%
Defence Industry and Space	1	0%
Total	716	100%

Source: Authors' own table based on https://ec.europa.eu/atwork/applying-eu-law/infringements-proceedings/infringement_decisions/.

Among the infringement procedures launched against Hungary, the proportion of those concerning rule of law was very low, but all of them involved the basic features of the emerging NER's political system. (Table 5).

Table 5. The most important infringement procedures concerning rule of law initiated against Hungary between 2010 and 2018

No.	Date of launch of procedure	Infringement procedure	
		Title	Law(s) triggering procedures
1	December 2010	Media regulation	Act CIV of 2010 + Act CLXXXV of 2010
2	January 2012	Independence of the Central Bank	Hungary's Constitution ('Fundamental Law') + CCVIII of 2011
3	January 2012	Independence of the judiciary: age of retirement for judges, prosecutors and public notaries	Hungary's Constitution ('Fundamental Law')
4	January 2012	Infringement of the independence the Data Protection Authority	Hungary's Constitution ('Fundamental Law')
5	April 2017	Infringement of EU law with modification of the law on higher education in Hungary	XXV of 2017 ('Lex CEU')
6	July 2017	Infringement of EU law on transparency of foreign funded organisations	LXXVI of 2017 ('NGO Law')
7	July 2018	Infringing EU law by passing certain regulations concerning measures against illegal immigration, and the 7th amendment of the 'Fundamental Law'	7th amendment of the Hungarian Constitution ('Fundamental Law') + VI of 2018 ('Stop Soros')

Source: Authors' own table based on Anders-Priebus [2021] p. 240

Besides the infringement procedures, among EU-Member State conflicts which can be managed within the existing frameworks, more significant cases were already appearing. These included the use of veto, much favoured by the Hungarian government, or budget disagreements over the increasing risk that funds earmarked for Hungary would not be properly accounted for. These in themselves, however, did not require responses from the Union which would have gone beyond the existing framework.

Member state behaviour endangering EU integration, requiring special measures

However, the next group of conflicts requires coordinated responses: when the behaviour of a member state directly endangers EU integration. Such were the French policy of 'empty chairs' in the 1960s,

which paralysed the functioning of the Union for a year, the Greek financial collapse, and Brexit.

Can we consider the decline of rule of law in Hungary as a crisis which endangers the Union directly? Such a decline of democracy and non-compliance with the rule of law has never happened in the history of the Union. Were the Hungarian and Polish cases to be classified as member state behaviour directly endangering integration, it would not be possible to co-exist with those states. In a year or two these cases would have to be dealt with in some way.

Conflicts stemming from member states related to differentiated integrations

Finally, *there is a set of disputes generated by member states which is connected to the fact that the Union became differentiated (multi-speed).*

Differentiated integration means that besides participating in the basic integration system of the European Union, further European integration systems can also emerge, which do not include all member states (for more on differentiated integration see *Csaba* [2019*a*], *Csaba* [2019*b*], *Halmai* [2019], *Palánkai* [2019]). Examples of such further integrations are the Schengen Area with 22 members, or the EMU with 20 members (Eurozone). These integration systems have their own conditions of accession, and in return for delegating member state competences to Union institutions, those who join are rewarded with extra benefits (for example, when a member state places its monetary systems under the ECB and in return the Union ensures the stability of the banking systems states belonging to the EMU).

Applying a permanent EU rule of law mechanism, introduced to manage Hungary's failure to comply with the principles of rule of law, could even lead to these member states finding themselves in another differentiated integration position; in their cases they would not receive *extra benefits for deeper integration*, but the opposite. They might lose out on a wide range of Union funds for failing to comply fully with the European rule of law regulations, and as this situation could persist permanently, they might be put in a differentiated integration status which would be better called 'disintegration'.

Consequently, Hungary's democratic backsliding and non-compliance with the rule of law might constitute a conflict which directly endangers EU integration, which cannot be sustained and/or could entail a drift towards inclusion in differentiated integration, with

implications of disintegration. *In order to find out which concept is appropriate to describe and interpret the European Union's response to Hungary's non-compliance with the rule of law, it is worth comparing the possible scenarios resulting from different ideas.*

4. The EU's attempts to reinforce the protection of the fundamental values of the Union (means, efforts and achievements) and of the Union budget interests

Article 2 of the Treaty on the European Union declares that the Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights. However, *according to reports adopted by the European Parliament, several steps of the degradation of democracy in the Hungarian political system violated these fundamental values, which were embraced by all member states, especially that of rule of law.* Besides, the EU had to face the anomaly that a member state was using Union funds to reinforce the economic background of an autocratic regime. Consequently, the European Union was forced to respond.

There is no precedent that tells the European Union what it must do in such cases. The question is: does it have the appropriate means at its disposal; furthermore, are the various union organisations united and determined to enforce the restoration of democracy?

The European Union also developed the means to defend fundamental values in response to challenges and crises. We shall highlight three attempts that were made in the course of this development: elaborating the criteria for accession, developing the procedure according to Article 7, and institutionalising of the rule of law mechanism based on conditionality.

Accession criteria as a way of protecting union values by regulating membership

As early as the beginning of the 1990s, the European Union was already considering the integration challenge posed by large-scale enlargement towards the East, which, due to the candidate members' inability to compete economically and their unstable democratic governance, might in the future cause integration problems on an unmanageable scale. In order to prevent this, a set of criteria for accession was adopted at the 1993 Copenhagen session of the European Council.[XV]

At the Madrid meeting in December 1995, the European Council added more demands: a candidate country has to lay the foundations for gradual and harmonious integration,

especially by developing a market economy, adjusting administrative structures and creating stable economic and monetary conditions. The EU set a condition for itself as well: it must be ready and be able to admit new member states. (*Losoncz*, [2023]).

Drawing up the Copenhagen accession criteria *basically fulfilled* its purpose in directing the preparation of candidate states in the course of the Eastward expansion after 2004. *However, soon they had to face the fact that their effect would last only up to the date of the member state's admission to the EU. These measures were incapable of managing any deterioration that might take place after accession; thus, among other things, they were also inefficient at protecting the Union's fundamental values*. Nevertheless, as a result of the challenges posed by the European Union's further expansion to the Balkans and the East, defining and implementing accession criteria has yet again become a matter of central importance in recent times. This is well illustrated by the news that in the wake of the European Council's last session, the leaders of ten member states held a separate conference on the subject (*Brzozowski* [2023]).

Procedure according to Article 7

The procedure according to article 7 of TEU is a basic defensive mechanism against member states violating fundamental EU values, in which as a final sanction the Council can suspend the rights of the member state in question. This first appeared in the Treaty of Amsterdam, which came into effect in 1999. This was complemented with a preventive mechanism in the Treaty of Nice, effective from 2003. So far, only the first part of this process has ever been activated, and only against Poland and Hungary. The process was initiated against Poland in 2017 by the Commission, and against Hungary by the European Parliament in 2018. However, both procedures were halted, as in order to declare the serious and ongoing violation of fundamental values and to proceed with the imposition of sanctions, the unanimous decision of all the member states except the one under accusation would have been necessary in the European Council. However, at this point both Poland and Hungary had already made it clear that each of them would veto the adoption of a resolution against the other in the Council. Procedures cannot be completed if two procedures according to Article 7 are launched against two cooperating countries, if a unanimous decision is required.

Legal mechanisms protecting the budgetary interests of the Union by imposing rule of law conditionality

Above, in our description of the conflicts between the Hungarian government and various EU bodies, we have already outlined the events directly preceding the drafting of the resolution on rule of law. However, we still need to mention several important stages along the path towards the resolution, examined from a broader perspective.

In September 2013, Viviane Reding, vice-president of the European Commission and Commissioner for Justice, summarised the challenges facing the EU with regard to rule of law in a comprehensive speech (*Reding* [2013]). The starting point of the speech was the less acknowledged fact that the "*Union is a unique construction, as it is not bound together by force, by a common army or a common police force, but only by the strength of the rule of law*." From the commissioner's speech, in which she assessed the situation and offered a wide range of recommendations, here we will only highlight the fact that she drew attention to the initiative intended to protect fundamental values, which appeared in the final report of the body called 'Future of Europe', established with the participation of 11 foreign ministers, in September 2012. The group of ministers declared it a prioritised task for the Union to establish a new mechanism, which would authorise the Commission to compile reports on obvious violations of fundamental values according to Article 2, including rule of law, by member states, and to draft proposals in connection with these for the Council.

The European Commission tried to fulfil this task. In 2013 they introduced the Justice Scoreboard, in 2014 the so-called 'rule of law dialogue', in 2018 the 'European Semester', and in 2019 the annual Report on Rule of Law. About these we could say that great efforts produced instruments of only limited effectiveness. *They cannot be used effectively against member states which deliberately violate rule of law, as they do not follow the logic of coercion, but rather that of consultation and direction* (*Czina* [2023], *Łacny* [2021]). [XVI]

Consequently, the pressure on the Commission did not decrease. In response to this challenge, finally, between 2018 and 2021 the above-mentioned legal instruments protecting the budgetary interests of the Union by imposing rule of law conditionality were completed: the 'rule of law conditionality regulation' enables action against member states that repeatedly violate fundamental values, and the regulation institutionalising 'horizontal enabling conditions' applying to all shared-management Union funds.[XVII]

While the Commission implemented the suspension of funds with reference to horizontal enabling conditions for the 2021-2027 funds assigned to both Poland and

Hungary, so far the only member state against which the rule of law conditionality regulation has been activated is Hungary (in April 2022, *ten years* after the first resolution of the European Parliament on the situation in Hungary).

The legal mechanisms protecting the budgetary interests of the Union by imposing rule of law conditionality have structural weaknesses: *linking concerns about rule of law together is a bold step, but at the same time it has a gravely restrictive effect*. It is not clear which measures that the member state might take with a view to correcting rule of law deficiencies will be acceptable, and in the case of this instrument it is not the law-violating government that will suffer but its citizens. However, at its first application "*the conditionality mechanism unquestionably proved to be more effective than other ways of protecting rule of law.*" The strong authority vested in the Commission made the procedure faster and simpler (*Czina* [2023]).

Attempts at protecting rule of law and achievements

Now we can move on to our second question. Daniel Kelemen worded a vitriolic criticism of the effectiveness of rule of law protection in various EU organisations. (*Kelemen* [2020], [2023]). This had two main elements. On the one hand, he criticised the EU for attempting to develop ever-newer instruments, and as it lacked the appropriate means – but we have seen that the EU had no appropriate weapons against those who violated the law intentionally – it did not dare to stand up to protect rule of law. On the other hand, he criticised the fact that the commitments of various EU organisations to protect fundamental values and rule of law were very varied. It is the Court of Justice of the European Union that gave the most unwavering support to the defence of the basic values of the Union. The European Parliament also contributed a certain amount, but up to the adoption of the Sargentini report it was its largest grouping, the People's Party, that was divided over this issue. Daniel Kelemen expressed the most damning opinion about the European Council, as the governmental members of the member states prioritised their own issues, and because in the 2010s it always focussed on different serious crises of the Union (the crises of the Eurozone, migration crises, Brexit, the crisis brought about by the Russian invasion of Ukraine). Finally, he complained that the Commission behaved more like servants than guardians of fundamental values and the rule of law.

However, drafting and announcing the legal mechanisms protecting the budgetary interests of the Union by imposing rule of law conditionality and launching the first

procedures to suspend funds for rule of law deficiency all indicate that the EU, at least in issues concerning the protection of the Union budget, has become more united and determined to protect rule of law.

Suspending funds, on the other hand, might turn into a retrograde step towards the dis-integration of the Union, so it is reasonable to have an overview of the possible economic consequences of such a disintegration.

5. The damage caused by Brexit and the modelled losses to member states resulting from the hypothetical disintegration of the Union

Before Brexit, any work analysing the economy of the EU focussed almost exclusively the various aspects of the development of integration. Brexit, however, increased interest in studying the damage and expenses that disintegration might cause.

Three years after the British exit, the first calculations on the economic balance of Brexit were published. Today, there is a consensus that the uncertainties surrounding Brexit slowed down investments, breaking from the single Union market reduced commercial openness, and these combined to set growth back in the UK (*Berend* [2021], *Halmai P.* [2020], *Losoncz* [2020]). *Compared to the EU27 average, in the pre-exit transitional period the per capita GDP in the United Kingdom took a nose dive, falling to the EU average by 2020.* Interestingly, this index did not worsen in 2021 and 2022, but this was the time of the pandemic, when the Union market also suffered, as many internal commercial obstacles were temporarily revived.

Economic analysts were not surprised by these developments, as the decision to leave was not founded on careful considerations of expected economic advantages. On the contrary, to quote László Csaba's summary: "According to those who understood the situation best, the real question was not whether traditional opposition would lead to break-up in the conflict between the practice of increasingly close cooperation and English unconventionality. Rather, when and in what form would this break-up materialise? Unquestionably, the fact that the British political class misread the situation, and that social media and the significance of proportionate voting and of communication based on fake news were underestimated all played important roles in the turn of events. (*Csaba* [2019*a*] p. 167)." As Olivér Kovács sceptically put it: "Arguments in favour of Brexit had nothing to

do with reality. Consequently, there is not much point in investigating the causality matrix of Brexit." (*Kovács* [2021] p. 575.)

Even if there is not much point in investigating the causality matrix of Brexit, it is worth drawing the conclusion that communication based on false information is of great significance. The only means to argue professionally against false information referring to the exit of a member state or to some other type of EU disintegration is to introduce the results of model-based calculations which are verifiable in their methodology (supposing of course that in the course of a debate professional arguments count for anything). In the following, we will outline the notable results of such a disintegration model calculation.

In order to simulate Union disintegration scenarios, Felbermayr et al. – applying the gravitation model already used – constructed a new model, using data on the 2014 goods turnover and the average net transfer in the European Union between 2010 and 2014. They published their results in various forms (here we refer to *Felbermayr et al.* [2022]. They simulated the following scenarios:

- collapse of the European customs union (S1),
- dismantling of the single market (S2),
- dissolution of the Eurozone (S3),
- break-up of the Schengen Area (S4),
- undoing regional trade agreements in force in 2014 between the EU and third countries (S5),
- complete collapse of all above-mentioned agreements and steps towards European integration (S6),
- complete EU dissolution and additionally termination of all net fiscal transfer payments between EU member states (S7).

The results of the simulation are shown in Table 5.

Table 5: Agreement-specific and aggregate losses in real private consumption as a result of reversed European integration (as a percentage of 2014 values)

		Scenarios						
		Customs Union	Single market	Eurozone	Schengen	Regional agreements	Total	Total w. transfer
Member states		S1	S2	S3	S4	S5	S6	S7
AUT	Austria	–0.04	–5.60	–0.88	–1.55	–0.02	–7.76	–7.57
BEL	Belgium	–0.15	–7.06	–0.99	–2.53	–0.04	10.20	10.61
BGR	Bulgaria	0.03	–6.92	–0.08	–1.50	–0.05	–8.30	14.54
CZE	Czech Rep.	–0.31	–7.40	–0.16	–2.33	–0.04	–9.86	12.88
DEU	Germany	–0.12	–3.55	–0.65	–1.04	–0.05	–5.23	–5.00
DNK	Denmark	0.00	–4.27	–0.03	–1.56	–0.04	–5.71	–5.66
ESP	Spain	–0.05	–2.53	–0.34	–1.02	0.09	–3.69	–4.50
EST	Estonia	–0.10	–7.22	–1.00	–4.23	–0.05	11.79	15.52
FIN	Finland	0.00	–3.72	–0.35	–2.32	–0.04	–6.07	–5.97
FRA	France	–0.02	–2.96	–0.44	–0.75	–0.02	–4.07	–4.03
GRC	Greece	0.31	–2.67	–0.30	–1.04	–0.14	–3.72	–8.27
HRV	Croatia	–0.08	–5.12	–0.10	–1.41	–0.01	–6.51	–7.63
HUN	Hungary	–0.17	–8.24	–0.16	–3.48	–0.07	11.53	19.23
IRL	Ireland	–0.37	–6.94	–0.86	–1.11	–0.09	–8.97	–9.45
ITA	Italy	–0.06	–2.69	–0.46	–1.02	–0.03	–4.09	–4.28
LTU	Lithuania	–0.27	–5.91	–0.03	–3.03	–0.02	–8.82	15.51
LUX	Luxemburg	–0.25	13.47	–2.53	–2.86	–0.20	18.06	18.71
LVA	Latvia	0.10	–6.32	–0.73	–3.47	0.00	–9.85	14.89
MLT	Malta	0.18	14.56	–2.45	–3.90	0.13	19.38	22.62
NLD	Netherlands	–0.23	–5.11	–0.70	–2.03	–0.06	–7.70	–7.75
POL	Poland	–0.25	–5.11	–0.08	–2.03	–0.03	–7.18	12.09
PRT	Portugal	0.18	–4.29	–0.59	–1.95	–0.01	–6.34	–9.19
ROU	Romania	0.00	–4.70	–0.10	–0.08	–0.08	–4.94	–9.44
SVK	Slovakia	–0.11	–8.11	–1.09	–2.83	–0.03	11.57	14.40
SVN	Slovenia	–0.26	–6.76	–1.13	–2.32	–0.06	–9.99	13.40
SWE	Sweden	–0.05	–4.26	–0.04	–2.23	–0.02	–6.29	–5.89

Source: Felbermayr et al. [2022] p.15

The most serious losses would be caused by the dismantling of the European single market; this would be followed by the termination of the Schengen treaty, then by the total collapse of the other achievements and agreements of integration. In a narrower circle of member states, in the case of countries who joined after 2004, losses caused by the termination of Union net transfers would also be significant.

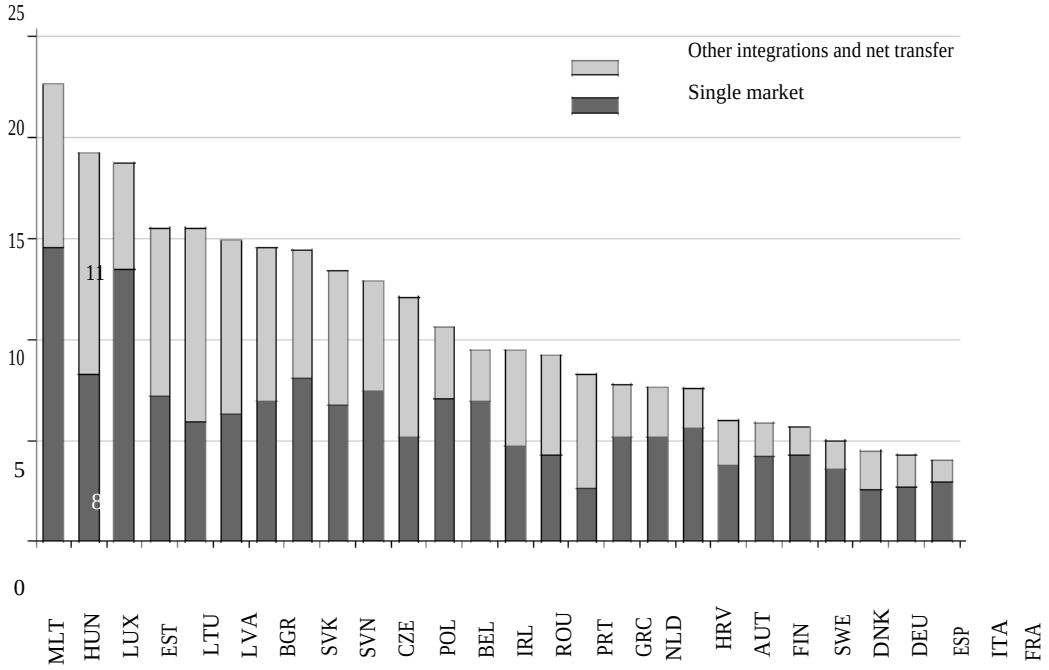
Figure 4 illustrates the condensed results of the model calculations, dividing the net losses of the EU member states resulting from the cessation of integration into two components:

- the combined effects of the dismantling of the Single Market and the Schengen Area,
- the effect of the ending of all other EU treaties (net budget transfers, Customs Union, Eurozone, EU regional trade agreements).

If we suppose that all steps and agreements related to integration were to end, then, as a result of the dismantling of the Single Market and Schengen all EU member states would suffer severe losses. To put it another way: the existence of a unified single market and being part of the Schengen Area make Union membership a win-win situation, even for net contributors. Countries with small internal markets profit especially.

The balance of the effects of other types of integration for different member states, on the other hand, is less straightforward, as some member states are net contributors in the EU budget, while the others are net beneficiaries. In the case of net contributor member states (Northern and Western European), the sums spent on contribution more or less neutralise the benefits of integration, apart from those resulting from membership of the Single Market and the Schengen Area. What is more, for Sweden and Denmark – which, in spite of being highly developed member states are not part of the Eurozone – the balance for other types of integration is slightly negative. For net beneficiary (Central and Southern European) member states, however, the received net transfers represent in themselves a significant benefit of Union membership, so in a hypothesized dissolution of the EU the loss of net transfers would cause further damage.

Figure 4: Losses in real private consumption resulting from the collapse of EU integration (percentage)



Source: Authors' own graph, based on Felbermayr and et. al [2022] p. 15.

For Hungary, the losses resulting from a counterfactual, hypothetical disintegration would be especially great. Losing the surplus from net transfers (which between 2010 and 2014, measured against the GDP, was a record sum) would barely be responsible for one third of the effect of the 19.2 percent fall in Hungary's real consumption. Almost two thirds of the fall would come from not belonging to the Single Market or the Schengen Area. Consequently, *Hungary could lose out on much more than the net transfers – which in themselves are very significant.*

In order to estimate the scale of the regulatory chaos that would follow the dismantling of the single market, or any country leaving it, it might be helpful to recall the statistics of the infringement procedures. This is because in order to have a single market it is not enough to have uniform Union regulations; the regulations must actually be enforced. By launching infringement procedures, the European Commission performs this - Sisyphean - task. It is worth recalling especially the statistics introduced earlier on procedures initiated against Hungary. They clearly illustrate that the majority of the Hungarian cases concern health and food safety, internal market, environmental protection and mobility procedures, all vital to the maintenance of a single market.

Among the costs of dismantling the single market, customs-duty-like costs would appear immediately, as well as losses due to trade restrictions that are not related to customs duties, the extra costs due to the dissolution of uniform regulations within the Union and of accommodating to the tangled skein of national regulations and permissions, not to mention the cost of the disintegration of corporate value chains and logistics networks. Besides the costs of leaving the single market, it is very easy to see how leaving the Schengen Area would cripple European mobility.

Although the costs would affect all member states, it must be emphasised that the greatest losers in a hypothesized disintegration would be the states which joined after 2004, all of which have small internal markets which are open, and receive the majority of cohesion funds. *A hypothesized disintegration would quickly put an end to the Eastern-European convergence machine*.

Obviously, this too is only a calculation based on a simulated model, with its own limits (for example, using data which recorded the state of affairs between 2010 and 2014), but it clearly indicates the disappearance of which elements of integration would cause the greatest damage, moreover it sets high professional standards for disintegration and exit debates.

6. Is there a way back to the EU for Hungary if NER is sustained?

In its relations with the EU, in the early 2010s the Hungarian government was only performing the 'peacock dance'. It avoided open conflict, using effective tactics and coming up with legalistic arguments (it searched for other examples from the past of EU member states in order to defend measures that violated fundamental values and came in for criticism; see *Világgazdaság* [2012]), but basically it followed a sort of 'free rider' strategy.[XVIII] In practice, the government completely failed to adapt to the goals and values of integration, while at the same time taking maximum advantage of short-term Union support mechanisms and using them to reinforce the power pyramid.

From 2015 onwards, the Hungarian government's peacock dance withered away, and by this time, while drawing on as much EU funding as possible (some of which was spent on the transformation of NER's fund allocation system, in an attempt at damage limitation), the government was engaged in a confrontational anti-migration and anti-LMBTQ campaign

intended to preserve national identity (*Kerner* [2020*b*], *Éltető–Szemlér* [2023] – befittingly: instead of performing a peacock dance it was already 'game of chicken').

Why did the Hungarian government end up having its funding suspended? In the wake of the 2015 change of government in Poland, and by forming the anti-migration bloc of the V4, the Hungarian government gathered a number of supporting member states, and reduced the risk of the procedure according to Article 7. However, making the government's confrontational anti-migration stance an issue at Union level was a miscalculation (*Pawlak–Strupczewski* [2016]), and by the end of the decade its former supporters had dwindled (due to Brexit, the suspension of Fidesz from the People's Party, then its exit, and changes in the German, Slovak and Czech governments).[XIX] By 2021, in its rejection of deeper integration, the Hungarian government went as far as to declare that "the expression *ever closer union* must be erased at the first possible opportunity from the Fundamental Treaty of the EU" (*Orbán* [2021]). The Hungarian government took no heed of warnings from various sources, and underestimated the determination and ability of the EU to protect rule of law and the unity of the alliance of the EU. Thus, having lost its defenders, it ran head first into the activation of the rule of law mechanism without braking.

So far, the EU Commission has only activated the rule of law procedure against Hungary. There were two reasons for this. On the one hand, the process of autocratisation increasingly raised questions about Hungary's respect for the fundamental values of the EU treaty. On the other hand, the EU was beginning to doubt whether the way Union cohesion funds were being used was appropriate to the targets that had been agreed, and whether the way rule of law functioned in Hungary properly ensured the accountability of the use of EU funds.

In spring 2022, the Russian invasion of Ukraine and the activation of the rule of law procedure against Hungary created new battlefields. In the rule of law procedure the Hungarian government is attempting damage limitation by combining reluctant accommodation to rule of law with threats to veto the budget (which has already been done several times). Following the Russian invasion in Ukraine, it placed itself in opposition to the EU over the question of supporting Ukraine with weapons and imposing sanctions on Russia, escalating its non-conformist foreign policy with a series of vetoes.

Questioning the perspectives of Hungary's European Union membership has by now become a common topic of conversation in Hungarian politics. Government politicians talking about this tend only to look at the macroeconomic effects of Union transfers (non-

refundable net funds from abroad), either promising to obtain resources from direct foreign working capital investments (*Nagy* [2023]), or already proposing that once we become net contributors, we will have to re-examine the arguments that justify our membership (*Csuhaj* [2021]).

As it transpired from modelling the costs of disintegration, the economic advantages enjoyed by EU members cannot be simplified to the net transfers inversely proportional to their level of development. The combined benefits of belonging to the single market and to the Schengen Area bear far greater economic significance. Taking a step further back, besides economic effects, socio-political effects should also be taken into account. We shall consider whether there is a way back towards the EU if certain major political trends are continued which ensure the sustainability of NER and its identity. We will also discuss whether these policies could be continued if NER leads to a break with the European Union.

Sovereignty

The basic condition for joining the European Union and for the Union itself to function is to share specific national competences (notions of national sovereignty) with the Union (in case of intergovernmental decisions of the European Council) or to transfer these competences to supranational Union organisations (for example, the final review of judicial decisions at the Court of Justice of the European Union).

In a speech in June 2021 (*Orbán* [2021]), however, the Hungarian prime minister – elaborating on his thesis about the future of the European Union – unequivocally turned against the basic principle of 'ever closer union', and criticised the supranational, 'overly politicised' functioning of the Commission and the Parliament, pointing out that "there is no European demos, only nations." He added that the EU should be transformed in order to protect the national and constitutional identity of the member states. In a speech in July 2023, (*Orbán* [2023*b*]), he outlined how the EU's next period would be marked by the struggle between sovereigntists and federalists. In this coming struggle the Hungarian government would fight against the federalists (whose main forces are not even supranationalist EU institutions, but leading member states: Germany and France). The main battlefield of the coming times would be sovereignty in foreign policy: in terms of content, either foreign policy in agreement with the Western allies (= shared sovereignty with the EU and NATO) or non-conformist policy towards Russia and China. In terms of procedure: either keeping

to unanimous decision-making by member states or shifting to decisions brought by qualified majority. In addition to that in the NER system today, fulfilling the obligation undertaken at EU accession that the Hungarian government would introduce the Euro, is utterly inconceivable, whatever prognosis the Hungarian National Bank might make about this. This is because becoming a member of the Eurozone would mean the Hungarian government conferring monetary management powers on the ECB, to supranational level, which is not compatible with the proclaimed struggle for sovereignty.

National identity and international struggle for identity

The fundamental policy of the NER is to reinforce national identity based on ethnic and historical components, and to raise this high above all other identities. Hungarian minorities living beyond the borders were granted dual citizenship, extensive identity-boosting programmes were launched inside and outside the country, with significant financial support. Within NER, boosting Union identity was absolutely not an aim, unlike in Slovakia, where this was one of the motivations for introducing the Euro (*Koller* [2021], *Gál–Malová* [2021]).

On the other hand, the approach which can be considered most widely-accepted in Western European countries is one where the content of national identity is basically citizen identity, and its multiple nature is taken for granted (personal, family, small community, citizen, multicultural and EU identity) (see for example *Kálnoky* [2022]). As for the Union, it considers the development of European identity, also meaning mutual acceptance (uniform European citizen's rights, EU symbols /flag, hymn/, Euro, the European Capital of Culture projects, Erasmus programme) as its own task. The supranational institutions of the European Union are indifferent to the Hungarian government's policy of encouraging and protecting the identity of Hungarian ethnic minorities living outside the borders, which is given great priority. Only some of the member states (France, Spain, Slovakia, Romania) take a stand on measures supporting the minorities (one of rejection), because they are afraid that raising the support of ethnic minorities to European level would reinforce separatist movements within their own countries. Consequently, a latent conflict of identity policy has existed between the post-2010 Hungarian government and the European Union (on the other hand, it must be mentioned that in connection with the Minority Safepack Initiative, MSPI, the European Parliament passed a resolution that supported it with a three-quarters

majority. The initiative was backed by the German Bundestag, the Dutch upper house and numerous regional parliaments)[XX].

From the mid 2010s, the Hungarian government complemented its traditional policy on identity with a new role: the identity of the fierce opponent of migration, then as flag-bearer of international neo-popularism (embracing imported identity themes such as anti-migration, taking action against woke identity and LMBTQ). But this already led to an open political clash between the Hungarian government and the EU, a clash which offered to the NER the easy task of taking steps against the risk of 'endangering families', without real opponents at home. Since this identity struggle has become NER's policy, backed up by relentless propaganda, the authors do not see a way back without loss of face[XXI].

Protecting the lower middle class, which forms the voting base, and state of emergency governance

An essential part of NER is the protection of the endangered lower middle class with unorthodox official intervention aimed at generating the greatest possible publicity.[XXII] For this, on the one hand a state of emergency is needed (or if this is lacking, an effective sense of state of emergency must be created); on the other hand, those deemed worthy need to be identified and protected by state intervention, even if this means infringing the Union framework of rule of law. Furthermore, since the beginning of 2020, on the grounds of preventing emergency situations, the government has been demanding and receiving unlimited authorisation to issue decrees in order to overrule laws.

Situations that needed defensive action requiring extraordinary interventions included the taxation of energy, telecommunications and multinational banking companies that made 'extra profit' in order to avoid taxing families in the early 2010s, then utility cost reduction, defence against migrants, defence against the Corona virus, defence against inflation caused by sanctions and against war, and finally defence against LMBTQ. The identifiable 'group in need of defence' is the petite bourgeoisie (families, employees, pensioners and small entrepreneurs) making up the majority of the party alliance's electoral base of 2-3 million voters and the core of 'work-based' society. Typical means of defence include fixing arbitrary official prices,[XXIII] issuing decrees on pricing and stockpiling at micro-management level,[XXIV] implementing official 'it costs what it costs'-style procurements,[XXV] fining producers for raising prices by levying extra tax on them,[XXVI] levying retroactive sectoral extra taxes, [XXVII] obliging service providers to include prescribed information on utility cost reduction as part

of the bills they issue, spending millions on 'national consultations', furthermore constant propaganda about states of emergency and about how the state defends the people, in the government-controlled media.

These measures clash with fundamental EU values and rule of law requirements at numerous points. For example, with a two-thirds majority there is no need to vest the government with unlimited authority to issue state of emergency decrees. But even the formalities of the drafting process of laws (e.g. the amount of time it takes and social consultation) are considered a nuisance by the government. For instance, the credibility of the budget is utterly undermined by government decrees which often overrule it. There is no reason to believe that NER will refrain in the future from overstepping the framework of EU rule of law in these policies. At the same time, as a result of the unavoidable devaluation of the Forint, the rise in interest rates and runaway inflation, a Huxit would cause uncontrollable damage to the situation of the petite bourgeoisie, which forms the voting base.

The control of development programmes by the NER hierarchy, the selection and recapitalisation of a new business elite, 'crony capitalism' and nepotism

In the case of local development projects, for which funding can be requested from centralised development programmes, the key issue for NER is that the pro-government representative of the region (chosen by the prime minister himself) should control the funds granted to the region (*Stumpf* [2022]), and send out unambiguous messages about funding being dependent on voting loyalty (*Körösényi* [2023]). Another important criterion connected to the implementation of development programmes, required by the NER, is that the contractors for programmes financed from both EU and Hungarian budgets should belong to a select group of new, major entrepreneurs, and the construction should serve their recapitalisation (see for example Péter Mihályi's theory on establishing the NER business elite; *Mihályi* [2023]). As András Lánczi, the former president of the government consultancy Századvég Foundation commented: "*What is called corruption is in essence the main policy of Fidesz*. What I mean by this is that the government's aim is to establish a stratum of Hungarian entrepreneurs, and the construction of strong pillars for Hungary in the provinces or in industry (*Lánczi* [2015])." This aim was met successfully: 'Connections to NER increase the chances of winning public procurement sevenfold.' (*Tóth* [2022]). However, within NER the

selection of the new elite and 'crony capitalism' are not mutually exclusive. On the contrary, they are closely intertwined (and even include elements of nepotism).

Following 2015, especially after 2022, the situation became more complex. As a result of more exacting EU supervision, the indicators of the corruption risks of EU-funded projects have significantly decreased, while those of projects financed from the Hungarian budget have not improved at all (CRCB [2023]). Furthermore, nepotism is rampant outside EU circles (real estate affairs, state subsidies for private capital funds, transferring resources with dividend preference shares).

After the reduction of EU funding, the control exercised by pro-government members of parliament over government-funded regional development programmes would only grow stronger. The loyalty of the major entrepreneurs with NER links, who have been recapitalised by state commissions, would not be lost either, as those not 'playing by the rules' would risk saying goodbye to their suddenly accrued corporate assets. Their ties could not be loosened by lessening EU support, nor by an exit from the EU. Naturally, they will need to continue receiving manifold government compensation (capital injection, bond programmes, targeted bail-outs, concessions, recovering new economic segments from foreign ownership).[XXVIII] However, large agrarian enterprises receiving single area payment schemes from the EU (and the whole agrarian sector) would immediately face a crisis if funding were reduced.

Attracting direct foreign capital investment to establish industrial and shared service centre capacities

In the NER system, one of the main sources of GDP increase - expanding investments and employment - and technological development is to attract direct foreign capital investment into Hungary to establish industrial assembly and supply and shared service centre capacities by offering state subsidies and low taxes. The countries in the region are in vigorous competition in this field. These investments, however, do not target the Hungarian market, so their pre-requisite is to be part of the single market and the Schengen Area. Consequently, NER cannot break with the Union, as it would risk a recession incomparably worse than that caused by Brexit. And the latest political development of the Hungarian government, which considers the attraction of industrial working capital a priority, is the prime minister announcing that "in the next one or two years, the Hungarian economy will need 500,000 new workers," and part of this need has to be met with migrant workers

(*gastarbeiter*) entitled to limited rights (*Orbán* [2023*a*]). So for the sake of foreign investments, the government is prepared to betray the identity struggle against migrants that it has been so consistently promoting since 2015.

To sum up: while carrying on with NER's basic policies makes it politically impossible to find a way back to the European Union, at the same time, breaking with the EU would shake the very foundations of the Hungarian economy.

7. What changes in Hungary could the EU achieve by applying the rule of law mechanism to protect budgetary interests? What further steps might it be forced to take?

We uphold our starting point: the European Union has taken a course of differentiated integration (Halmai P.), and a multi-speed Europe is not a danger, but a fact (*Csaba* [2019]).

What changes can a differentiated and multiple-speed EU achieve in Hungary by applying instruments that impose rule of law conditionality for budget protection?

It can restrict the open violation of fundamental Union values, and can, up to a point, reinforce the accountability of the EU budget. By monitoring the integrity of the use of funding, it can limit the improper acquisition of EU funds. Finally and most importantly, it can, by systematically applying conditionality, isolate autocratic member states.

What are the changes that the differentiated and multi-speed Europe does not wish to (or cannot) achieve by applying instruments that impose rule of law conditionality for budget protection?

The procedure according to Article 7 launched against Poland and Hungary for continual violation of fundamental Union principles has come to a halt. In the wake of the Polish elections in October 2023, quick remedial actions to restore rule of law are to be expected, which will bring about the termination of the procedure against Poland. The procedure against Hungary, on the other hand, is ongoing. What is more, should the conflict between the Hungarian government and the EU escalate, and without the protection of the Polish veto, moving the procedure according to Article 7 into its second phase is a realistic threat. However, until the procedure according to Article 7 is moved into the second phase, the EU in itself cannot hope to coerce the essential transformation of NER by implementing instruments that impose rule of law conditionality for budget protection. This is because being tied to the budget significantly restricts the scope of action of the instruments. For example, certain key features of autocratic transformation, such as taking control of the

media, reducing the sphere of competence of local governments or distorting the conditions of election campaigns are utterly beyond the scope of authority of these instruments. Thus, for the time being, a country with an autocratic regime will remain a member of the integration of liberal democratic countries. Consequently, rule of law reforms tied to the implementation of the budget may become interventions that remedy a few symptoms, but bring no real cure.[XXIX]

What further steps might the differentiated and multi-speed EU be forced to take?

In order to ensure that the EU's foreign policy remains functional, a group of ministers of foreign affairs has already initiated the further reduction of member states' right to veto (*Baerbock et. al* [2023]). Besides this, with the involvement of a select circle of member states, evaluation of the challenges posed by the EU's next expansion has begun (*Brzozowski* [2023]). Should the EU make concessions in terms of meeting the Copenhagen accession criteria – for geostrategic reasons – at the accession of the next candidate states (*Spirk* [2023], *Michel* [2023]), it can only do so if it first implements some changes within the Union as well (*Macron* [2023]), and creates systems that are able to force member states permanently violating fundamental values to correct their behaviour (new regulations that can be adopted without right of veto, effective sanctions, implementation by the Commission).

8. Scenarios for the future development of conflicts caused by Hungary's growing political separation

Having taken into account the path to the *application of instruments that impose rule of law conditionality for budget protection,* the perspectives relating to NER's main policies, and the steps that the EU is likely to take, let us return to our basic question: in its conflict between the Hungarian government and the EU over the rule of law, is Hungary demonstrating a kind of member-state behaviour which directly endangers the Union and as such cannot be allowed to continue for long, or is this the beginning of a process of disintegration taking place within a differentiated system of integration; a process which due to shortcomings in the rule of law entails the partial suspension of funding?

Officially, the European Union has never had a fallback plan to deal with a member state's failure to meet the fundamental values of the Union's founding treaty, resulting in the integration process suffering a setback.

The Commission's White Book, issued in 2017 and outlining the Union's visions of the future up to 2025 (*European Commission* [2017]), contained five scenarios, but only two of these included disintegration, and neither of them referred specifically to a member state. None of the five scenarios in the White Book yet included scenarios for Union expansion. Nowadays, however, if we extend the horizon of the visions of the Union's future up to 2030, we cannot avoid including further expansion.

A report drafted at the request of the French and German ministers of state for Europe by an international working team of 12 members and published in September 2023 (*Costa et al.* [2023]) received a great deal of publicity. This document outlines comprehensive reform proposals in response to the challenges imposed by the expansion of the Union. Considering Hungary's prospects within the Union, two packages of proposals in the document must be highlighted. One refers to reinforcing the maintenance of rule of law and to measures intended to defend it. They recommend the extension of budgetary conditionality, so that its applicability should not be limited to the protection of the EU budget, but in case of a member state violating the rule of law, they should be applicable in a wide range of cases. Furthermore, the limitations of the procedure according to Article 7 would be removed by the introduction of a four-fifths threshold for Council approval and the obligatory closure of launched procedures within five years. The other package of proposals to be highlighted refers to the creation of a more differentiated European Union. It is recommended that member states aspiring to an enhanced degree of integration should establish formally, within the existing Union, an inner circle of integration. A second circle would be composed of the existing members who do not wish to participate in the enhanced integration. However they would have to accept the loss of most of their current rights to veto. Outside this, a circle of associate Union members should be established, who are already part of the single market, and a fourth circle of countries, the European Political Community, should be set up to serve as a forum for European political dialogue. And although this is only an expert report, it is still a document which elaborates on the vision of the Union's future as seen by the two most significant member states of the European Union.

If we are looking for the various scenarios referring to the conflict between the Hungarian government and the EU, covering the period up to 2030, then we must bear in mind, apart from the most important recent developments – the Franco-German EU reform proposal, and the October 2023 Polish elections, which resulted in the termination of the

democracy backsliding collaboration between Hungary and Poland. We must consider the following main factors:

- will there be a further expansion of the EU by 2030?[XXX] (In which case the accession of Ukraine would pose a serious challenge from the point of view of the EU budget, while the accession of the Balkan candidate would be problematic from the point of view of the EU's decision-making and governance systems),

- will the EU's commitment to reinforcing integration be maintained after the next national and EU elections? (In which case there will not be any setbacks in the application of instruments that impose rule of law conditionality for budgetary protection; indeed, further steps are possible),

- will the NER system be maintained in Hungary in the long run? (In which case there is no political way back to the European Union.)

Taking these issues into account, *from the point of view of Hungary's position up to 2030,* we will have to consider the following basic scenarios.

Table 6. Scenarios for the EU-Hungary conflict up to 2030 from the point of view of Hungary's position until the end of the period

	Scenario	Basic conditions for the scenario and its development	Consequences for Hungary in the EU	Probability
1	Hungary is placed in quarantine in the current, but differentiated Union, with fewer rights and benefits.	The expansion and reform of EU27 are not launched, the EU does not abandon rule of law procedures against Hungary, but Article 7 is not applied	Union decision-making: Both in EU27 and the expanded EU, the range of decisions requiring unanimous approval is reduced, the strength of the Hungarian veto is reduced. Union decision-making: using indirect methods, the range of decisions needing unanimity is reduced, the strength of the Hungarian veto is reduced. . Net benefits from the EU budget: Reduction of the sum of net Benefits in EU27.	Relatively high (approx. 50 percent)
2	EU disintegration begins, The EU abandons rule of law procedures against Hungary.	The expansion and reform of EU27 are not launched, EU-sceptic parties win majorities at the European parliamentary and national parliamentary elections.	Union decision-making: decision-making becomes chaotic, being paralysed by member-state vetoes. Net Benefits from the EU Budget: the net contributor countries immediately reduce their contributions, leading to a crisis in the financing of the EU.	Low (between 20 and 30 percent)
3	In an expanding and reformed EU Hungary remains at a basic level of integration without power of veto.	In order to expand EU27, the EU is reformed, budgetary and foreign policy decisions are brought with a qualified majority.	Union decision-making: Hungary loses the power of veto. Net Benefits from the EU Budget: an expanded EU about break even point.	Low (between 20 and 30 percent)
4	Launching Huxit[XXXI]	In EU27, Poland returns to the EU fold, and with Polish protection removed the EU pursues the procedure according to Article 7 against Hungary, but before EU rights and benefits are withdrawn, the Hungarian government launches Huxit.	Union decision-making: the continuation of the procedure according to Article 7 annuls the Hungarian power of veto. Net benefits from the EU budget: Procedure according to Article 7 threatens Hungary with total loss of legal rights.	Very low (under 10 percent)
5	Hungary returns to the EU fold	NER ceases to exist, a change of government takes place, and even the leaders of state institutions independent of the government ('checks and balances'), who have been 'cemented' in place for up to 9 years by laws passed with two-thirds majorities, are unable to prevent a return to EU values.[XXXII]	Union decision-making: constructive participation. Net Benefits from EU Budget: Massive sum of net benefits in EU27, the expanded EU will break approximately even.	Very low (under 10 percent)

Source: authors' own table

In the most probable scenario the conflict over rule of law between the EU and Hungary continues. The Union refraining from strict implementation of rule of law regulations or Hungary with less veto power in the basic level of an expanded and enhanced Union are both scenarios with a considerably lower probability. Hungary's reconciliation with the Union, and the Huxit -– both are unlikely. Although the possibility of Huxit is already being openly discussed in Hungary, it would cause for Hungary, a country with a small internal market and with an economy deeply integrated into the EU, unbearable losses (devaluation of the Forint, introduction of agricultural customs tariffs, massive price-rises in foodstuffs, the paralysis of economic mobility and so on). What is more, the economic interests of the EU would also suffer more from a Hungarian exit than if the country were to remain inside. Thus – in case of rational scenarios – a prolonged conflict is most likely; Hungary and the Union will remain permanent thorns in each others' sides. In a more differentiated Union, Hungary will be confined in a sort of quarantine which offers less support and fewer chances to participate. At the same time, this will not be a stable situation, but a drift towards disintegration, with occasional heightened conflicts involving both parties (e.g. for the Hungarian government, launching a new anti-Brussels national consultation, "law on sovereignty" and strengthening its non-conformist relationships with Russia and China, while the EU might attempt media regulation and question the Hungarian presidency of the Union). Although the economic base of EU after the successful operation of EMU is more stable than ever and the disintegration would be a very damaging scenario for every member country (see Felbermayr et al. [2022]), the destructive strengths of the irrational claims of the EU opponent "sovereigntist" parties must not be underestimated.

Summary

In this case study we analyse the development of the Hungary-EU relationship since 2010.

In the 2010s, the economic catching up process took place in Hungary was accompanied by the autocratic transformation of its political system. This entailed the violation of the fundamental values of the European Union as laid down in treaties, especially the rule of law requirements, and Union budgetary interests were also infringed by the way in which funds were used. The Hungarian government marginalised the long-term optimalisation of

member state benefits and obligations, and subjugated it to the preservation of the power of the party alliance which had obtained a sufficient majority to alter the constitution.

Very soon, the EU also had to face the deterioration of Hungarian democracy and rule of law. It was primarily the European Parliament that urged counter measures. However, it transpired that the instrument the EU had at its disposal to deal with such situations (the procedure according to Article 7) was not effective. By the end of the decade, in the wake of various efforts of questionable efficacy, the European Commission proposed new instruments involving a novel approach to safeguard EU budgetary interests by setting rule of law conditionality, to apply 'horizontal enabling conditions' and the 'rule of law conditionality regulations'. The Hungarian government aggravated the latter step by launching an international struggle to preserve national identity, which began with the 2015 migration crisis, and by pursuing a non-conformist policy over the Russian-Ukrainian war. The European Union "accepted the challenge," and following the Hungarian elections it made access to a whole range of Union funds conditional upon meeting the horizontal enabling milestones and rule of law conditionality.

We do not anticipate a further escalation of the conflict, the completion of the procedure according to Article 7, or Huxit. Based on the experience gained during Brexit and models of disintegration scenarios, total disintegration would be accompanied by very heavy costs. Consequently, the implementation of budgetary conditionality would most likely end in a temporary cease-fire. Naturally, in EU27 this is a situation that cannot be legalised at treaty level. However, if the EU is expanded, the Union shall be further differentiated, where Hungary remain in the basic level of membership with less veto power and less benefit. In our view the case of the worsening Hungary-EU relationship can be explained by the upgrading of the conception of the differentiated EU. Until the 2010's the differentiation of the EU meant upward differentiation only (enhanced cooperation; Schengen and EMU). In contrast, the EU's answers on the illiberal transformation of the Hungarian political system have launched a new type of differentiation, a downward differentiation (less benefit, less participation, a kind of disintegration) in the EU for the member state concerned.

Although most probably there will be a set of legal modifications correcting rule of law shortcomings in Hungary, as a result of which a substantial part of the EU funds might be released, the democratic deficit of this member state of the European Union, and the confrontational style of the Hungarian political system, will remain. In a Union which is

becoming increasingly differentiated, Hungary will be set apart in a sort of quarantine, with less access to funding and fewer opportunities to partake in decision-making, drifting on and on, though with occasional moments of stability, towards the maelstrom of disintegration.

[I] Gábor Gulácsi, economist, curator of the By Force of Thought Foundation (email: g.gulácsi@outlook.hu)

[II] Ádám Kerényi, researcher at the HUN-REN CERS Institute of World Economics (email: kerenyi.adam@krtk.hun-ren.hu?)

[III] In Poland, the erosion of constitutionalism can be seen to have begun with the change of government in 2015. After that year, the decline of democracy took place simultaneously in Hungary and Poland, a process during which the governments and dominant parties of the two countries not only learned from each other, but also collaborated in countering the steps taken by the European Union. (Democratic backsliding as a collaborative project: *Holesch-Kyriazi* [2021], [2022]). As a result of the October 2023 elections in Poland, this collaboration came to an end.

[IV] Without discussing the theoretical questions of the economic convergence and divergence in the EU single market we have to note, that both mentioned drivers for the convergence of the new, less developed EU members are transitional ones. When their internal labour resources dried up, the labour costs will be closer to the EU average and the state of development of their regions above 75% of the EU average, these drivers will not work anymore.

[V] The selection and description of these conflicts are closely related to the normative view of this study. In a possible - but so far not existing- "souveraintist" overview the conflicts connected with the corruption risks in the use of EU funds would not be mentioned, and the reports, requests and suggestions of EU would be interpreted as illegitimate interventions.

[VI] The alarm referred to the question of whether the new Hungarian constitution adopted on April 18, 2011 and the provisions of the 'cardinal' acts following it were in accordance with the Union treaty, with special focus on the fundamental rights of the Union. The tasks were, for the European Commission, its own Committee on Civil Liberties, Justice and Home Affairs, the European Council and the Venice Commission, to evaluate and monitor whether the above-mentioned Hungarian legislation was in accordance with the fundamental rights of the EU (*European Parliament* [2012]).

[VII] The report examines in detail the issues it considers critical: the Fundamental Law and its implementation, the democratic system of checks and balances, the independence of the judiciary, electoral reform, pluralism in the media, the rights of people belonging to minority groups and freedom of religion and thought, as well as the recognition of churches.

[VIII] Two chains of events were especially widely discussed: the overwhelming success of the companies of NER's leading oligarch, Lajos Simicska at public procurements, and the successes achieved by Elios, partly owned by the prime minister's son-in-law, at tenders – something which led to legal complaints being filed.

[IX] In order to obtain internal support for this, the government launched mass communication campaigns (The "If you come to Hungary, you cannot take the jobs of Hungarians" campaign, as well as the Soros-Juncker campaign). Its policy of promoting national identity was upgraded to fighting to protect national identity, and finally it organised state-run collections of signatures called 'national consultations' (*Mráz* [2023]) and an anti-migration referendum (*Éltető–Szemlér* [2023]).

[X] The project was transferred to the state budget, while the police dropped their investigation into the charges of budget fraud, stating that no crime had been committed.

[XI] A good example of how the selection of winners of public procurements was manipulated in NER's system of fund allocation is the case of Lajos Simicska, who in the first half of the 2010s was one of the architects of NER's economic background. After he turned against the prime minister in 2015, his main company, Közgép, which up to that point had collected public procurement contracts, was excluded from public procurements from one day to another, and his companies were replaced by, for example, selected companies belonging to Lőrinc Mészáros.

[XII] The motion was supported by the majority of the representatives in the European People's Party (EPP), the political group in the Union to which Fidesz belonged. In March 2019 Fidesz's EPP membership was suspended, and in March 2021 Fidesz left the People's Party

[XIII] The four conditions were the following: (i) applying effective monitor mechanisms in areas of public procurements (ii) implementing the necessary instruments and capacities for the effective application of regulations on state support (iii) effective mechanisms to ensure the implementation of the programmes

compliant with the Charter and (iv) implementing and applying the UN convention on the rights of persons living with disabilities.

[XIV] In case of deficit in the state of law, the draft included the suspension of the acceptance of commitments to provide support and of actual payments as measures to be taken by the Commission. Furthermore, it stated that these measures regulated financial management concerning the implementation of the Union's budget, consequently these could be passed by the European Parliament and the Council with a qualified majority. As a result, the Hungarian and Polish governments in alliance could not have prevented the approval of the draft resolution. However, at the end of 2020 the 2021-2027 budget and the Council's approval of the directives of Next Generation EU, a life-line for the Southern states, were being discussed at the same time, and these did require a unanimous decision. The Hungarian and Polish governments declared their intention to veto these, unless a softened rule of law resolution was adopted. However, net contributors of the Union (such as the Netherlands), found any softening unacceptable (*Kerner* [2020*a*], [2020*d*]). Following this, as a result of an informal deal with the Council (it was agreed that the state of law mechanism would not be applied until the action for annulment at the Court was settled, and until the 'Commission's directives', including the specific rules for implementation, were worked out (*European Council* [2020*b*]), nor would they be applied before the next Hungarian elections (*Vörös-Abloncy-Magyar* [2023]). At this, the Hungarians and Poles gave their consent.

[XV] The adopted directives specified and complemented the accession criteria by grouping them into four points. The first is acceptance of the political, economic and monetary aims of the union, and the establishment and stability of institutions guaranteeing democracy, rule of law, human and minority rights. In accordance with the second, the candidate countries must observe the obligations that come with membership: they must be capable of adopting and applying the continuously growing common achievements (union law, unlegislated basic principles, agreements, declarations, statements and practices etc.). The third criterion is establishing and maintaining a functioning market economy. According to the fourth, candidate countries must be able to bear the pressure of competition within the union.

[XVI] A question may be raised here, by what economic theory can be explained this member state's behaviour which violate rule of laws. In our view the application of the theory of "moral hazard" can be promising, however we have to keep in mind that EU is an "UPO" (unidentified political object), incomparable to anything else,

[XVII] The country-specific Recovery and Resilience Facility (RRF), an instrument complementing the 2021-2027 budget, intended to boost economic recovery after Covid, centrally supervised by the EU, may also have preconditions in order to reinforce rule of law. This is because the programmes must be in accordance with the relevant country-specific recommendations defined within the framework of the European Semester, which may include recommendations on rule of law measures.

[XVIII] "As a result of the dance of diplomacy, refusal must be presented as if we would otherwise like to make friends. These are manoeuvres belonging to the art of politics, so that out of seven proposals we nod to two or three (which we have done already, only they haven't noticed), and the remaining two, those we do not want, we refuse by adopting the majority in the end. This complicated game is a kind of peacock dance." (According to newspaper reports, Prime Minister Viktor Orbán uttered these now notorious words in connection with the EU at the Századvég conference, which was organised in 2012 for the second anniversary of the government's inauguration. There is no available transcript of the speech; it was referred to in the media (e.g. http://nol.hu/velemeny/20120604-pavatanc-1312137).

[XIX] Even the Hungarian prime minister finds the loss of one of his supporters particularly serious: "Empire or nations? Here we suffered a more serious punch in the guts when our English friends left the European Union with Brexit. That tipped the balance within the Union between supporters of sovereignty and federalism. It looked like this: on one side were the French and Germans, as federalists, on the other side it was the English and us, the V4. *If the English were still inside the European Union, then we would not have to learn expressions such as 'rule of law mechanism', 'conditionality' and 'economic governance'; they would not exist.* They can only be introduced in the European Union because the Brits opted out, and we, the V4 could not prevent this; what is more, the federalists launched an attack on the V4. We can all see the results. Basically, the Czechs have switched sides, Slovakia is wavering, only the Poles and Hungarians are holding out." (*Orbán* [2023*b*])

[XX] Reported by Bálint Ablonczy

[XXI] At the same time, the fact that with the application of the rule of law mechanism the suspension of funds affected the Hungarian implementation of the Erasmus+ programmes at those Universities which were reorganised into public foundations, created a schizophrenic situation for the Hungarian government, which touched upon identity policy. Beyond its immediate training targets, Erasmus+ is one of the most successful programmes for enhancing Union identity. Although reinforcing European Union identity is by no means the aim of the Hungarian government, being left out of Erasmus+ would result in thoroughly negative feedback

from university students (and their parents), and would be politically very difficult to defend.

[xxii] Targeting as the voting base 'people' (rather than 'citizens') who strive for security and the Kádár period-like boost in consumption, and obtaining continuous feedback from them by means of polls, was the gist of Fidesz' pre-2010 socio-political turn (*Körömi* [2017]).

[xxiii] For example, freezing the price of water and energy supplies since 2015 or introducing a price cap on fuel at the end of 2021.

[xxiv] For example, prescribing the supply of a minimum stock of price-capped foodstuffs in each shop belonging to large retail chains, then obliging them to hold sales.

[xxv] For example, the panic-driven decisions of the Ministry of Foreign Affairs in the Covid period to procure Chinese ventilators resulted in an extra expenditure of 300 billion Forints, while purchasing surplus gas when gas prices were at their highest meant an extra expenditure of 500 billion Ft. These together constitute almost 1.5% of the annual Hungarian GDP.

[xxvi] For example, an extra-profit tax levied on 90 percent of the increase in prices in the building material industry.

[xxvii] Retail, petrochemical and pharmaceutical industries.

[xxviii] Obviously, the reactions of other Hungarian entrepreneurs to an EU exit would be very varied. For those Hungarian industrial and service suppliers who do not depend on NER, who sell in European markets, an EU exit would cause economic damage and capital loss that would be impossible to compensate. And somewhere between these two groups are those small enterprises who depend on commissions from the local market and whose livelihood depends on tourism. A significant flight of capital is not implausible in these circles.

[xxix] According to the sharp standpoint of Daniel Kelemen, one of the leading researchers in this field' "if the EU leaders were to acknowledge that any one of the member states has turned into an autocracy, then they would be admitting that the European Council functions illegally. This is because the 10th Article of the Treaty on the European Union declares: 'The functioning of the Union shall be founded on representative democracy', and 'Member States are represented in the European Council by their Heads of State or Government and in the Council by their governments, themselves democratically accountable either to their national Parliaments, or to their citizens.' If the EU leaders were to acknowledge in the Commission or in the Council that the Council actually functions in violation of Article 10, as some of its members are autocrats, who are not democratically accountable, then arguably all legal acts that have been adopted by the EU in the past few years would be open to dispute. Consequently, silence rules, and not a single leader of the Council or Commission will openly speak about the dirty secret that Europe hosts a pet autocrat. The emergence of the government of at least one autocratic member state (Hungary), and presumably it will be followed by others, is a scandal and a tragedy at the same time for the EU. A scandal, since the appearance of an autocracy within the EU is a betrayal of the professed fundamental values of the Union. A tragedy, because it could have been prevented. What's more, it is an ongoing tragedy, as the EU could still be doing much more about the spread of the cancerous growth of autocracy. However, the EU leaders refuse to use the instruments at their disposal. (*Kelemen* [2023] pp. 224-225)"

[xxx] The present Hungarian government would certainly not take part in the further integration of the EU and in the establishment of an inner circle of member states (as we have seen, in the NER system even joining the Eurozone, an obligation undertaken at accession, is unimaginable). Thus, as far as the government is concerned, this is not a realistic option, but a 'federalist' initiative to be foiled. Consequently we do not include it among Hungary's Union scenarios.

[xxxi] A detailed, multifaceted analysis of the costs of a – counterfactual – hypothetical Huxit is given in the studies published in the 2019 special edition of Külgazdaság (*Csaba* [2019*d*], *Csáki* [2019], *Deák* [2019], *Gálik* [2019], *Horváth et. al* [2019]).

[xxxii] The Hungarian prime minister's view, in which the system of checks and balances is 'Eurobabble', something that 'a person with any self-esteem' does not apply in the Hungarian political system (*Viktor Orbán* [2023*c*]) is in contradiction with such 'cementing' activities by NER. This contradiction can be resolved by supposing that these checks and balances (e.g. the State Audit Office, the Media Authority) in NER indeed do not have the function of supervising and restraining governance; on the contrary, their function is to restrain the opposition in its anti-governmental activities.

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The Functional Federalism of the United Arab Emirates

by
Nisrine Abiad[I]

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Abstract

Although only a young federation, the United Arab Emirates is prosperous and well-functioning, and its success set it apart from numerous unaccomplished federal experiments in the region. On the occasion of the golden jubilee of the UAE's 1971 establishment, this article aims to understand what model of distribution of powers is designed in the UAE and to what extent it is possible to classify it through the lens of comparative federalism. It is notable that flexibility in the provisions of the constitutions and in the jurisprudence of the UAE Supreme Federal Court shapes the division of powers between the federal government and the emirates. The analysis clarifies that despite evidence of dual and administrative federalism features, the UAE federalism model is still in the making. Nevertheless, it finds its relevance in a strong principle of supremacy of federal laws and the recent emergence of a direct relationship between the citizens and the federation.

Key-words

federalism, United Arab Emirates, distribution of competences, UAE Supreme Federal Court

1. Introduction

Fifty years ago, on 2 December 1971, a federation was born through an accord between 6 entities in the Gulf region known as 'emirates'. This federation was called the United Arab Emirates (UAE), and Abu Dhabi was set as its capital. The emirates of Abu Dhabi, Dubai, Sharjah, Ajman, Fujairah and Umm Al-Quwain were the first members of the newly established federation. On 10 February 1972 a seventh emirate, Ras al Khaimah, joined them in the federation. Born after the dissolution of its predecessor, the Federation of the Arab Emirates[II] which existed for few months only, standing among Muslim states where several newly formed federations were struggling to establish themselves in places such as Iraq, Libya, and Nigeria, and against the backdrop of a twentieth century littered with unsuccessful federations such as the West Indies (1958 to 1962) and Serbia and Montenegro (1992 to 2006) (Hueglin and Fenna 2015, 341), the United Arab Emirates has been a success and celebrated its golden jubilee[III] in December 2021 in peace and prosperity. As nicely put by Heard-Bey, "the UAE is there to stay" (Heard-Bey 2021, 421).

The majority of scholarly literature on UAE federalism is available in the Arabic language. Bin Huwaidan gives an interesting recount of the political history of the United Arab Emirates including the steps to federal integration. The author notes that although the fifty years of the UAE's existence may seem short in comparison to the age of countries, it is sufficient to provide us with much information on the federal experience in the UAE. The author observes that the federal structure of the UAE is now mature, having survived the inception stage where there existed real fear for its continuation as a federal state due to many internal and external challenges. Bin Huweidan posits that the UAE has now reached the stage of federal consolidation (Bin Huweidan 2022, 147-148).

In the English language however, scholarly literature on the federal system of the United Arab Emirates is scarce. Heard-Bey provides the most detailed historic account of the formation of the federation (Heard-Bey, 2021). Al-Abed summarizes the historical background of the birth of the federation and provides an overview of its main constitutional basis (Heyller and Al Abed (eds) 2021, 121). Simmons has researched the UAE federation and has recently provided an updated overview in a dedicated chapter in the Forum of Federations Handbook through which she reminds the reader of the history of the development of the UAE federation and conducts an interesting analysis of some

constitutional provisions relating to federalism. Simmons observes that the UAE constitution provides for "arrangements resembling a federation" that "reflects a compromise between emirates in favor of a centralized or integrated federalism and those that preferred persevering the autonomy of individual emirates" (Simmons 2020, 356). Further, the author acknowledges the significant constitutional federal powers but notes that they are counterbalanced by interesting powers granted to the emirates including residual powers and the ownership of the "natural resources and wealth" (Simmons 2020, 359).

Yet, many aspects of the UAE federation remain unexplored. In the very early stages after the formation of the state, the structure of the UAE was even sometimes identified as a confederation that was overlooked (Peterson 1988, p.198). The United Arab Emirates is very succinctly addressed in one of the most prominent academic works on comparative federalism. It is merely cited in a table of federations established in the twentieth century that are still in existence, in their order of formation (Hueglin and Fenna 2015, 48).

Building on the scholarship concerning the UAE federation, and acknowledging that the UAE remains a very young state which has yet to achieve its own preamble goals in becoming "*a comprehensive, representative, democratic regime*", but is nonetheless a functioning and stable federation that has applied high international standards to itself and its people in many respects,[IV] this research aims to conduct a critical examination of the UAE constitution and jurisprudence of the Supreme Federal Court with the aim of understanding the division of powers – mainly legislative and administrative –between the two levels of this federal entity. The division of powers is of fundamental importance in federal systems (Mueller and Fenna 2022, 1) and the ultimate purpose of analyzing the division of powers in the UAE federal order is to identify how or where the UAE federalism model follows classification of federalism systems in comparative federalism while capturing its main characteristics. The paper intends also to present new material for reflection in the ongoing federal debates and constitutional experiments in this troubled region of the world where transplanting Western style models of federalism may not necessarily be the most suited option.

The next section will set the conceptual contexts by briefly discussing traditional federalism models.

2. The Models of Federalism

Constitutionalists agree that there is no single definition of federalism, nor a single model of a federal state. Federalism represents "a family of disparate systems" (Parikh and Weingast 1997,1593). However, it is constant that federalism finds its foundation in a partnership that aims to build a state through a stable framework of government that is established voluntarily, aiming to achieve unity while accommodating and preserving diversity within a larger political union. One of the key principles of federalism is the principle of a vertical division of power between the federal and constituent levels, a division that comes in addition to the horizontal division of powers in any state between the 3 branches: government, legislative and judiciary. This constitutes a defining characteristic of any federal system (Parikh and Weingast 1997, 1598). Other principles pertaining to the autonomy of the entities and the external sovereignty of the federal state, as well as the principle of participation of the entities in the federal level of government, are also paramount to the existence of a federal order. If these principles are respected, there is a large margin for maneuver in calibrating the government and governance aspects between the two levels in the federation.

As Hueglin and Fenna explain, "one of the most important distinctions between federations will be the approach they take to dividing powers and responsibilities between the central government and the government of the constituent units" (Hueglin and Fenna, 2015, 53). Classically, scholars distinguish between the following two basic models: dual federalism and administrative federalism. The first model is based on the American model of federalism. It creates "distinct national and subnational policy domains" and makes each level of government responsible for the entire policy-making process including implementation and administration (Hueglin and Fenna 2015, 53). Since its establishment in the US, the model of dual federalism has been replicated in other federations across the globe including Canada, Australia and many others.

The second model finds its roots in German federalism and is commonly known as administrative federalism or the administrative division of powers. It reserves legislative power to the national level of government, granting executive and administrative powers to the local level or units of the federation. In Germany therefore, the legislative powers are concentrated at national level and most administrative powers rest with the local units known

as *Länder*. With administrative federalism, a significant degree of cooperation naturally exists between the two levels of the federation.

Comparative federalism is a complex field, given the many ways in which a federation can be constructed and operate, and they often do not follow traditional classification (Hueglin and Fenna 2015, 55). What model of distribution of powers did the UAE founders design for their new federation? In other words, to what extent is it possible to classify the division of powers in the United Arab Emirates?

In order to answer the question posed by this paper, section 3 briefly reminds the reader of the birth of the UAE and some important aspects relating to the context of its establishment. Section 4 provides an overview of the constitutional distribution of powers between the two levels of government in the UAE through which a large margin of flexibility is revealed. Section 5 attempts an unsuccessful classification of UAE federalism; Section 6 rationalises UAE federalism, revealing its atheoretical dimension. Section 7 seeks an explanation for the effectiveness of UAE federalism in light of its flexibility, and last; Section 8 concludes the research paper.

3. The Birth of UAE

On 2 December 1971, the sheikhs of each entity signed an agreement declaring the establishment of their federal state. This historical document has since become an integral part of the Constitution as its preamble. The latter shows that from its inception, UAE federalism has not been based on the joining of diverse cultural communities defined by their language, race, religion or other trait. At a time of regional instability created in the aftermath of the British withdrawal from the gulf, the 6 sheikhdoms decided, for political and economic reasons, to unite in a new federation called the United Arab Emirates, which two months later welcomed a seventh sheikhdom. The preamble emphasizes in its second paragraph the desire of the founders and the desire of the people for "more enduring stability and a higher international status for the Emirates and their people." In addition to this, the third paragraph mentions the desire to create a state that is "capable of protecting its existence and the existence of the its members." Common cultural reasons are also present in the core of the establishment of the UAE as the preamble stresses with pride the common Arabic roots and Islamic beliefs (Bin Huwaiden 2022, 96).

As far as the form of government of the newly established Union was concerned, the founders, with a sense of pragmatism, and being fully aware of "the realities and the capacities of the emirates at the present time"[V] intended that the United Arab Emirates would become a "comprehensive, representative, democratic regime". By setting a representative regime as a goal and not an immediate reality to implement in the newly formed state, the founders saved the federation from certain chaos. Simmons explains that around the time of the constitution of the UAE, the population was "less than 100,000 residing in impoverished desert villages and practicing a traditional way of life" (Simmons 2020, 354). Heard-Bey points to the "extremely harsh climate and inhospitable environment (that) imposed terrible hardship on the people born in the emirates before the oil age" (Heard-Bey 2021, 418). The knowledge index shows that half of the population of the UAE was illiterate at that time.[VI] The goals set in the preamble, including to "prepare the people for a free constitutional life", were set by the founders as a necessary precursor to the realization of the ultimate form of government. Since its establishment, the federation has invested heavily in its human capital making significant progress in the education sector. It has also made steps towards democracy[VII]. This approach founded in realism helps with understanding the federalism choices in the UAE and provides the roots for its viability.

4. Understanding the distribution of powers in the federal UAE order

It is notable that flexibility in the provisions of the constitution as well as in the jurisprudence of the UAE Supreme Federal Court shapes the division of power between the federal government and the emirates.

In the federal constitution

Flexibility seems to be provided by constitutional design in the distribution of powers between the federal and the local authorities, known as emirates. It can be seen through the following aspects: (1) the distribution of legislative and executive powers between the federal and local levels, (2) the wide default powers granted to the emirates, and (3) the extended prerogatives of the emirates in the field of international relations.

1- The distribution of Legislative and Executive Powers.

The distribution of powers between the federation and the emirates is detailed in chapter 7 of the UAE constitution. Article 120 defines the 19 subjects in which the federal government has exclusive jurisdiction in the enactment of laws and in their execution. These include foreign affairs, defense and the armed forces, the protection of security against internal or external threat, finances and taxes, duties and fees, air traffic control and the issue of licenses to aircraft and pilots, nationality, passports, residence and immigration, currency notes and coins etc. Article 121 defines the subjects in which the federal government has authority for the enactment of laws only, leaving the execution of those laws to the local governments. This category includes work relations and social security, real estate ownership and expropriation for public interest; handover of criminals; banking; insurance of all kinds; protection of flora and fauna etc.

Finally, Article 122 grants the emirates with all residual powers, providing that: "*the emirates shall have jurisdiction in all matters not assigned to the exclusive jurisdiction of the Union in accordance with the provisions of the two preceding Articles*".

Therefore the emirates execute not only the laws they enact themselves pursuant to their legislative power in all subject matters residually covered by Article 122, but they also execute the laws enacted by the federal authority in specific areas defined by the constitution itself in Article 121.

2- Blanket legislative and executive prerogatives granted to the emirates.

In addition to the distribution of powers between the federal government and the emirates illustrated by Articles 120, 121 and 122 of the UAE constitution, other constitutional provisions vest upon the emirates a sort of blanket legislative and executive power adding yet another layer of complexity to the distribution of respective powers.

Article 125 grants the emirates a general power to take necessary measures to implement the laws enacted by the federation and Article 149 vests upon the emirates a generic power to enact laws even in matters reserved exclusively to the federation by Article 121 when those laws are necessary for their executive role in an area covered by that Article. Article 149 provides that: "As an exception to the provisions of Article 121 of this constitution, the emirates may promulgate legislations necessary for the regulation of the matters set out in the said Article without violation of the provisions of the Article 151 of the Constitution".

As such, the emirates can, on the basis of Article 125 and Article 149, enact laws and execute laws in matters where responsibility has not directly been granted to them by Articles 121 and 122 of the Constitution.

The Federal Supreme Court has upheld these extra blanket powers vested upon the emirates by the Constitution on different occasions. In a decision rendered not long after its establishment on 8th November 1981,[VIII] the Court argued, in application of Article 149, that, although in principle, according to the explicit text of Article 121, the federation unilaterally legislates in the affairs of protecting livestock, defining the territorial waters of the state, setting the conditions for fishing in these waters, and determining the procedures for issuing a fishing license, an exception may be made for the emirates to deal with legislation on these matters until federal legislation is issued on them.

A few years later, during judicial review proceedings, the Federal Supreme Court upheld the constitutionality of a law issued by the emirate of Sharjah on a subject reserved by the constitution to the federal authority, on the basis that the latter had not yet enacted laws on the subject in question. The Court stated:

"*Whereas, as long as the federation did not issue any legislation regarding the control of alcoholic beverages to regulate the affairs of continuing and exporting the status of alcoholic beverages, obtaining and consuming them, and supplying them to others, as is the content of the provisions of the law issued in 1972 by the Emirate of Sharjah in this regard. The aforementioned law is issued by a competent authority in accordance with the provisions of the Constitution".*[IX]

The discussion of those powers granted to the emirates is echoed by Simmons who notes the extraordinary scope within the federation for each emirate to shape its own economic development, as well as her statement that the constitution permits the promulgation of legislation by the emirates in the areas of jurisdictions allocated to the federation (Simmons 2020, 356).

3- Powers of the emirates in international relations.

Flexibility is also present in the federal constitution in the matter of international relations and foreign affairs. Article 123 permits "*as an exception to Article 120 concerning the exclusive jurisdictions of the federation in matters of foreign policy and international relations",* the emirates to conclude limited agreements of a local and administrative nature with the neighbouring states and regions under specific conditions that will be detailed later in this paper. The same

provision allows the emirates to retain their membership of, or join if they were not member before 1971, two specific international bodies, namely the Organization of Petroleum Exporting Countries (OPEC) and the Organization of Arab Petroleum Exporting Countries. It may be true that international relations are increasingly the domain of subnational entities such as the emirates (Michelmann and Soldatos 1990) but the emirates interference in the supposedly exclusive domain of the national government has been a matter of tension. The term *paradiplomacy* is commonly used to note such activities of non-central governments in international relations. Usually, the central government has the exclusive authority to conduct external affairs. Comparative federalism shows that it is rare that a constitution grants such flexibility towards international relations in its own provisions as is seen in Article 123.

In the jurisprudence of the Supreme Federal Court

The jurisprudence of the UAE Supreme Federal Court has fully embraced the flexibility embedded in the constitution. It has applied the principle of flexibility sometimes in favour of the emirates (1) and other times in favour of the federal authorities (2), thus becoming an indispensable adjudicator of the UAE federal order.

1. Judicial Flexibility benefitting the emirates

In the 1981 *Livestock* jurisprudence discussed above, the Court contended that the emirates can legislate on a subject exclusively reserved to the Federal authority as long as the latter has not yet enacted laws on it.[X] A decade later, in a decision rendered in 1992, the Court went one step further by accepting that local laws on matters exclusively reserved to the federal authority by Article 121 can coexist with federal laws on the same matter on the condition they do not contravene any of the federal provisions. The Court stated that:

"*It is permissible for the emirates to issue the necessary legislation to regulate commercial affairs, provided that they do not conflict with the federal laws that regulate them*". The Court continued: "*Although the legislation related to Company Law falls within the enumerated matters in Article 121, and is, as such, originally reserved exclusively to the federation without the emirates, yet it is permitted, in accordance with the text of Article 149 of the Constitution, to issue the necessary legislation to regulate these affairs in a way that suits their special circumstances, provided that the enacted laws do not contain provisions that contradict the federal laws that regulate it*".[XI]

It is interesting to note that the openness of the Supreme Court towards cooperation between the federal government and the emirates on certain areas does not always result in advancing the autonomy of the emirates through the adoption of a broad interpretation of the provisions of the Constitution allowing them to function with the greatest autonomy possible. The attitude of the UAE Supreme Court in adjudicating on these powers is balanced as on other occasions it has ruled to the advantage of the federal government on areas which were reserved in principle to the emirates.

2. Judicial flexibility benefitting the federal authority.

The UAE Federal Supreme Court demonstrated its flexibility in one of the earliest decisions rendered by the constitutional division on 14th April 1974. The Court was invited by the federal government to interpret Articles 120 and 121 of the Constitution relating to the legislative and executive powers with the request to clarify what the provisions meant in terms of distribution of powers between the federal entity and the emirates. On this occasion the Supreme Federal Court granted an unequivocal invitation to the federal government to intervene in topics reserved to the emirates. This extension was however accompanied by a defined framework to govern its use.

The Court constructed its interpretation in three steps. In the first step, the Court took the time, in a very pragmatic approach to such a foundational decision at this early stage of the establishment of the state, to explain in detail, in the form of an academic exercise, the definitions of the legislative and executive powers and the differences between the laws and regulations.

The Court explained that legislation refers to the rules issued by the federation through the authorities that have the power to issue them according to the forms and in accordance with the procedures stipulated in the Constitution. Such legislation should be comprised of general and abstract norms and it should comply with the Constitution. The Court addressed itself to the UAE Council of Ministers who had requested this judicial interpretation and clarified that the executive authorities of the federation cannot issue regulations on matters for which the Constitution requires legislation.

As far as regulations are concerned, the Court explained that: "*what is meant by the executions of law are the administrative measures issued by the competent enforcement authorities and necessary to put the law into practice. They are either general regulatory decisions that lay down the detailed rules setting the*

method for implementing the legislation, or individual administrative decisions or other complementary decisions necessary to facilitate the implementation of laws. All these decisions and actions must comply with the law issued for its implementation". It further explained, with the same pedagogical approach, the functions of the authority entrusted with the implementation: "*It does not have the power to decide a rule that leads to amending or suspending the law or exempting it from its implementation, and it does not have the power to add new provisions to the legislation*". Having outlined the background, the Court explained to the authorities that had instigated the case that the importance of the right to implement the law should not be underestimated, because the provisions of the law may not be enforceable without further implementation, and laxity in such implementation may disrupt the law, and thus regulatory decisions necessary to implement the law should be issued promptly.

In a second step the court focused on the two provisions relating to the distribution of legislative and administrative powers in the UAE federation, Articles 120 and 121 of the Constitution. The Federal Supreme Court thoroughly delimited the distribution of legislative and executive powers between the two levels of authorities in the UAE federation. The Court provided:

"*In terms of the distribution of legislative and executive competencies between the federation and the Emirates, the federation has exclusive powers in legislation and execution in the affairs listed in Article 120, and it has powers in legislation only in the affairs listed in Article 121, while the emirates are concerned with the execution of the affairs listed in Article 121*".

In a third step the Court cautiously delivered the possible exceptions to the principle it had presented earlier. The court provided that "*in few situations, in the course of legislating under Article 121, the federation might find out that this matter overlaps or connects with another matter that falls within the legislative and executive exclusive federal prerogatives of Article 120 in such a way that it is not possible to separate them*". The Court argued that in this case, the federation extends its legislative power to include the execution power as an exception to the provisions of Article 121. The Federal Court based its interpretation on an analysis of the equivocal opening provision of Article 121 that it was "*without prejudice to the provisions of the preceding article*". The Federal Court justified extending an invitation to the federal government to act in an area reserved to the local government by following a contrario reasoning in the decision. The Court stated: "*this is because giving the executive authority to the emirates in this particular topic contradicts the federation's unilateral executive power on the overall topic, for which the sole responsibility should be the federal authority*

according to the text of Article 120". It thus identified an inseparable relationship between a topic where execution falls under the prerogative of the local government and a topic where execution falls under the prerogative of the federal government. In this particular situation, the interpretation of the Court permitted the latter to take a prerogative reserved to the former.

This extension was however tightly constrained by the Court. In its 1974 decision the Federal Court provided the interpretation of Articles 120 and 121 requested by the Council of Ministers in accordance with Article 99 of the UAE Constitution. Aware of the pivotal importance of such an interpretation at an early stage in the life of the federation which had only established itself in December 1971, the Supreme judge took the time to provide detailed explanations and justifications. Not only was the reasoning explained before an expansive interpretation of the provisions was endorsed, but more importantly, the Court firmly framed the parameters for such an extension. It developed three prerequisites which must be met before the expansive interpretation could be relied upon: 1- establishment of a criterion, 2- definition of the nature of this criterion and 3- setting a rule for limitative interpretation.

While the Court referred to the existence of an overlap between the subjects listed under Article 120 and those under Article 121, it made it clear that the overlap itself was not sufficient to justify the federal government subsuming a local government power of execution. The Supreme Federal Court's reasoning gave rise to the following rule: the two subjects should be tightly linked to one another, creating an inseparable connection between them. "*This link must be organic and direct"* said the Court before continuing that: "*the two subjects should be linked to each other's as the part is linked to the whole*". The Court further explained the characteristics of the link between the two subjects, stating that: "*in a way the execution prerogative itself becomes possible from a practical point of view only if it is combined along with the legislative prerogative in the hand of the federation*". The Court further expanded on the extent to which the identification of such a criterion should remain limited in order to avoid: "*the expansion of the competences of the federation at the expense of detracting from the competences of the emirates*". The Court was keen not to render Article 121 an empty provision by incorporating it into Article 120, and thus referred to the rules of interpretation in its ruling by stating "*the provisions of the Constitution should interpret each other's and not abrogate each other's".*

In brief, the Supreme Federal Court upheld an extensive power for the federal government to appropriate the executive prerogative of the emirates granted by the Constitution in Article 121 when it judges that the subject of the legislation connects organically or directly with a topic listed in Article 120 in which the federal authority legislates and executes.

This particular flexibility in the constitutional design of the federation reflected in the jurisprudence of the UAE Supreme Federal Court cannot but impact on the nature of the UAE federal model. By designing a federation based on its realities, needs and aspirations, has the UAE shaped a very special theoretical model of federalism?

5. Attempts to define the UAE federalism model

This section examines the theoretical nature of federalism as applied in the United Arab Emirates, attempting to determine which federalism model is followed by the UAE.

A first glimpse at the allocation of powers in the main provisions of the constitution might perhaps create a perception of dual federalism in the UAE. Dual Federalism refers from a legal perspective to a particular model of allocating functions between the federal government and the local entities, characterized by defining separate and exclusive spheres for each level's actions (Young 2014, 34-82). As is noted above, Article 120 defines limited topics within the scope of powers reserved to the federal authority; and Article 122 provides a residual power to the emirates of jurisdiction in all matters not assigned to the exclusive jurisdiction of the federation. It would thus be possible to say that these provisions create separate and distinct spheres of authority as between the federal entity and the emirates; an approach consistent with what is referred to as the theory of dual federalism. Historically, in comparative law, the Constitution of the United States of America is seen as putting in place a dual federalism by allocating specific and enumerated powers to the federal government and reserving the remaining powers to the states. The 10th Amendment provides that "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people". One can see an analogy between the 10th Amendment and Article 122 of the UAE Constitution, as both provisions

grant the local authorities' wide powers to enact laws and regulations on all matters not specifically reserved by other provisions to the federal authority.

Scholars who researched the UAE federal system have mostly identified it as a system of dual federalism (Bin Huwaiden 2022, 67). Nonetheless in the United Arab Emirates, a deeper analysis of federalism matters in the Constitution itself and in the jurisprudence of the Supreme Federal Court reveals a more complex relationship between the two levels of government, and sets the scene for a more nuanced approach to the UAE theory of federalism.

The flexibility described above stems from a theory of federalism far removed from separating the roles of the federal and local entities into specific spheres or layers. Rather they show considerable connections in their various mechanisms.

A summary of the legislative and executive distribution of powers between the emirates and the central authority in the UAE would assist at this point. The federal authority enacts laws and executes them in certain matters as defined by the Constitution (Article 120). The federal authority legislates in other defined matters on which the execution is left to the emirates (Article 121). The latter has a residual power to legislate and execute in all matters not granted specifically to the federal authority by the Constitution (Article 122). Yet, both the federal authority and the emirates have been entitled by the Supreme Federal Court to impinge upon the areas reserved to the other through the following fine balancing exercise: on the one hand, the emirates can execute and enact laws in areas where the federal authority has not yet acted even if the matter is exclusively reserved to the latter. Furthermore, they can maintain their legislation on matters reserved to the federal authorities even when the latter has enacted federal laws, provided that the local laws of the emirates do not contradict the federal laws. On the other hand, the federal government can enact executive ordinances on areas reserved by Article 121 to the local government, when not doing so affects its executive and legislative powers listed in Article 120.

A dissection of some aspects of the mechanisms quoted above seems required in order to be able to identify if other theories of federalism invite themselves into the model of the UAE federal order.

For a very wide array of topics including banking, insurance, company law, civil and commercial transactions, procedural codes, and many others, Article 121 of the UAE constitution reserves the policy making to the federal level and the implementation to the

local levels known as emirates. This explicit distribution of functions on a vast array of subjects is a defining characteristic of a European-style model of federalism born in Germany and known under the appellation of administrative federalism. The German constitution in its Article 83 provides that "the Länder shall execute federal laws in their own right insofar as this Basic Law (i.e. the constitution) does not otherwise provide or permit". Hence, as a general rule, it is assigned to the Länder of the German Federation to carry out the policies enacted by the federal authorities. In the UAE, by assigning the policy making to the federal authorities on a list of topics but requiring their implementation by the emirates, the constitution has adopted a dedicated provision that defines the feature of administrative federalism. Furthermore, the wide spectrum of subjects covered by the broad enumeration of Article 121 reinforces that the drafters of the Constitution were pursuing a type of administrative federalism, very different in its conceptualization from the model of dual federalism.

Features of both dual and administrative federalism are thus present in the constitutional design of the federation in the United Arab Emirates. The former, or American style federalism, can be seen in Articles 120 and 122, and the latter, the German style of federalism, is seen in Article 121. Furthermore, Articles 125 and 149 bring to the UAE federalism a certain constitutional element of cooperation between the two levels of the federation. This cooperation seems paramount for the proper functioning of the whole, and it takes place in concurrent or shared jurisdictions on many aspects. In the US, dual federalism has been slowly evolving towards this sort of cooperation, instituted not through constitutional norms, but rather through decades of evolution of the US Supreme Court jurisprudence.

It was through the jurisprudence of the Supreme Court that the states were granted the possibility to enact laws on matters reserved to the federal state provided that the state laws do not conflict with federal law or jeopardize the goals of the federal regulations. These interpretations of constitutional provisions by the Supreme Court have prepared the ground for some evolution of US federalism towards more cooperation. Scholars have referred to this phenomenon of cooperation as a marble cake federalism where federal and local entities do not act in completely separate spheres but rather come together on many aspects, like the two layers of a marble cake are closely entwined in the same space (El Sabawi 2020, 598).

When comparing the US federal path with that of the UAE, one can observe that it took decades of US Supreme Court jurisprudence to establish a functional version of federalism,

moving from a restrictive jurisprudential interpretation of dual federalism towards cooperative federalism. In the UAE, the constitution seems to have established the basis for a principle of functionality at its conception in 1971, thus sparing endless tension on the subject. Indeed, looking at the US distribution of powers helps to illustrate the extent of the pragmatism and flexibility provided by the UAE Constitution itself and echoed through the jurisprudence of the UAE Supreme Federal Court, which maintains a highly pragmatic jurisprudence in this regard, playing, as seen in the previous section, the role of the adjudicator or the guardian of the UAE federal order.

In sum, cooperative federalism as seen in recent years in the US, also seems to be embodied through Articles 125 and 149 of the Constitution, in addition to the two dominant models explored above.

Furthermore, it is possible to identify through the federal mechanisms in place in the UAE the implementation of the doctrine of enumerated powers. UAE federalism welcomes the presence of concurrent powers. As explained by Nico Steytler, "we speak of concurrent powers, generally, when the federal government and constituent units may or do operate in the same policy fields" (Steytler 2017, 1). In the UAE constitution, Article 149, as seen above, provides clearly that the constituent units can enact laws that are necessary for the regulation of a few subjects under the limitation of the supremacy of federal laws. This means that the constitution does not object to concurrent legislative power shared by the federal level and the emirates for specific topics. The Supreme Federal Court has pushed the concurrent power mechanism even further by allowing, as explored above, the emirates to enact laws on a topic reserved to the federal power provided the latter has not yet acted in that area and by allowing the federal government to implement policies in areas reserved to the emirates.

The combination of the various federalism features and mechanisms in the UAE federalism may appear unusual, but is in fact not uncommon. The next section will discuss its rationale.

6. Rationale for the UAE complex classification: functional federalism

First, federalism in many countries has not been static. Comparative federal experiences have shown that federalism is in constant motion. Even in cases where the constitution has not changed, such as in the US, the jurisprudence and political and socio-economic dynamics

have forced the evolution of the federal model with the addition of cooperative and integrated elements. A similar trend can be identified in Canada where the Supreme Court has gradually "pulled away from a dual understanding of the division of powers set out in Constitution Act, 1876", and moved towards "allowing larger zones of contacts between federal and provincial legislations" (Boudreault 2020, 6). While Canada retains its dual federal model, it has integrated many cooperative and administrative elements. Thus, the Canadian federalism can "no more be characterized, according to the Supreme Court itself, as founded on watertight compartments" (Gaudreault-Desbiens 2014, 1). In other countries the evolution has been more premeditated, by means of constitutional reforms that have directly impacted on the federal model itself, for example, Switzerland which has purposely moved from dual federalism to administrative federalism.

Second, administrative federalism, the features of which appear in Article 121 of the UAE Constitution, does not operate exclusively in any federal model. Even in Germany, the land of its birth, few subjects remain under the administrative realm of the central government alone. Thus, even where elements of administrative federalism are detected, it is not surprising to find them alongside some elements of dual federalism. In this vein, identifying a mix of federalism theories in the UAE order could seem in line with any traditional administrative federalism. However, in the UAE the number of subjects under the full competence of the federal government under Article 120 is high in comparison to other federal states (Bin Huwaiden 2022, 74).

Third, comparative federalism provides various illustrations of a combination of federalism models. Scholars Mueller and Fenna point to India as "an interesting case where a substantial element of administrative federalism was introduced into what was overall a dual system" (Mueller and Fenna 2022, 13). Indeed Schedule 7 of the Indian Constitution consists of three different lists: the Union list, the state list and the concurrent list.

Fourth, reasons inherent to the specific context of the birth of the UAE can help to explain the difficulty of placing the UAE model of federalism in a particular category. In 1971, constitutional theories were not the primary concern of the drafters of the Constitution. Their key aim was the establishment of a unit that could be a viable structure in which a state could exist, defend itself and educate its people, with the aim to move in time towards a more accomplished order with democratic features and more defined political and constitutional regimes. The preamble of the constitution attests to this pragmatic

approach, far from dogmatic categorization or political modelling. The UAE federal order was the result of negotiations between the different entities while planning to federate under a leadership aware that "there is no place in today's world for weak entities" and that the establishment of a federal order was the only way forward, as Sheikh Zayed bin Sultan al Nahyan, founder and former president of the UAE pointed out at the time. The UAE federal order is the result of a tentative constitutional sketch that was established as temporary at first, in order to test its functionality and viability. The constitution was only made permanent in 1996. Simmons rightly notes that "the constitution reflects a compromise between emirates in favor of a more centralized or integrated federation and those that preferred preserving the autonomy of the individual emirates. Sheikh Zayed of Abu Dhabi has always been an advocate of the former, while Sheikh Rashid of Dubai traditionally supported the latter" (Simmons 2020, 356). The combination of different federal mechanisms from different federalism models seems to be simply the constitutional result of this political compromise.

The UAE in 1971 was thus not aiming for a particular model of federalism, but rather wanted to retain flexibility and keep cooperation on the table for the sake of viability and functionality.

In comparative literature, scholars have argued that the federalism in the US "was not an embodiment of any particular philosophy nor was it an excessively legalistic undertaking" (Glendening and Reeves 1977, 329). In this perspective, "in contrast with the kind of understanding associated with dual federalism and its progeny", federalism can also be simply "explicitly atheoretical" (Rosenthal and Hoefler 1989, 7) or as identified by Glendening and Reeves, it can be a pragmatic federalism. It would perhaps be a stretch today to define the very mature model of US federalism as not belonging to a theoretical model or simply a pragmatic approach. However, 200 years ago at its birth, it likely could have been accurately described as either.

One could also view UAE federalism as an empirical federalism, since it is based on captured experiences, pragmatic solutions and effectiveness, rather than on conceptual paradigms and theories, or formalistic approaches.

The oscillation of the federal court between supporting the powers of the emirates and strengthening central powers to create a fine balance reveals a concern to achieve a functional result. Thus, Emirati federalism appears, at its present stage of maturity, to follow a form of

federalism shaped by the dominant political dynamic, and the need to find a balance and solutions to pressing questions, rather than a federalism which responds to global federal designs or particular constitutional theories. The Supreme Federal Court as an adjudicator of the federal order is doing "whatever a situation requires" within the contours of the process sketched by the federal mechanisms of the UAE (Rosenthal and Hoefler 1989, 7). This can clearly be seen to be a pragmatic approach.

It is thus argued that the UAE federal order was not concerned with fitting a particular model or theoretical category. Rather the priority was to establish broad rules of federalism with the aim of making the establishment of the UAE state doable, workable and functional. UAE federalism can still be seen today as atheoretical, but it is not prevented from evolving with time and maturity, into one of the classic, or less well known, federal models of comparative federalism.

This flexibility, added to some other peculiarities of the UAE order including the composition of the federal institutions such as the Supreme Council, has pushed few scholars to see in the UAE some sorts of confederal arrangements rather than a federation (Simmons 2020, 4 and Peterson 1988, 198). Nonetheless, the UAE is not a confederation for the following reasons: (1) the role of the emirates in international relations remains very limited, it was further reduced with the reduction of oil resources (Bin Huweiden 2022, 73), hence the emirates do not retain full sovereignty necessary to confederal orders, (2) both levels in the UAE order exercise, as elaborated above, meaningful powers which is a determinant factor in defining federations (Fenna and Schnabel 2023, 1), (3) the 1996 constitutional revision confirms the permanent status of the UAE constitution and reaffirms the federal order as the definite principle of state organization, and (4) the organization since 2006 of elections for the Federal National Council witnesses the emergence of a direct relationship between the federation and the people which supports and strengthens the federal structure.

The openness towards cooperation and flexibility in the constitution itself, in the jurisprudence of the Federal Supreme Court and in the constitutional design of the distribution of legislative and executive powers between the federation and the emirates, invites a further question. On what founding principles is the UAE federation built? How does UAE federalism combine functionality whilst also permitting such a degree of flexibility? Flexibility by itself could be harmful or chaotic to federalism. Boudreault argues that "flexibility favors overlap of federal and provincial legislation whether it leads to

cooperation or to competition" (Boudreault 2020, 3). Flexibility could also negatively impact on cooperation, as by removing constraints on the powers of each level in the federation, it reduces the need for cooperation and dialogue (Boudreault 2020, 11).

Instead of trying to identify a specific federal system or category for the UAE that, at best, will be inaccurate, it makes more sense to divert the search to the principles that hold the UAE order altogether and can explain its significance. In comparative federations, many such principles have been identified, including autonomy, subsidiarity and loyalty. Hugo Cyr sees the combination of these principles as the normative structure that confers to federalism "its inherent logic" (Cyr 2014, 30). In this vein, the next section will examine some founding principles that bring the UAE federal order together.

7. Supremacy clause and democratisation: cornerstones of UAE federalism

Article 151 of the Constitution establishes the principle of federal preemption by providing that: "*the provisions of this Constitution shall prevail over the Constitution of the member emirates of the federations and the Federal laws which are issued in accordance with the provisions of this Constitution shall have priority over the legislation, regulations and decisions issued by the authorities of the emirates*". The same provision foresees the possibility of conflicts between federal and local norms and notes the primacy of the former over the latter: "*In case of conflict, that part of the inferior legislation which is inconsistent with the superior legislation shall be rendered null and void to the extent that removes the inconsistency".*

Furthermore, the constitution reiterates the consecration of the supremacy of federal laws in Article 149, explored above. This Article contains the mechanism for concurrent jurisdiction, allowing emirates to legislate on topics where Article 121 grants them only the power to execute, on the condition that legislating is necessary for the implementation of the matters being executed. A second condition in this provision sets the limit of concurrent jurisdiction clearly – they must not contradict with the provisions of Article 151. Thus, local legislation can never violate federal legislation.

The first and most significant manifestation of the principle of loyalty emerges in the constitutional primacy of federal legislation over the local legislation of the emirates. This means that validly enacted federal laws always prevail over contrary law enacted by the

emirates. This doctrine of preemption was inserted into the federal design of the UAE by the founders, but the constitution also vests the Federal Supreme Court with the power to adjudicate on this matter.

The constitutional division of the UAE Supreme Federal Court has made significant use of this provision in many decisions. An example is the Decision dated 23 December 2014[XII] where the federal judge had to decide between imposing the penalty prescribed for a particular crime in Article 3 of the Federal Law (where the penalty is the imprisonment for a period not exceeding one year and a fine not exceeding two thousand dirhams, or one of these two penalties) and the penalty provided for the same crime in Article Sixteen of the Local Law (imprisonment for a period of not less than three months and a fine of not less than Thirty thousand dirhams and not more than two hundred thousand dirhams). The Court relied on the preemption doctrine of Article 151 of the Constitution to rule that the federal provision was the applicable one.

The sacrosanct constitutional rule of the supremacy of federal law is one of the main pillars that explains the solidarity and efficacy of the UAE federal order, despite its flexibility

Another major recent development in relation to the UAE constitutional order reinforces the existence and relevance of the UAE federation. While there were no direct relationships between the citizens and the federation, in 2006, few democratic improvements were introduced, affecting the constitution itself of one of the main federal institutions, namely the Federal National Council (FNC). When the FNC was established in 1972, all its 40 members were appointed by the rulers of the seven emirates in accordance with a quota for each emirate provided by the Constitution. In 2006, a reformation stage began including nominations by the rulers of each emirate for 50% of the FNC seats and the initiation of an election process through an electoral college accounting for the remaining 50% of the seats (Yaghi and Antwi-Boateng 2015, 215). Although embryonic in 2006, this timid liberalization has since been steadily growing towards a wider representation at the occasion of each FNC election. It rose from 6,595 citizens included in the electoral college in 2006 to 135,308 in 2011, 224,281 in 2015, 337738 in 2019, and 398,879 in 2023, accounting in the last 2023 elections for approximately 40% of the UAE's total emirati population.

In studying the relationship between federalism and rights, Chen brings forward the discussion about the connection between federalism and democracy. Federalism literature includes voices that identify federalism as a principle of organization of state regardless of

its democratic foundations or elements (Chen 1999. 853). Nonetheless, most federal scholars see a definite correlation between federalism and democracy (Elazar, 1998, 84). Fenna and Schnabel have very recently echoed this trend in their quest for establishing definitional clarification for federalism. As the two authors aimed to find the essential elements of federalism, they identified that the "existence of two constitutionally guaranteed orders of government, each enjoying a direct relationship with the people and exercising meaningful powers, is both necessary and sufficient for a political system to be characterized as a federation." (Fenna and Schnabel 2023, 1). In that vein, the democratic development taking the form of the gradual participation of the UAE citizens in the composition of the Federal National Council through elections although still an emergent exercise, puts the UAE in a better position to give relevance to its federation.

8. Conclusion

This paper has provided a scholarly overview of the model of federalism as applied in the United Arab Emirates and has looked at its defining characteristics. It has highlighted the inherent fluidity of the UAE federalism, seen through the great degree of flexibility the federation offers at more than one level in its constitutional mechanisms and the jurisprudence of the Supreme Federal Court. Rather than indicating adherence to a particular classification, this flexibility reflects the pragmatism of the founders, whose focus was creating a workable and viable federal order rather than establishing a federal order perfectly aligned with a purely theoretical model. Thus, at this point, the United Arab Emirates' federalism cannot fit, fully, in any of the classical federal models. Nonetheless, despite the significant degree of flexibility, the UAE federal order finds its strength and efficiency in the principle of the supremacy of federal laws, as enshrined in the jurisprudence of the Supreme Federal Court. Another promising feature fostering the consolidation of the UAE federal order is the nascent relationship built between the citizens and the Federal National Council through the implementation of national elections.

Finally, it is possible to say that functional federalism is in place in the United Arab Emirates. The constitution itself seeds this approach, but UAE Federal Supreme Court jurisprudence nurtures it. In comparative federalism, literature has referred to "a functional approach to federalism" (Bronstein 2014, 28). This approach can be mapped to the US,

where the Supreme Court adopted functional inquiry or analysis in the context of federalism and the separation of powers (Greenspan 1988, 1046). More recently, this approach to federalism was highlighted, for example, in South Africa, where scholars found that functional federalism "encourages judges actively to consider how different levels of government can function most effectively within the framework of the constitutional scheme" (Louw and Bronstein 2018, 548). As such, extrapolating to the UAE, the judges of the Federal Supreme Court will smoothly pursue their quest towards finding "the optimal balance of power" ((Louw and Bronstein 2018, 548) between the emirates and the federal level.

[I] Law Professor at Saint Joseph University of Beirut, School of Law, Dubai Campus (email: nisrine.abiad@usj.edu.lb).

[II] In the wake of the announcement of the withdrawal of the British presence from the Gulf region, there was an attempt to establish a union between the sheikhdoms, Qatar and Bahrain. The Federation of the Arab Emirates was established in February 1968. However, 18 months later, Bahrain and Qatar declared their independence from the newly established state respectively in August and September 1971.

[III] 2021 was announced as the Year of the 50th to commemorate 50 years of the United Arab Emirates.

[IV] As an illustration of the achievements of the United Arab Emirates and a sign of its prosperity, it should be noted that the UAE was ranked in the Global Competitiveness Report 2020 published by the World Economic Forum as first in the region and ninth in the world. Other indicators include the launch of a UAE-built probe to Mars from Japan's Tanegashima Space Center on 20 July 2020, the successful startup of the first unit of the Baraka Nuclear Energy Plant in August 2020, and Dubai International airport's position as the busiest airport in the world in December 2022 with more than 4.5 million seats booked.

[V] See the Preamble of the UAE Constitution in English available at https://www.constituteproject.org/constitution/United_Arab_Emirates_2009.pdf?lang=en (last accessed 21st February 2023).

[VI] In 1971, 48% of the population aged 15 and above were literate, and in 1970 the average length of schooling was only three years (See World Development Indicator database, World Bank, United Arab Emirates data).

[VII] See below.

[VIII] See Decision Number 5 for Year 8 Constitutional, 8th November 1981, published in The Rulings of the Constitutional Division 1973-2012; Sader Legal Publishing, pp 46-50 (in Arabic).

[IX] See Decision Number 1 on 5th June 1983, The Rulings of the Constitutional Division 1973-2012; Sader Legal Publishing, p. 55.

[X] See Decision Number 5 for Year 8 Constitutional, 8th November 1981, published in The Rulings of the Constitutional Division 1973-2012; Sader Legal Publishing, pp 46-50 (in Arabic).

[XI] See Decision Number 1 on 3rd June 1992, published in The Rulings of the Constitutional Division 1973-2012; Sader Legal Publishing, p 79 (in Arabic).

[XII] Decision Number 5 dated on 23rd December 2014, in Compilation of Case Law 2014, Sader Legal Publishing p.12 cited in The Constitution, Sader Between the Legislation and the Jurisprudence in the United Arab Emirates, Sader Legal Publishing 2022, pp. 178-179 (in Arabic).

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Sub-national Constitutional Law in Argentina: Considerations on the nature and scope of provincial constitutions

by

Cristian Altavilla[I]

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Abstract

Sub-national constitutional law constitutes a fundamental chapter of federal theory that, despite its diversity and richness, has been little explored. Recently, n all federal countries of the world, sub-national constitutional law and its importance in the constitutional order are being (re)discovered.

The main aim of this paper is to study the delimitation of the s*ub-national constitutional space*, through the bases and limits placed on local constituent power by the Argentine federal constitution. Another aim is to unravel the foundations of Argentine sub-national constitutional law, through analysing the principle of constitutional autonomy, the distribution of powers between levels of government and the co-sovereignty theory.

The article concludes with reflections on Argentina's "provincial margin of appreciation", and on the advantages and innovations of sub-national constitutional law.

Keywords

Sub-national constitutional law – comparative constitutional law – federalism – decentralisation

1. Sub-national Constitutional Law - Some basic concepts

Sub-national Constitutional Law (SCL) constitutes a fundamental chapter within federal theory which, despite its diversity and richness, has been little studied. Today it is possible to observe the discovery or the rediscovery of the SCL and its importance in the constitutional order in almost all federal states of the world.

It is surprising that countries with a long federal tradition did not produce scholarly works on the subject, at least until recently. Argentina, in this sense, boasts a long tradition of SCL or provincial constitutional law, dating back to the founder of our National Constitution, Juan Bautista Alberdi's pioneering book "*Elementos de Derecho Público Provincial*" ("Elements of Provincial Public Law") published in 1854 [1998]. This work established a critical foundation that continues to influence scholarship today. However, despite a century and a half of federalism, Argentina still lacks comprehensive studies encompassing all 24 federated units. While established regional schools like Córdoba, Mendoza, and Buenos Aires boast rich provincial law scholarship, most research remains focused on one provincial constitutional system, and in many provinces, the subject is not covered in the curricula of Law schools. This presents a vast field to be explored.

While the US defines SCL as "a set of rules (both formal and informal) that protect and define the authority of sub-national units within a federal system to exercise some degree of independence in structuring and/or limiting the political power reserved to them by the federation" (Marshfiled, 2011:1157), in Argentina, there are multiple definitions of this branch of law[II]. Notably, Hernández (2011:5) views SCL as "the branch of legal sciences, which studies the organization of the autonomous government of provinces, within a federal state, determining at the same time, the scopes, forms and conditions of the exercise of local authority". The authors generally agree on two defining characteristics of SCL: firstly, it governs the autonomous organiation of federal entities, and secondly, it functions within a larger federal system, forming a partial legal order that is an integral part of the whole.

Though the label "Provincial Public Law" persists in Argentina, largely due to historical tradition, modern terminology favours "P*rovincial Constitutional Law"*. However, both curricula and textbooks still use the *traditional* name, in honour of its founder, Juan Bautista Alberdi (1810-1884).

To determine the nature and scope of this subject is an ardous task. We must determine how extensive (or narrow) SCL is, and how it has been (effectively) used by sub-national entities (that is, even if their space is large, whether they have been capable of truly innovating and creating or whether they have merely copied the federal design). This necessitates comparing constitutional texts horizontally (across sub-national states) and vertically, in a double comparative, that is, each province against both the national framework and international precedents of federal states.

This paper will seek, by way of generic considerations, some answers starting from the fundamental principles that govern SCL, focusing on the Argentine case with a comparative perspective (in particular with Latin American federations).

2. The principle of Constitutional Autonomy as SCL's foundation

One of the guiding principles and the foundation of SCL is the principle of autonomy, that is, the constitutional recognition of autonomy to federal units. As its etymology indicates, autonomy (auto nomos) implies the ability of an entity to create its own norms and institutions, and to be governed by them, without external interference.

The autonomy of the federative units translates into a capacity for *self-organisation* that manifests itself both in the power to draw up their own constitutions, establishing through them the regime of their superior governing bodies, and in *normative* autonomy (Fernández Segado 2003). This autonomy presupposes a power of public law by which, "by virtue of its own law and not of a mere delegation, it is possible to establish binding legal rules" (Fernández Segado 2003:58). In other words, public bodies or federated entities enjoy *political autonomy*, and not merely administrative autonomy, so that their provisions have the force of law – unlike what happens, for example, in the Colombian Departments or in the Chilean regions, whose provisions constitute mere administrative acts.

As Thorlakson (2003) has argued, it is the constitutional recognition of autonomy that ultimately distinguishes federal states from other types of decentralised systems (like federal-regional or unitary states):

> It is the *guarantee* of autonomy for each level of government that distinguishes a federal system from a unitary state and from other types of relationships between states. This captures the element that many writers have deemed to be of central importance – the contractual nature of federalism. What distinguishes

> federalism from a decentralised unitary state is whether the central government has the power unilaterally to alter the distribution of powers in the state. In federal systems, mutual consent is required before the political 'contract' between the federal government and the constituent units can be altered. Federalism should also be clearly distinguished from consociationalism, a non-territorial method of dividing power and autonomy between two or more groups. (2003:5).

Perhaps the Argentine Constitution best defines the autonomy of the federated entities. Article 122 clearly stipulates that "The Provinces make their own local institutions and are governed by them. They elect their governors, legislators, and other Provincial officials, without intervention by the Federal Government".

This autonomous capacity translates into the ability to establish own institutions, as enshrined in the Argentine constitution: "Each Province shall adopt for itself a constitution […]" (Article 5). Similarly, the Brazilian Constitution holds that "The States are organized and governed by the Constitutions and laws they adopt, observing the principles of this Constitution'" (Article 25) and the Venezuelan constitution recognises that "it is within the exclusive competence of the states", the power to "dictate their Constitution to organize the public powers, in accordance with the provisions of this Constitution" (Article 164, paragraph 1). In the Constitution of the United States, constitutional autonomy is contained in the *Guarantee Clause* of Article 4, section 4, which provides that "The United States shall guarantee to every State in this Union a Republican Form of Government […]", and in the *Tenth Amendment* (1791), which establishes that "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people".

As Astudillo Reyes argues, "the constitutional enunciation of the principle of autonomy in favor of the federative entities operates as a basis of validity for the existence of one or more legal systems within a national legal system" (2008:32), giving rise to a decentralised institutional context in which it is possible to clearly distinguish a central sphere of validity and a peripheral sphere. In turn, this principle of autonomy gives rise to the principle of "self-sufficiency" of local legal systems, a notion from which "the ultimate basis of validity of the norms that make up the local legal system is subordinated to the local constitution [...] true autonomous legal systems in which the local Constitution acts as the 'closing' norm of the system" (Astudillo Reyes 2008:34).

Argentine provincial constitutional texts stand out for explicitly recognising the principle of local constitutional supremacy over the entire provincial legal system. This sets them apart from Mexican federal states, where not all constitutions explicitly guarantee this principle.

Finally, these self-sufficient local constitutions must also be self-guaranteed:

> "The coexistence of a set of self-sufficient legal systems linked to the respect of the stipulations of the constitutional pact shows the mutual implication and nourishment that must exist between the theory of constitutional justice and the theory of the sources of law, to the extent that it becomes inexorable, on the one hand, the establishment of a system of guarantees of the general Constitution that protects the political unity of the State; and on the other hand, the existence of systems of local guarantees with the purpose of protecting the local Constitution. The first represents a jurisdiction of general constitutional "level" because it is directed to the immediate and direct "action" of the general constitutional norms; the others are raised as jurisdictions of particular constitutional "level" because they are destined to the direct and effective protection of the local constitutional norms, thus providing the first indications for a timely delimitation of competences" (Astudillo Reyes (2008:36).

The principle of local constitutional supremacy not only protects the local constitution but also lays the groundwork for a distinct set of mechanisms, institutes and functions forming the *local constitutional procedural law* (Brewer Carias 2003; Astudillo Reyes 2008; Suprema Corte de Justicia de la Nación 2005; Cienfuegos Salgado 2008). Furthermore, we can discern within the federal constitutional justice system a "*local constitutional justice*" sub-system. This sub-system focuses primarily on reviewing the constitutionality of the acts of the Federated States and of the Municipalities (Brewer-Carías 2003). Currently, Latin American constitutional doctrine (particularly in Mexico) has placed great emphasis on this new sector of SCL, which is directly connected to constitutional procedural law: "In our days we can affirm the configuration of a new sector of Constitutional Procedural Law that we can call local, which comprises the study of the different instruments aimed at protecting no longer the federal or national constitutions, but the ordinances, constitutions or statutes of the states, provinces or autonomous communities" (Ferrer Mac-Gregor Poisott, quoted by Cienfuegos Salgado, 2008:25).

3. Delimiting the sub-national constitutional space - the foundation and limits of local constituent power

Sub-national Constitutional space has been defined by Alan Tarr as a space or a margin left by a federal constitution to be filled by sub-national entities: "in most federal systems the national constitution is 'incomplete' as a governing constitutional document, in the sense that *it does not seek to prescribe all constitutional arrangements*. Rather, *it leaves 'space' in the federal nation's constitutional architecture to be filled by the constitutions of its subnational units*" (2007:2).

What does this sub-national constitutional space comprise? The answer will obviously depend on each institutional context. Tarr, however, in a comprehensive and comparative study, has identified the following items: (1) the power to draft a constitution; (2)the power to amend that constitution; (3) the power to replace that constitution; (4) the power to set goals of government; (5) the power to define the rights that the constituent unit will protect; (6) the power to structure governmental institutions of the constituent unit, including whether (7) the legislature shall be bicameral or unicameral; (8) the power to define the process by which law is enacted in the constituent unit; (9) the power to create offices; (10) the power to divide powers between governmental institutions of the constituent unit; (11) the power to determine the mode of selection for public officials of the constituent unit; (12) the power to determine the length of office and the methods and criteria for the removal of officials (13) of the constituent unit prior to the completion of their term of office; (14) the power to establish an official language; (15) the power to institute mechanisms of direct democracy; (16) the power to create and structure local government; (17) the power to determine who are the citizens of the constituent unit; (18) the power to establish voting qualifications for officials of the constituent unit (2011:1134).

Three types of limits demarcate this space: ***(a)*** *forbidden* subjects defined in the federal constitution, which states or provinces cannot regulate, and ***(b)*** the *basic principles* outlined in the federal constitution that provinces must follow when exercising their constituent power, and ***(c)***, *specific regulations* of the federal charter governing the internal organisation of provinces or states. While the first acts as a categorical *prohibition*, the latter two *impose* the *federal* order.

The degree or intensity of these limitations is inversely proportional to the space or margin of the SCL: the fewer limits contained in the federal constitution, the greater the sub-

national space or margin to create and innovate with new institutions. In this framework or space, the SCL develops, which is, in turn, a living expression of the principle of constitutional autonomy enjoyed by the federated states within a federal state structure that encompasses them.

The question of the extent of the powers of the sub-national constituent and the limits it possesses is crucial in this matter. One can begin with a broad understanding of the federal/national constitution as incomplete "in the sense that it relies extensively on the mechanisms established in state constitutions, and leaves almost all matters within the sphere of state power to be regulated by state constitutions and laws" (Williams, 1990:1). Although it might be assumed that the constitutions of all federal states should leave ample space to the federated entities to organise themselves, this is not always the case: "In some federal systems, the federal constitution also prescribes the political institutions and processes for the constituent units of the country, thus providing the constitutional architecture for the entire federal system" (Tarr 2011:1133), as in the case of Belgium and Canada, and the Brazilian, Venezuelan and Mexican federations in Latin America.

In other cases, "federal constitution is an 'incomplete' framework document in that it does not prescribe all constitutional processes and arrangements. Rather, it leaves 'space' in the federal system's constitutional architecture to be filled by the constitutions of its sub-national units, even while it sets parameters within which those units are permitted to act" (Tarr 2011:1133). Alberdi also adopted this broad conception, when he stated in *Elementos de Derecho Público Provincial*, that "the elements of the provincial law, in a federal state are all the power not expressly delegated by the constitution to the general government of the State".

The principle of autonomy – and within this, the principles of self-organisation and self-sufficiency – is not absolute; it is instead subject to limits, the extent and intensity of which varies in each federal design, since it must comply with the *principle of (legal) subordination*, on which the federal system is based (Bidart Campos 1998). Each federal system determines the extent of these powers and at the same time, places concrete limits (both *prohibitions* and *impositions*), although this will never be in a concrete or conclusive way, and thus sub-national space will always be diffuse.

As stated before, three types of limits can be identified: **(a)** *forbidden* subjects, **(b)** Constitutional *basis* to which the local constituent power must adhere, and **(c)** *specific regulations* of the federal charter.

For instance, Latin American constitutions often reflect a limited sub-national institutional capacity for innovation, echoing Fernández Segado's (2003) observation of a paternalistic or highly conditioned self-organising ability at the sub-national level. Latin American constitutions often reflect a limited sub-national institutional capacity for innovation, echoing Fernández Segado's (2003) observation of a paternalistic or highly conditioned self-organising ability at the sub-national level. A general observation of Latin American constitutions clearly shows that the sub-national institutional capacity to innovate is highly limited.

On the one hand, the constitution designates certain areas such as managing international relations, maintaining armed forces and issuing currency as the exclusive responsibility of the federal government and as *Prohibited subjects* for the states.

On the other hand, federal constitutions establish some guidelines in terms of basics that local constituents must follow. Regarding these *basics*, we can classify them into two groups: *general guidelines* (for example, respecting the republican form of government), as well as *regulations or specific indications* of the central constitution regarding the organisation of local powers (for example, how legislative branches must be composed, the time and form of elections, etc.).

In Mexico, for example, Article 115, states that "The states comprising the United Mexican States shall adopt a republican, representative, democratic, secular and popular form of government for their own organization. The states shall be divided into municipalities, which shall be the basis of the political and administrative organization", and Article 116 (reformed in 1987), reaffirms the principle of division of powers as an inviolable tenet in the organisation of state public power. In Brazil, Article 25 mandates the subordination of state constituent and normative power to the principles established in the federal constitution, including the republican form of government, the representative system, and the democratic regime, alongside the rights of human beings, municipal autonomy, and public administration accountability (Article 34).

The Venezuelan Constitution (1999), according to Article 159, establishes that states "are obligated to maintain the independence, sovereignty and integrity of the nation and to comply with and enforce the Constitution and the laws of the Republic". To this, Article 164, section 1 added the requirement that states' Constitutions shall be promulgated "in

accordance with the provisions of this Constitution", which requires for instance, the respect for the fundamental principles of Title I of the Constitution.

Finally, in Argentina, Article 5 lays the foundation for provincial constituent power, which must be subject to certain principles: "Each Province shall adopt for itself a constitution under the republican, representative system, in accordance with the principles, declarations, and guarantees of the National Constitution, ensuring its administration of justice, municipal government, and elementary education. Under these conditions, the Federal Government guarantees to each Province the enjoyment and exercise of its institutions".

In addition to these *generic* and rather *indicative* guidelines for how the federated entities should organise themselves, there are other more *specific regulations* or *indications* – which I have included in the third group. Here there is greater interference by the central state in local authorities. For example, in Mexico, the (very extensive) Article 116 of its federal constitutional text stipulates that the federal constituent regulate in great detail the political-state organisation of the Mexican federated states. The text outlines a series of questions to govern the organisation of the federated state. These include the duration of state public offices such as that of governor and legislators; the possibility (or impossibility) of re-election; the form of election; eligibility criteria for candidates; the number of representatives of the state legislature, establishing a minimum according to the state population; guidelines on budgets, public services, and the audit body of the federated entities; and rules on the composition and independence of the state judiciary department; on the selection procedure, on electoral processes, on the installation of Administrative Justice Courts, autonomous bodies, etc.

Brazil, for its part, regulates the organisation of the federal states in Chapter III (The Federated States") of Title III ("Organization of the State") and in Chapter IV ("organization of the municipalities"). It contains provisions regulating numerous aspects related to the organisation of the states, such as the number of members of the Legislative Assemblies, the term of office of State Deputies, the time of their election, their remuneration, the competence of the Assemblies, institutes of semi-direct democracy, such as the popular initiative, the election of the State Governor and Vice Governor, the term of the executive mandate – which is four years (Art. 28), as well as other provisions scattered in the Brazilian

constitutional text, such as the prohibition of immediate re-election for State Governors (Article 14, section 5).

Likewise, the Brazilian Constitution recognises the competence of the Superior Court of Justice to prosecute and judge, in the original jurisdiction, in cases of common crimes, officials inlcuding the Governors of the States and of the Federal District, the appellate judges of the Courts of Justice of Accounts of the States and of the Federal District, the members of the Councils or Courts of Accounts of the Municipalities (Article 105, section 1).

The Venezuelan constitution of 1999, although it establishes fewer requirements for the self-organisation of its states, regulates important aspects, such as the conditions for being elected governor, the term of office, the possibility of immediate re-election (and for a single term), the number of members of the state Legislative Councils ("Consejos Legislativos" is the new name given to the state legislatures in the 1999 Constitution), as well as their powers. It also makes reference to principles of national law regarding the organisation and operation of these Councils (Article 162); the main features of the mandatory state-level oversight body, the Comptroller General's Office.

The result of these *impositions* is that sub-national space is reduced (to a large extent), with little room for innovation and creation, and, furthermore, leads to a *homogenisation* and *equalisation* of local constitutions with each other and with the federal one. Ultimately, autonomy becomes a formal principle, at least as regards the capacity for self-organiation. Although it is argued that the basis of these impositions lies in the need to ensure that the political structures existing in the Federation and the states "be *minimally homogeneous*, and that these states be also homogeneous among themselves" (Fernández Segado 2003), excessive regulation can undermine local autonomy and call into question the federative organisation itself.

To that, we need to add that the 1999 constitutional reform eliminated the senate, a prerequisite for any federal system. That is why many authors and organisations (such as the Forum of Federation) have removed Venezuela from the list of federal countries.

In Argentina, Article 5 establishes the sole basis for provincial constituent power, without the federal constitutional text establishing any type of specific imposition, as is observed in other Latin American constitutions. While the American constitution exemplifies minimal federal regulation, with practically no reference to the organisation of the federated states,

Argentina's Article 5 mandates provincial constitutions to ensure the republican and representative system of government, the administration of justice, the municipal regime and primary education, broadly adhering to the principles, declarations and guarantees of the National Constitution. This Article is based on the *Guarantee Clause* of Article 4, Section 4 of the US Constitution, since it establishes that "Under these conditions, the Federal Government guarantees to each Province the enjoyment and exercise of its institutions".

Finally, in addition to these ***impositions***, there are also ***prohibitions***. Mexico contains a series of prohibitions in Articles 117 and 118 which, in general terms, align with the classic theory of federalism on powers typically belonging to central governments, such as minting money, taxing people or things who transit through and enter into or exit from the territory (Article 117), imposing tonnage taxes, deploying permanent troops or warships or waging war against any foreign power (Article 118). The Brazilian Constitution contains some prohibited powers scattered throughout its text. These include the power to establish religious cults or churches, to subsidise them, to restrict their operation or to maintain relations of dependence or alliance with them or their representatives. Collaboration in the public interest, through legislation is permitted, provided it does not discriminate on any grounds against any group of Brazilian citizens. Collaboration in the public interest, through legislation is permitted, provided it does not discriminate on any grounds against any group of Brazilian citizens. These prohibitions apply to both the states and the Union, the Federal District and the municipalities (Article 19). Furthermore, there are a series of constitutional limitations on imposing taxes (Article 150), such as the prohibition to create inter-state or inter-municipal taxes (Seijas Villadangos 2019).

Argentina also provides for a series of restrictions (mainly contained in Article 126), but these are much less detailed than the Mexican constitution and more permissive in several aspects (for example, the possibility of entering into international agreements, or the possibility of contracting loans from states or international organisations). Article 126 lists numerous areas prohibited to provinces. These include signing political treaties, regulating commerce and internal or foreign navigation, setting up Provincial customs offices, minting money, or establishing banks with the power to issue bank notes (without the authorisation of the Federal Congress). Provinces cannot pass Civil, Commercial, Penal, or Mining Codes (after the Congress has legislated on them); or enact special laws on citizenship and naturalisation, bankruptcy, or counterfeiting of currency or State documents. Provinces are

also prohibited from imposing tonnage duties; building warships or raising armies (except in the event of foreign invasion or of such imminent danger requiring prompt action, immediately communicating this to the Federal Government); and appointing or receiving foreign representatives. Furthermore, Article 127 forbids Provinces from declaring war on each other, since their *de facto* hostilities are considered acts of civil war, characterised as sedition or rebellion, and as such, suppressed and punished by the Federal Government in accordance with the law.From a comparison – albeit brief – of the constitutional texts, it is easy to see that the Argentine federation is an exceptional case in the Latin American context, where very detailed and regulatory constitutions predominate in the organisation of sub-national entities. The lack of regulation on the way sub-national states are organised expands the space of sub-national constitutional law available to them – space that the provinces have been able to take advantage of to a great extent, with the incorporation of new and modern institutions, rights and guarantees. In this sense, it can be affirmed that although Argentine federalism is quite decentralised politically compared to other federations, such as the Brazilian, Mexican, and Venezuelan ones, it is not decentralised in other aspects, such as fiscal matters, for example (Altavilla 2020).

4. The Residuary Clause and the thesis of Two Sovereignties

The "Residuary Clause" refers to a mechanism for the award of all those powers and functions that are not contemplated in the constitutional text, since the constituents cannot foresee, at a given moment, all the powers and functions that are or can be the responsibility of the State. The point is to determine which of the two orders of government will be responsible for those functions that are not listed. This point is important, because it significantly expands the power of the federated states:

> On its own, comparing enumerated exclusive state powers does not predict how the allocation of power in a federation may change over time. We must also consider the assignment of residual powers. For instance, the American and Australian constitutions were designed chiefly to enumerate a limited range of powers, clearly assigning federal powers and leaving the residual to the states. In Canada, the only federation of the six in which the constitution assigns residual powers to the federal level, the framers had the opposite task of enumerating a complete list of state tasks (Thorlakson 2003:9).

Returning to the concept of *incomplete constitutions*, when delimiting the sub-national space, it is crucial to determine which of the two powers holds this residual clause, that is, to which of the two levels all those competences that the constitution does not enumerate or foresee will correspond. This liminal principle of the system of distribution of powers between the central state and the member states, crucial in any federation, was not incorporated in the original text of the US constitution – the first modern federation in history – but was added two years after its entry into force, in December 1791 (along with the nine amendments known as the *Bill of Rights*). The Tenth Amendment states: "*The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people*" – although Madison itself considered that this amendment was superfluous and unnecessary, since the whole of the Constitution implied this principle (Dam 1977).

In Latin America, we can observe that in general, this clause plays in favour of the federated states: In Brazil, Article 25, section 1 provides that "Powers not forbidden to them [the states] by this Constitution are reserved to the States"; in the same sense the Mexican constitution, whose Article 124 declares that "The powers not expressly granted by this Constitution to federal officials, shall be understood to be reserved to the States". Argentina, in Article 121 (original 104, text incorporated in 1860 constitutional reform) provides that "The Provinces retain all powers not delegated by this Constitution to the Federal Government, and those they have expressly reserved by special covenants at the time of their incorporation".

The *Residuary Clause* is connected to the theory of co-sovereignty, or shared sovereignty between the two levels of government – a thesis elaborated and defended by the authors of *The Federalist Papers*, in particular, James Madison, who develops the point in Articles 39 to 51 of the Papers, and which would later have constitutional value with the incorporation of the *Tenth Amendment* in 1791, and Alexander Hamilton. Hamilton stated that "the plan of the convention aims only at a partial union or consolidation, the state governments would clearly retain all the rights of sovereignty which they before had, and which were not, by that act, *exclusively* delegated to the United States. This exclusive delegation, or rather this alienation of state sovereignty, would only exist in three cases: where the constitution in express terms granted an exclusive authority to the union; where it granted, in one instance, an authority to the union, and in another, prohibited the states from exercising the like authority; and where

it granted an authority to the union, to which a similar authority in the states would be absolutely and totally *contradictory* and *repugnant*" (No 32).

Madison, for his part, clearly differentiated this system of shared sovereignty from those of the unitary state, arguing that "But if the government be national, with regard to the *operation* of its powers, it changes its aspect again, when we contemplate it in relation to the *extent* of its powers. The idea of a national government involves in it, not only an authority over the individual citizens, but an indefinite supremacy over all persons and things, so far as they are objects of lawful government. Among a people consolidated into one nation, this supremacy is completely vested in the national legislature. Among communities united for particular purposes, it is vested partly in the general, and partly in the municipal legislatures. In the former case, all local authorities are subordinate to the supreme; and may be controled, directed, or abolished by it at pleasure. In the latter, the local or municipal authorities form distinct and independent portions of the supremacy, no more subject, within their respective spheres, to the general authority, than the general authority is subject to them within its own sphere. In this relation, then, the proposed government cannot be deemed a *national* one; since its jurisdiction extends to certain enumerated objects only, and leaves to the several states, a residuary and inviolable sovereignty over all other objects" (*The Federalist Papers*, No 39).

In federal theory, the power to dictate one's own laws is so broad that the federated states can be considered as true sovereign states. This is clearly established in Mexico's constitution, which states that Mexico is "composed of free and sovereign states in all matters concerning their internal regime" (Article 40). While Alberdi's draft of the Argentine National Constitution used the term "sovereignty" when referring to the provinces, the Convention of 1853 omitted it in the final text. However, although, unlike the Mexican Constitution, Argentina's lacks an explicit reference to provincial sovereignty, legal scholars and judicial rulings have, since the federation's inception, upheld this concept.

5. The Provincial margin of appreciation in SCL

It is no easy task to determine an intermediate or ideal point to delimit the space of sub-national constitutional law. The limitations imposed by the federal constitution are based on *the need to ensure that sub-national political structures are minimally homogeneous*, across states and with

the federation. But this homogenisation should not imply an imitation or replication of federal institutions – otherwise there would be no point in adopting a federal system.

In this sense, some federations have drafted certain principles or interpretative guidelines to make the requirement of homogeneity and internal coherence compatible with that of the *sub-national space*. Article 28 of the Bonn Basic Law establishes guidelines which bind the Länder to the constitutional principles contained in the German constitution. As Fernández Segado (2003) argues, the objective is to generate a certain homogeneity, but without demanding either full adequacy or uniformity.

German constitutional scholars developed the "*Hausgut*" principle. This term means *household*, *house*, and it refers to what is proper, to what belongs to the domestic domain. With this term, the literature refers to the existence of a certain nucleus of privative functions that is maintained by local authorities, of which the *Landers* cannot be deprived, and whatever such privative functions may be in particular, "the Land must retain in any case the free decision about its organization, including the fundamental organizational decisions contained in the Constitution of the Land" (Fernández Segado 2003:62).

In Argentina, local literature has identified this principle with the concept of "provincial margin of appreciation". The concept is taken from international law, where the expression "margin of appreciation" refers *to the space for manoeuvre that International organs and Tribunals are willing to grant national authorities*. The same can be said within federal countries, where local authorities and courts interpret and apply the law – especially the Constitution – considering their own history, culture and idiosyncrasy. According to this principle, it is possible for local authorities to give to a constitutional clause a different meaning from that assigned by the National Supreme courts, as long as it is consistent with local culture, history, traditions, etc.

Although it is true that interest in the study of sub-national constitutionalism has been relatively recent, Argentina has a long tradition of the study and interest in this branch of the legal system. This interest originated with the publication of Juan Bautista Alberdi's work, "*Elementos de Derecho Público Provincial*. Two doctrinal schools can be identified in Argentine constitutional history, one strictly constitutionalist, focused on the analysis and study of the national constitution but with particular attention to the political organisation of the provinces, exemplified by Manuel Estrada (1895), Segundo V. Linares Quintana (1956), and Germán Bidart Campos (1998). The second group meticulously analyses provincial public law itself. The main representatives of this group inlcude Juan A. González Calderón (1913),

Arturo M. Bas (1927), Juan P., Ramos (1914), Francisco Ramos Mejía (1915), and Clodomiro Zavalía (1941). Recently, three more schools can be identified: the Córdoba School, headed by Pedro J. Frías (1985) - followed by, among others, Iturrez (1985), Alfredo Mooney (1997), Antonio Hernández (2008), Antonio Hernández and Guillermo Barrera Buteler (2011); the Mendoza school with Dardo Pérez Guilhou (2003; 2004); and the Platense School with Ricardo Zuccherino (1976) as well as Mercado Luna (2000) from La Rioja.

Towards the end of the 19th century, Manuel Estrada, following classical American literature and, in particular, the authors of *The Federalist Papers*, adopted and interpreted the federal constitutional text from the broad viewpoint of provincial powers (1895: 326- 327). In the part on "Federal Law", he dealt with the "guarantee of local self-government" (1895: 347 et seq.), recognied by Articles 5, 105, 106, 107 of the constitutional text (in its 1853 original enumeration), referring to the "relative independence" of the provinces.

Joaquín V. González, with a very clear vision of the scope and extent of provincial public law, wrote, in 1897:

> Because the constitution of a province is a code that condenses, orders and gives imperative force to all the natural right that the social community possesses to govern itself, to all the original sum of inherent sovereignty, not ceded for the broader and more extensive purposes of founding the Nation.
>
> Then, within the juridical mold of the code of rights and powers of the Nation, there is room for the greatest variety, all that may arise from the diversity of physical, social and historical characters of each region or province or from its particular collective desires or aptitudes.
>
> Thus, they contribute to the development, vigor and improvement of national life, and reflect their influence on the progress of the public law of the entire Nation (1983:648/9).

These "local diversities" make up what has been called the *Provincial margin of appreciation*, which "reflects the peculiar manifestations of the particular and proper exercise of the constituent power of each province and of the City of Buenos Aires after the constitutional reception of its regime of autonomous government" (Ábalos, 2020). The expression is adopted by local doctrine from the concept developed in the field of international systems of human rights protection, where the doctrine of national margin of appreciation postulates the respect and deference of supra-national courts towards the interpretation made by the national States themselves of fundamental rights and their scope, especially on those points where there is no international consensus on sensitive issues (Barrera Buteler 2017). In this sense, what is sought is that the local constitutions and institutions receive and condense

regional particularities, and at this point, "respect for the local particularities that the different orders of government manifest in the exercise of their constituent power and in their own sphere of competence, is a key aspect" (Ábalos, 2020).

Barrera Buteler asks whether the concept of margin of appreciation can be transferred to the Argentine federation. He answers in the affirmative regarding the application and interpretation of Common Law (the different codes of private law, commerce, criminal law, whose regulation is centralised at the national level), since the Constitution itself has explicitly reserved to the provincial courts the power to apply these laws emanating from the Federal Congress, whenever things or persons fall under their jurisdiction (Article 75, section 12 and Article 116). This also implies the power to interpret it, from which it is "clear that the National Constitution has intended that the provincial courts interpret the contents of the substantive codes according to the local cultural reality and this may give rise to different interpretations of the same rule in one province and in another. But this cannot be a cause for scandal in a federation. In the United States there is diversity of substantive legislation among the states and not only diversity of interpretation" (Barrera Buteler 2017:503). This diversity is precisely the foundation of federalism, the idea that any community, state or province, can legislate, apply and/or interpret the law, according to their own particularities, and this will consequently give different outcomes in different states.

From this perspective, *"federalism is more compatible with diversity* than with *homogeneity* and this is the basis of the provision of the final part of section 15 of Law 48[III], which expressly excludes from the extraordinary appeal, on the grounds of Article 14, section 3, those cases in which is questioned 'the interpretation or application that the provincial courts make of the substantive codes'", according to Article 75, section 12, National Constitution) (Barrera Buteler 2017:503). This gives provincial judicial branches a great deal of autonomy and independence, since it means that both provincial legislation and the common national law (Civil, Commercial, Penal, Mining, and Labor and Social Security Codes) can be controlled neither by federal courts, nor the National Supreme Court – except when the norm or the interpretation expressly affect the National Constitution. In other words, the final judicial decision regarding provincial law and codified law rests with the Provincial Supreme Tribunals.

Assessing the provincial margin of appreciation for rights enshrined in the National Constitution or in treaties with constitutional hierarchy (Article 75, section 22) proves more

challenging, due to the Supreme Court's role as sole interpreter of this constitutional framework. However, this "does not prevent the interpretation of those rules that protect fundamental rights from being made by combining the single normative provision with the social and cultural reality that may be varied and diverse and, consequently, may admit differential nuances depending on whether they are applied in the context of one province or another. Above all, it is not possible to disregard the provisions of the local constitutions which, whenever possible, must be harmonized with those of the National Constitution and only set aside when there is total incompatibility between them" and, "in this task of harmonization, the role of the provincial courts is extremely important, opening a 'dialogue of courts'" (Barrera Buteler 2017:503).

The National Supreme Court of Justice has, throughout its history, laid down key jurisprudential guidelines. Most notable are: early precedents explicitly endorsing co-sovereignty, and more recent ones embracing the concept of "provincial margin of appreciation."

In one of the first rulings, "*Blanco, Julio v. Nazar, Laureano*" (1864), the Supreme Court held that, according to Article 105 (current Article 122), the provinces reserved the right to establish their own institutions for their internal regime, and that the federal government could not intervene, because if "the National Courts were to intervene in the internal government of the provinces, their magistrates would not be the agents of an *independent* and *sovereign* Power". It also held that "the provinces retain after the adoption of the general constitution, *all the powers they had before and to the same extent*, unless that the Constitution contains some express provision restricting or prohibiting their exercise" and with respect to federal justice, sustained that "its jurisdiction is *restrictive* by its nature, and in criminal matters can only be exercised by applying the laws of Congress"[IV].

A year later, in "*Mendoza Hermanos v. Province of San Luis*" (1865) the Court said that it is "the only final interpreter of the Constitution", that "the independence of the Provincial Governments is circumscribed to the exercise of the Powers not delegated to the National government, and that neither the latter, nor their dignity suffer any detriment by appearing before a Court that they themselves have created to settle their controversies, being so that the same *sovereignty*, taken in its highest expression, can consent without disrepute to be judged by a Court of its own choosing". In this case, the province of San Luis was sued directly before the Supreme Court for establishing import duties. The province argued that

"in no case can a Province be sued by private parties before the National Courts", since "the Provinces are *sovereign*, and their independence and dignity would be undermined if they could be forced to appear before a Court". Faced with this argument, the Court replied that "according to Article 100, all cases that deal with points covered by the Constitution are within the jurisdiction of the Supreme Court and the lower Courts of the Nation; a provision that embraces the universality of the cases of this nature, without any exception"[V].

In "*Plaza de Toros*" (1869) the Court reaffirmed that the provincial police power was considered as "included in the powers they have *reserved to themselves*, that of providing what is convenient for the safety, health and morality of their neighbors; and that, consequently, they may lawfully dictate laws and regulations for these purposes" and that, furthermore, since this was so, the "national justice would be incompetent to force the provinces" to permit an activity that it had previously prohibited, by virtue of that police power (in this case, bullfighting), "even if it [the bullring] could be qualified as an industrial establishment" [VI]. That same year, in "*Resoaglí v. Provincia de Corrientes*" (1869), it held that the National Constitution provisions were made to regulate the national government, "*and not for the particular government of the Provinces*, which according to the declaration of Article 105, *have the right to govern themselves by their own institutions*, and *to elect by themselves their governors*, *legislators and other employees*; that is, they retain their absolute sovereignty in all matters relating to the powers not delegated to the Nation, as recognized by rticle 104"[VII]. In the case "*Casiás, Raffo and Co.*" (1873), the Court stated that the provinces are "*sovereign* and *independent states* of each other" [VIII]; and in *"Sociedad Anónima Mataldi Simón Ltda. v. Prov. de Buenos Aires*" (1927) the Court referred to "the *two sovereignties*, national and provincial"[IX].

In the famous "*Bressani*" (1937) case – quoting the U.S. Supreme Court in the "*Texas v. White*" ruling of 1868 – the Argentine Supreme Court held that the National Constitution "... has intended to make one country for one people" but "has not set out to make one centralized Nation. The Constitution has founded an indestructible union of indestructible states". As regards the sub-national space, it is worth mentioning the passage in which the Court stated that "the constituent actors and eyewitnesses of the process that ended in the Constitution of 1853, established a unity not by suppressing the provinces – a path that had forced to evict a terrible experience – but by *conciliation* of the extreme diversity of situation, wealth, population and destiny of the fourteen states and the creation of an organ for that conciliation, for the protection and encouragement of local interests, whose whole is

confused with the Nation itself". Finally, with respect to the *principle of adequacy* and *homogeneity*[X].

Although it is true that in the following decades, the Court would abandon the expression "sovereign" to refer to the provinces – coinciding with a jurisprudence that validated federal advances and invasions of provincial competences[XI] – in recent rulings it again referred to the provinces as *sovereign states*. A notable case is that of "*Provincia de La Pampa v. Provincia de Mendoza*[XII][XIII], understanding that it should act, not as a judicial tribunal, but rather as an arbitrator, even applying, in an analogous manner, principles of international law. It held that the Court's jurisdiction is activated in those cases that are not a "civil case" in the concept developed by the regulatory laws of that competence (for example Law 48 or Decree-Law 1285/58) and as conceived by the jurisprudence of this Court. The original jurisdiction in those complaints requires only the existence of a conflict between different provinces produced as a consequence of the exercise of the non-delegated powers that are the result of the recognition of their autonomy. In short, "jurisdiction is limited to disputes which between entirely independent states could be the subject of a diplomatic settlement".

In the case "*Partido Justicialista de la Provincia de Santa Fe v. Santa Fe*" (1994), the Court established a series of very important guidelines regarding the provincial *margin*. It held that "Article 5 of National Constitution declares the union of the Argentine people around the republican ideal. But it is a particular union. It is the *union in diversity*. Diversity coming, precisely, from the federalist ideal embraced with the same fervour as the republican ideal". From this perspective, "federalism involves a recognition and respect for the identities of each province, which is a source of vitality for the republic, to the extent that it enables a plurality of trials and the search by the provinces of their own ways to design, maintain and improve local republican systems. This diversity does not entail any disintegrating force, but a source of fruitful dialectics, always framed by the supreme law of the Nation". Therefore, "the supremacy referred to in the National Constitution (Article 31) guarantees the provinces the establishment of their institutions and the election of their authorities without the intervention of the federal government (Articles 5 and 122), subjects them and the Nation to the representative and republican system of government (Articles 1 and 5) and entrusts this Court to ensure it (Article 116) in order to ensure the perfection of its functioning and compliance with those principles that the provinces agreed to respect when they concurred in the adoption of the National Constitution".

Finally, in the most recent precedent of the Court, "*Castillo v. Province of Salta*", the Supreme Court expressly includes the term "provincial margin of appreciation", in which it holds that "Article 5 of the National Constitution, in establishing the bases of provincial constituent power (which translate, at the same time, into a series of unrenounceable obligations for the provinces) expresses a 'provincial margin of appreciation' that does not conflict with the aforementioned Article 5 but, rather, sets forth a way of implementing educational competence [in this case] taking into account provincial particularities, in accordance with the weighting of their own constituents". Therefore, this "'provincial margin of appreciation' in educational matters makes it possible to understand (and validate) that certain jurisdictions of our federal State place emphasis, as happens in religious matters, on the teaching of subjects such as the promotion of the associative and cooperative spirit, the special knowledge of local history, culture and geography, productivity based on regional characteristics, among others", which allows (as the provincial constituent has concretely done) to include in the curricula specific contents linked to its own jurisdiction, "a characteristic aspect of the 'provincial margin of appreciation' which is connatural to the federal system established by Article 1 of the National Constitution"[XIV].

This margin includes a space of free development without interference from the federal powers (neither of Congress, nor of the President, nor the federal courts, including the Supreme Court), both in the conception and sanctioning of the norm, and in its subsequent application and exercise, since it takes place in a reserved area (powers reserved by the provinces – Article 121 National Constitution) where they act with *sovereign powers*. It also translates into the idea of respect for the particularity, individuality and peculiarity with which the provincial convention adopts and makes the fundamental principles of the fundamental legal system (the national constitution) compatible with the local reality and particularity.

Once the province enacts the constitution, no external authority can approve or review it. Instead, there are two mechanisms for review: on the one hand, an ordinary mechanism, the judicial review, which is exercised only by the local judicial power – and only exceptionally and definitively, by the Supreme Court, through Extraordinary Appeal, and on the other hand, an extraordinary mechanism, of a political nature, which is a federal intervention (Article 6), ordered by the federal Congress.

This margin also covers *normative interpretation*, whether carried out by the bodies that implement the regulations or activate the institutions, or by the doctrine and local courts. In

the case of Argentina, this judicial interpretation is not limited to local regulations, but has a significant impact on federal legislation; while the normative production of substantive legislation (civil, commercial, criminal, etc.) is concentrated in the federal legislative body, the National Congress (Article 75, section 12), its application (and therefore, its interpretation) falls under the jurisdiction of both the federal courts and the provincial courts: "The reservation made in section 12 of article 75 left a sufficient margin for the provincial courts to adapt, as necessary, the provisions of those acts of Congress to the local idiosyncrasy, because the power of 'application' of those norms brings implicitly that of their 'interpretation'" (Barrera Buteler 2017:497).

This is not the case in other Latin American federations, such as Mexico, where the system of mandatory jurisprudence of the federal courts on the interpretation "of the Constitution, federal or local laws and regulations and international treaties" (Article 94, paragraph 10, Constitution of Mexico) is in force, or in Venezuela, where there is no local judiciary at all.

In conclusion, it can be argued that the sub-national space is quite broad in Argentine federalism and that, in general terms, the provincial constituents have been able to take advantage of it.

6. Historical trajectory and current situation - Sub-national Constitutional Law as a laboratory of rights and institutions

There are some historical periods that represent real advances in sub-national constitutional law, bringing with them important *innovations*, and other moments in which processes of "*assimilation*" or "*homogenisation*" occur, making sub-national texts similar to the federal one.

For example, in Argentina, two moments of innovation, which have significantly advanced provincial constitutional law, can be identified: those experienced in the first three decades of the 20th century, and those experienced in the 1980s and 1990s. In both processes, sub-national innovations ended up being included in the federal text (both in the constitutional reforms of 1949 and of 1994, respectively).

Similarly, moments of assimilation or homogenisation can also be identified. For example, the constitutions sanctioned in the 1850s, immediately after the national

Constitution of 1853, and the constitutions of 1949, sanctioned as a consequence of (and under pressure from) the new federal text of 1949. In both cases, the federal government put pressure on the provincial governments to sanction their texts, although in 1853 it did so with the aim of "completing" the federal constitutional process, with the sanctioning of the respective provincial constitutions, without additional requirements on how to sanction the new provincial constitutional texts. In 1949, however, there was strong pressure for the provincial texts to "resemble" the federal charter, which ended up being mere copies of it – there were even written instructions from the Ministry of the Interior on how to draft the "new" provincial constitutions (see Altavilla 2018). Rather than dictating specific content, the federal government's main pressure on provincial constitutions in the 1850s stemmed from the urgency of establishing a cohesive Argentina. This haste, however, sometimes led provinces to simply imitate the federal text. Rather than dictating specific content, the federal government's main pressure on provincial constitutions in the 1850s stemmed from the urgency of establishing a cohesive Argentina. This haste, however, sometimes led provinces to simply imitate the federal text.

Despite *these similarities* with the federal text, Argentine sub-national law also showed some innovations, for example, the restoration of *Cabildos* (a traditional institution of local government), some issues related to education, etc. Around 1870, provincial constitutionalism would begin to detach itself from federal constitutionalism, making the exercise of local constituent power more effective and creative

In the German federation, despite the notable differences between the *landers*, the existence of a common historical background and a strong process of assimilation have resulted in a process of homogenisation between the local constitutional texts, both in structure and content (Niedobitek 2013).

In the United States, Robert F. Williams (1990) identifies a "constitutional revolution" that occurred in the 1970s, both in state constitutional texts and in the judicial interpretation of the individual rights contained therein, preceded by a period of state constitutional revisions and reforms between 1945 and 1970, which modernised state constitutions. This has allowed for a "rediscovery" of state constitutional law, in its use both by trial lawyers (to assert rights that the federal constitution does not contain, for example), and by judges and magistrates themselves through judicial interpretation of state constitutions, mainly with

regard to fundamental rights, with a true "'explosion' of the state Bill of Rights in recent decades" supplementing the scant list of Bi*lls of Rights* of the federal constitution.

In recent decades, Mexican sub-national constitutionalism has been immersed in a stage of profound renewal. The interest in this specific branch of political law is due to multiple factors, including the fact that the main issues of Mexican constitutional law are the subject of permanent discussion; the dynamism of local political processes, the absence of a dominant political force such as the PRI (Institutional Revolutionary Party / Partido Revolucionario Institucional) and the consolidation of the legal principle of constitutional autonomy (Astudillo Reyes, 2008). However, the development of sub-national law in Mexico has been very recent, and only eight states (Veracruz, Coahuila, Guanajuato, Tlaxcala, Chiapas, Quintana Roo, Nuevo León and the State of Mexico) out of a total of 32 states have so far taken the first step.

What is certain is that beyond this spasmodic movement between *diversity* and *assimilation*, it is possible to convincingly argue that sub-national constitutional law is an interesting laboratory of rights and institutions, and its existence and presence provides a series of *comparative advantages* within the federal institutional design.

This feature was described early on by Justice Louis Brandeis, in his famous sentence: "One of the happy incidents of the federal system is that a single brave State may, if its citizens choose, serve as a laboratory; and try new social and economic experiments without risk to the rest of the country"[XV]. And Justice Oliver Wendell Holmes similarly referred to this part of constitutional law, as "social experiments ... in the isolated chambers afforded by the several states..."[XVI].

Furthermore, *sub-national constitutional law is much broader than constitutional federal law*; it therefore provides for more rights and more guarantees, is more detailed and considers the particularities and peculiarities of the local community. It is also more extensive than the federal one. For example, while the Argentine National Constitution has one hundred and thirty articles, the constitutional text of the provinces exceeds 200 articles. In the American state constitutions, this breadth of local texts compared to the federal one can also be observed.

An intelligent, courageous and innovative use of this space brings important advantages:

- It enhances the ability of a federal system to *accommodate multiple political communities* within its constitutional regime;

- It duplicates the *mechanisms for protecting* individual rights (Carnota 2007);
- It strengthens the system of *checks and balances* between the branches of government;
- It can improve the *deliberative quality of democracy* within sub-national units and the federal system as a whole (Marshfield, 2011);
- It *expands* the rights established in the national Constitution;
- It refines them by incorporating local or regional elements and perspectives;
- It doubles (or triples) the spaces for *participation* and, therefore, for *control of citizens*;
- It doubles (or triples) the mechanisms of defence and protection of the constitutional order and fundamental rights;
- It implies a double guarantee for citizens: the *republican system* translates into a guarantee as it limits power, dividing it functionally. Federalism helps to strengthen this guarantee translated into the limitation of power, because it divides it again but from the territorial point of view (also functionally, because both provinces and municipalities must adopt republican and representative forms of government). Moreover, "state constitutions serve as limitations on the sovereign and plenary power of states to make laws and govern themselves" (Williams 1990:2);

In this way, sub-national constitutional law serves as a true *laboratory of rights* and *institutions* that allows (and encourages) innovation and the rapid and spontaneous creation of efficient constitutional responses to the problems that modern, constantly evolving societies pose to legal and political operators. Added to this is a greater "sensitivity" of the provincial constituent, being closer to the population to whom it provides legal-constitutional solutions to daily problems. This *immediacy* of the local constituent gives rise to very efficient solutions, as the history of provincial constitutionalism in Argentina has demonstrated.

Indeed, sub-national constitutional law has been an interesting precedent and antecedent of national or federal law: the *amparo* action [*Action of Constitutional Protection*] originated in the Mexican state of Yucatan in 1840, while the process of *amparo* was received only in the Reform Act of 1847, and in the Constitution of 1857, which would be the first to recognise

the *amparo* as a means of protection of human rights (Rodriguez 2017). In the United States, *judicial review*, the widespread jurisdictional control of constitutionality, was applied by the States before it was created by the Supreme Court in the famous *Marbury v. Madison* case of 1803: "Interestingly, several state courts had exercised this power long before 1803, and even before the federal constitution was ratified" (Williams 1990:265), citing as the first antecedent (in independent America), the case of *Holmes v. Walton* in the State of New Jersey in 1780.

In Argentina there are countless provincial constitutional antecedents that were later incorporated into the federal (constitutional and/or legal) order, a noteworthy one being the constituent cycles of the '50s and '60s, where the "new" provinces exercised their original constituent power (Chaco, La Pampa, Misiones, Santa Cruz, Chubut, Rio Negro, Neuquén) and the old provinces reformed their texts (San Luis, Santiago del Estero, Santa Fe), with innovations such as the constitutionalisation of political parties, municipal autonomy, supervisory bodies. Also significant is the constituent cycle of the 1980s and 1990s where nine provinces reformed their texts (La Rioja, Salta, Santiago del Estero, San Juan, Jujuy, Córdoba, San Luis, Catamarca and Río Negro). This was the immediate and most important antecedent for the federal constitutional reform of 1994, with significant contributions such as the incorporation of second and third generation rights, constitutionaliation of institutional guarantees for the defence of fundamental rights (amparo, habeas corpus and habeas data), supervisory bodies (such as the ombudsman), special state policies, municipal autonomy, among many others.

Despite this progress, the study of sub-national constitutional law still has many challenges ahead; in particular, its analysis and comparative study, both nationally and internationally. On this last point, Latin American dialogue is still lacking; the Mexican literature (which is very recent) does not draw much on American (North American or Latin American) literature, but is mainly based on European authors, which in many cases are old and outdated doctrines, especially regarding the concept of *autonomy*. The re*ference to the Italian and Spanish literature is striking. These start from an administrative* - rather than constitutional – sub-stratum and do not fully conceive the scope of the term *autonomy* nor develop a federal theory – since these are not federal countries, and beyond the great decentraliation fo their systems, they have resisted calling themselves federal countries, and their structure is ultimately not federal. Even in Brazil this point has not been significantly developed, and in Venezuela, after the 1999 reform, the sub-national space was severely limited. Therefore, it

is not a stretch to say that Argentina has not only a long tradition, but also that its doctrine and jurisprudence are at the forefront of federal issues in Latin America.

[I] CONICET – Siglo 21. Ph.D. in Law and Social Sciences (University of Córdoba, Argentina) with a Ph.D. Visiting in Political Science at Bologna University, Italy. Assistant Researcher at CONICET, Argentina. Researcher and Professor of Constitutional Law, Subnational Constitutional Law and Public Law, Siglo 21 University and National University of Córdoba. Visiting researcher at universities in different countries (Brazil, Denmark, Spain, Colombia, Italy, Switzerland, and the United States). He has been visiting scholar at Harvard University (USA). He has published books and more than thirty papers on topics related to his area of specialization in national and international journals and media. e-mail: cristianaltavilla@hotmail.com.

[II] Confr. Mooney 2001, Hernández 2011, Montbrun 2003.

[III] Law 48, from 1863, stablishes the procedure of the Federal Extraordinary Appeal [*Recurso Extraordinario Federal*] before the National Supreme Court of Justice.

[IV] CSJN, "Blanco, Julio c/ Nazar, Laureano, por sustracción de mercaderías a fuerza armada" Fallos 1:170, May, 30th, 1864.

[V] CSJN, "Mendoza, Domingo y Hno. c/ Provincia de San Luis s/ derechos de exportación - cuestión de competencia", May, 3rd, 1865, Fallos 1:485.

[VI] CSJN, "Empresa 'Plaza de Toros' c/ Gobierno de Buenos Aires", April, 13th, 1869, Fallos 7:150.

[VII] CSJN, "D. Luis Resoaglí c. Provincia de Corrientes por cobro de pesos", July, 31st, 1869, Fallos 7:373, en Ábalos, 2020.

[VIII] CSJN, "Casiás, Raffo y Ca., y Casas y Ferrer C/ Don Tomás Armstrong", September, 6th, 1873, Fallos 14:18.

[IX] CSJN, "S.A. Mataldi Simón Limitada c/ Provincia de Buenos Aires", September 28th, 1927, Fallos: 149:260.

[X] CSJN, "Bressani, Carlos H. y otros c/ Prov. de Mendoza", June, 2nd, 1937, Fallos: 178:9.

[XI] The Court will begin to refer to the provinces no longer as sovereign but as autonomous – for example, in the cases "Berga", and "Cardillo", (Sagüés 2003:3).

[XII] CSJN, "La Pampa, Provincia de c/ Mendoza, Provincia de s/ acción posesoria de aguas y regulación de usos", Desembre, 3rd, 1987, Fallos: 310:3520 (see Altavilla 2009).

[XIII] Article 127 states that No Province may declare or wage war against another Province. Their complaints must be submitted to and settled by the Supreme Court of Justice. Their de facto hostilities are acts of civil war, characterized as sedition or rebellion, which the Federal Government must suppress and punish in accordance with the law".

[XIV] CSJN, "Castillo, Carina Viviana y otros el Provincia de Salta - Ministerio de Educación de la Prov. de Salta s/ amparo", sentencia del 12 de diciembre de 2017, Fallos: 340:1795, voto en disidencia parcial del Ministro Rosatti.

[XV] New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting), quoted by Williams 1990.

[XVI] Truax v. Corrigan, 257 U.S. 312, 344 (Holmes, J., dissenting), quoted by Williams 1990

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Independence in the European Union

by

Francisco Pereira Coutinho[1]

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Abstract

The dream of "independence in Europe" has been driving the very successful political action of nationalist movements in substate regions such as Catalonia, Flanders, Scotland or the Basque Country. After tracing this *telos* to the federal nature of the European Union, this essay analyses the legal arguments which support the claim to political independence of those regions, first and foremost the right to secede based on the principle of self-determination of peoples. It finishes by discussing the legal paths for the transformation of substate regions into Member States of the European Union within consensual and non-consensual secession processes.

Keywords

Enlargement, Nationalism, Secession, Self-determination, European Union

1. Separatism and European integration

1.1. It is not a coincidence that Hobsbawm's prophecy is being challenged right at the crib of modern nationalist movements in Western Europe. A referendum held on 18 September 2014 in Scotland, with the consent of the British parliament,[II] saw 44.7% of voters decide in favor of independence.[III] Veneto's parliament enacted a law that same year to convene a referendum on independence,[IV] which was later deemed unconstitutional by the Italian Constitutional Court for breaching the principles of the unity and indivisibility of the State.[V] The Spanish Constitutional Court repeatably rejected referendum proposals regarding the right to decide of Catalonia and the Basque Country, as well as for Catalonia's right to self-determination, reasoning that the proposals exceeded the regional parliaments' powers that had adopted them.[VI]

The Catalan government (*Generalitat*) went ahead anyway with a referendum on 1 October 2017, which was partly disrupted by police forces dispatched from other Spanish regions by the Madrid central government.[VII] On 10 October 2017, members of the Catalan government and a majority of deputies in the Catalan parliament, acting as "democratic representatives of Catalonia", signed a declaration proclaiming the establishment of the "Republic of Catalonia as an independent and sovereign State".[VIII]

The Spanish State's response to the declaration of independence of Catalonia was swift and incisive. The Spanish Government was authorized by the Senate to dismiss the *Generalitat* and assume direct administration of Catalonia until regional elections could be held.[IX] Key political figures of the Catalan independence movement (commonly called the *procés*) who remained in Catalonia were detained and handed prison sentences ranging from 9 to 13 years for the crimes of insurgency and misuse of public funds.[X] The sentences were later pardoned by a new left-wing Spanish Government not surprisingly sustained by a Catalan nationalist party (Esquerra Republicana).[XI] Those who left Catalonia, including Carles Puigdemont, the ousted President of the Catalan government, have not yet been tried due to the refusal by German, British and Belgian courts to enforce European arrest warrants on various grounds, such as the existence of a serious risk of fundamental rights breach.[XII]

Nationalism is flourishing in substate regions vested with significant self-governing powers by the Italian Constitution (1948), by the Spanish Constitution (1978), and by the "devolution" carried out by the British parliament, which led to the re-establishment of the

Scottish, Welsh, and Northern Irish parliaments, in 1997. This runs straight against the idea that "in regions where the classical aspiration for separate nation-states might be expected to be strong, effective devolution or regionalization ha(d) pre-empted it, or even reversed it.".[XIII] Hobsbawm seems to have missed that when mixed with European integration, constitutional decentralization of competences does not neutralize nationalisms, but only fuels them.

1.2. The nation was famously depicted as "an imagined political community".[XIV] It is imagined because although the bulk of its members don't know each other personally, they subconsciously believe to share common traits – a "common (national) conscience" (Article 39, paragraph 5, of the Ethiopian Constitution) – that differentiate them from other national groups. The nation is also crucially imagined as limited and sovereign. This means that it can only be ideally expressed through the state, which ultimately defines who is a (national) citizen and who is a foreigner. Citizenship is thus the reification of an imagined political community based on a "deep horizontal comradeship" from which stems a fraternity that explains why, over the past centuries, so many people have willingly sacrificed their lives for such limited imaginings.[XV]

As an ever-evolving social construct – a "cultural product"[XVI] subject to a "daily plebiscite"[XVII] –, the nation was framed by nationalism through a symbiotic identification with a distinct form of the modern territorial state – the nation-state.

By nationalism I am referring to the political belief that nations are the building blocks of humankind, and that each nation or people – the concepts are intertwined – has the right to self-determination by establishing a state that will be a primary member of the international legal order, and as such can aspire to join the United Nations.

The nation-state is therefore a fusion of the Westphalian concept of state sovereignty (political independence) with the principle of national sovereignty (self-government of the nation), which in turn is based on the principle of popular sovereignty (the people as the source of political power). The equation state = nation = people is perfectly reflected in Article 1, paragraph 2 ("National sovereignty resides with the Spanish people, from whom the powers of the State derive"), and in Article 2 of the Spanish Constitution ("The Constitution is based on the indissoluble unity of the Spanish nation, the common and indivisible homeland of all Spaniards"). The equation was unsurprisingly the blueprint for

the Spanish Constitutional Court's refusal to recognize legal meaning to the reference to the Catalan nation included in the preamble of Catalonia's Statute of Autonomy of 2006. The statute was adopted by the Spanish Parliament and approved by the Catalan people in a referendum.[XVIII]

The idea of the nation as a primal and eternal reality, which "exists before everything and is at the origin of everything",[XIX] and which stems from "natural" factors such as geographical diversity, race or language, is nothing but a myth:[XX]

"In fact, nations, like states, are a contingency, and not a universal necessity. Neither nations nor states exist at all times and in all circumstances. Moreover, nations and states are not the same contingency. [...] The state has certainly emerged without the help of the nation. Some nations have certainly emerged without the blessings of their own state. *It is more debatable whether the normative idea of the nation, in its modern sense, did not presuppose the prior existence of the state*."[XXI]

The modern nation was created by nationalism through the transformation of pre-existing cultures (nationalities) or by the invention of nations *ex nihilo*, often leading to the obliteration of pre-existing cultures.[XXII] Since the last third of the nineteenth century, nationalism used the State – "(the) human community that (successfully) claims the *monopoly of the legitimate use of physical force*"[XXIII] – to disseminate, primarily through mass public education, a particular version of the nation's history,[XXIV] and to instill in the population feelings of belonging and loyalty to the nation-state. These feelings are crucial to the achievement of the ultimate goal of nationalism of having the people regard the nation as the primary form of collective identification, and therefore recognize the primacy of the obligations towards the nation-state over all other public responsibilities, particularly whenever there is an armed conflict that threatens the existence of the nation-state.[XXV]

Delayed massive public schooling was probably a decisive factor for the late emergence of a shared sense of national identity in countries such as Portugal. Although frequently portraited as one of the oldest nation-states in Europe,[XXVI] Portuguese national identity only came about after the establishment of the Republic in 1910,[XXVII] thereby justifying the plausibility of the apocryphal anecdote that recounts how King Luís I of Portugal, while on a yacht trip already in the late nineteenth century, after having inquired some fishermen if they were Portuguese, received the following response: "Us, Portuguese? No, my Lord! We are from Póvoa do Varzim!".[XXVIII]

Against the background of the nineteenth and early twentieth centuries experiences of having the state used as the vehicle by which nationalism sociologically constructed and insulated the nation from the effects of historical erosion,[XXIX] it is no surprise that the decentralization of competences challenged the unity and the cohesion of European nation-states, particularly when it included ceding powers in the realm of education to substate regions predominantly populated by national minorities.

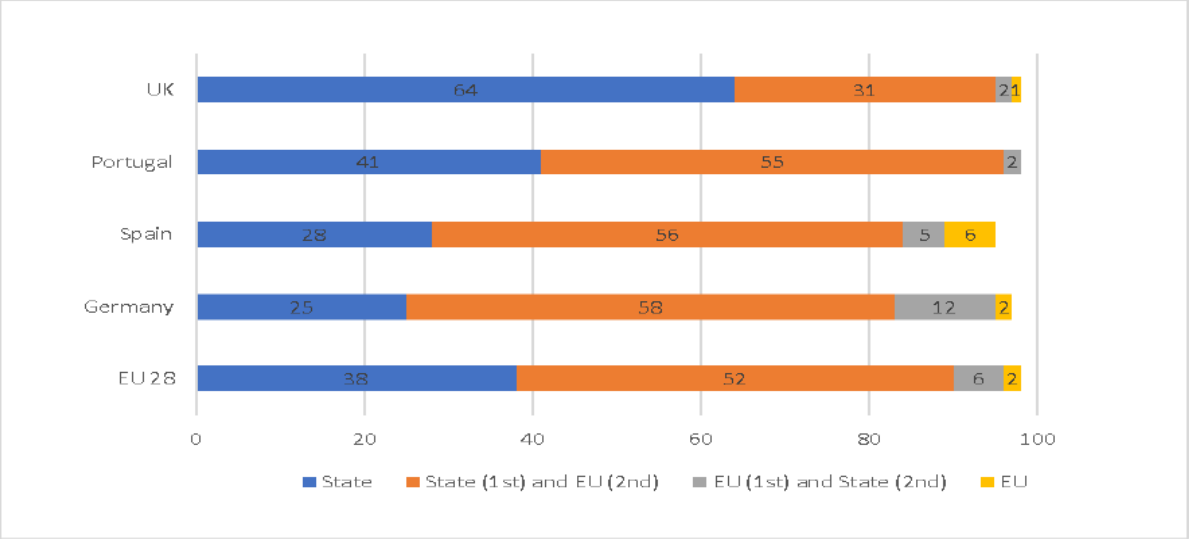
A good example is Spain, where the constitution gives the Autonomous Communities the competence to establish "other Spanish languages as official languages" (Article 3, paragraph 2), and wields them authority in the field of education for matters not exclusively within the purview of the State (Article 148, paragraph 2). The Catalan Statute thus regards Catalan as "a language normally used as a vehicular and learning language in education" (Article 6, paragraph 1), and grants various competences to the *Generalitat* in the field of education, including the exclusive power "to determine the contents of the first cycle of early childhood education" [Article 131, paragraph 2(b)]. The regional competences in the education domain are detailed in Law 12/2009, of 10 July. Its preamble describes Catalonia as "a nation with a culture and a language that shape its identity" and expresses the "desire to create a sense among all citizens of Catalonia of identifying with a shared culture, where the Catalan language plays a fundamental role in social integration". Through the implementation of a model of "linguistic immersion" in Catalan, this identitarian objective is considered to be achieved without breaching the Spanish constitution, as it does not prevent the attainment of proficiency in Castilian (Spanish) by the end of compulsory schooling.[XXX]

An even more extreme case can be found in Belgium, where, as per the Flemish nationalist leader Bart de Wever, the ongoing process of decentralization of competences across regions and linguistic communities is making the Belgian nation-state to "be snuffed out slowly, […] like a candle, barely noticed by anyone".[XXXI]

It is rather paradoxical that states which have decentralized very relevant competences in the field of education have refused to transfer those competences to the European Union. Such a refusal signals an implicit recognition of the importance of education in preserving national identities.[XXXII] It is not by chance that the "Erasmus" education mobility program, which was established through a regulation adopted under a complementary competence (Article 165 of the Treaty on the Functioning of the European Union (TFEU)), has become

one of the European Union's most popular policies, and one that have significantly contributed to the development of an (albeit still nascent) European identity (Chart I).[XXXIII]

Chart I – National Identity in the European Union



Source: Eurobarometer. 83 European Citizenship: Report 1 (2015), at 22.

Of the resident population of the European Union in 2015, 2% identified exclusively as European (0% in Portugal and 6% in Spain), and 6% identified primarily as European (2% in Portugal and 12% in Germany). About 52% identified primarily as citizens of a Member State (58% in Germany and 31% in the UK), while 38% identified exclusively as citizens of a Member State (64% in the UK and 25% in Germany). Over two decades, the proportion of individuals who exclusively or primarily identify themselves with the European Union has remained unchanged in Germany, increased by 4% in Spain, and decreased by 2% in Portugal and 7% in the United Kingdom.[XXXIV]

More than seventy years after the Schuman declaration, the prophecies of federalist and neo-functionalist integration theories have not been met. The expectation was that the deepening of European integration would imply a shift in national citizens' primary loyalty towards the EU.[XXXV] That did not happen. Nevertheless, approximately 40 million people, particularly young individuals who were "born in one member state, get their education in another, marry someone from yet another country, and work in multiple locations within the EU",[XXXVI] identify themselves primarily as Europeans. The Eurobarometer data also suggests that most national citizens have developed a secondary loyalty towards the EU. The

exception was the UK, where 64% of the population identified themselves exclusively as British, and the consequence was – with insight not surprisingly – Brexit.

1.3. Secessionist movements aim at the establishment of a sovereign state from part of the territory and population of another state, while keeping the parent state's political and legal systems intact.[XXXVII] The growing support they have been amassing in Western Europe was sharply influenced by two strategic choices. Firstly, the call for a civic nationalism,[XXXVIII] which advocates for the creation of plural and tolerant national political communities that reject the use of violence as a legitimate mean of political expression.[XXXIX] Secondly, the request for independence and automatic incorporation into a federation of states – the European Union – established by constitutional treaties that impose "a permanent limitation" on the "sovereign rights" of its members.[XL] In other words, nationalist movements aspire the substate regions they represent to leave political communities in which they have thrived – Catalonia, Scotland, Flanders, the Basque Country, or Veneto are among the most developed regions of their states and even of the European Union itself –, to integrate into a "community of political communities" composed of devitalized states which have relinquished an essential part of their sovereign powers.[XLI]

One such power is arguably monetary policy. In 1992, the French Constitutional Council declared that monetary policy was "vital to the exercise of national sovereignty".[XLII] France was thus prevented from joining the Economic and Monetary Union established by the Maastricht Treaty.[XLIII] Months later, however, the Constitutional Council made a dramatic U-turn. It stated that it lacked jurisdiction to review legislation adopted by referendum by the French people, considering that the ratification of the Maastricht Treaty represented a "direct expression of national sovereignty".[XLIV] This episode illustrates the futility of the German Federal Constitutional Court's attempt to limit the scope of European integration. In the Lisbon Treaty judgment, the Karlsruhe court omitted monetary policy from the list of competences the German State could not surrender to the European Union, which otherwise included criminal law and the use of force.[XLV]

If the European Union is instrumental to the resolution of problems of its members, placing theoretical limits on the transfer of competences to the supranational level, except for those concerning the political existence of the states themselves, is useless. The powers of the European Union cannot be determined in abstract. They depend on the evolving

needs of the Member States, as the decisions to create the European Stability Mechanism and the European Recovery and Resilience Mechanism during the euro and pandemic crises clearly demonstrate.[XLVI] The rule of thumb is that Member States will only transfer competences to the Union, including in domains traditionally deemed vital to the exercise of national sovereignty, such as defense, foreign policy or monetary policy, "if, but only if, they have to in the attempt to survive". [XLVII]

1.4. Why then argue for the exercise a right to self-determination which ultimately will not lead to the establishment of a full fledge sovereign state? What is the point of discussing secession within a political space without physical borders conceived as an antidote to the aggressive ethno-nationalisms that sparked two world wars? And how to explain the paradox emerging from the federal polity created after the war to rescue the European nation-state being after all a catalyst for its demise?

Addressing these questions requires a contextualization of the existential threat European nation-states were facing at the end of the Second World War. Out of the twenty-six nation-states that remained in 1938 as pillars of a continental political order (partly) based on the "principle of nationalities" and supervised by the League of Nations,[XLVIII] only six remained at the end of 1940. Three others were annexed, eleven occupied, four partially occupied or annexed, and two converted into satellites.[XLIX]

European integration prevented the collapse of the nation-state, the dominant form of political, social, and economic organization in Europe since the French Revolution. Its origin and epicenter was undoubtedly France. Occupied during the Second World War, France engineered European integration primarily to permanently solve the existential security concern caused by the establishment of a contiguous German nation-state in the nineteenth century.[L] European integration served also as an instrument to re-establish itself as a leading power in international relations, by which it could aspire to assume once again the political and economic leadership of Western Europe.[LI] French plans included the creation of the European Coal and Steel Community (ECSC) to turn German coal into European coal (1951), the establishment of the European Defence Community (EDC) to transform German soldiers into European soldiers (1952), and the adoption of the Maastricht Treaty to Europeanize the German currency (the Deutsche mark) (1992). These plans were welcomed by Germany which perceived them as conditions for the end of Allied military

occupation and the reestablishing as a sovereign state (1955), and to the exercise of the right of self-determination that allowed for reunification after the fall of the Berlin Wall (1990).[LII] For small and medium-sized European states, European integration represented a higher form of national interest as it ensured political independence from larger neighboring states.[LIII] Benelux emerged from the idea that the post-war nation-state should rely on more than just securing classical state functions, such as the physical security and the protection of the fundamental rights and freedoms of its citizens.[LIV] It had also to provide for economic security and social protection, as the UK would come to realize during the 1950s,[LV] which could only be fully attained through an internal and transnational market governed by supranational institutions such as the those established, on Dutch initiative,[LVI] through the Treaty of Rome, in 1957.

There is thus no contradiction between the nation-state and the European Union. This conclusion directly contradicts federalist integration theories which tend to observe national diversity as a historical deviation that prevents the political expression of a common European culture founded on the Greco-Roman heritage and reshaped by the Christian tradition.[LVII] The identification of European nation-states as historical anomalies is incompatible with the thought of the founding fathers of the European Union[LVIII], but it has been nurtured by supranational political institutions.[LIX] The latter have been promoting a nation-building European identity strategy which included supporting the publication of a book that recounts the eschatological story of the moral victory of European unity over the harmful forces of division.[LX] The consequence of this strategy is the persistent association of European integration with the *telos* of creating a "European superstate" that fuses nations together into a single European *demos*,[LXI] as well as with the cosmopolitan view that it represents the first step towards global peace and the beginning of a historical era characterized by the gradual withering away of the nation-state.[LXII]

Such a perspective disregards the more plausible explanation according to which European integration is instrumental for building the allegiances that support national political communities.[LXIII] European integration has been pivotal in providing citizens with the high standards of prosperity and physical safety which secured the allegiances necessary to the post-war survival of the European nation-state.[LXIV] The federal path was inevitable due to the inability of nation-states to address the internal challenges of the welfare state and the external challenges of globalization. The dialectical tension between federalism –

perceived as a political and legal philosophy consistent with political contexts in which the search for unity goes hand in hand with the "genuine respect for the autonomy and legitimate interests of the participant entities"[LXV] – and national sovereignty is however more apparent than real since "you cannot surrender something you have largely lost".[LXVI]

Brexit illustrates that political unification is not necessarily the end point of European integration.[LXVII] It also demonstrates that the benefits of formalizing and regulating political and economic interdependencies can be rejected by a direct expression of national sovereignty. The UK left the European Union on 31 January 2020. This secession was perhaps the "Machiavellian moment" of European integration,[LXVIII] marking the self-reflective moment in which the European Union realized its finite condition and definitively abandoned the founding neo-functionalist mythology, mirrored in the preamble of the Treaty on European Union (TEU), which sets out the irreversibility of the "foundation of an ever closer union among the peoples of Europe".[LXIX]

1.5. The European Union is a federation (a federal union) of states. This is a form of political association established to preserve the political existence of its member (the nation-states), but which changes their political status in view of that common purpose[LXX-LXXI].

The European Union sets a new stage in the evolution of the European nation-state.[LXXII] From isolated "nomad states", they were transformed into "sister states" (Member States) by treaties adopted by peoples organized as states. The treaties establish a plural (federal) constitutional order based on the ideas of dual sovereignty, dual democracy, and dual citizenship.[LXXIII]

The political dualism of a federation is reflected in the belonging of each citizen to two political communities both democratically represented in parliament (national and European). Schütze argues that this dual citizenship presupposes the coexistence of national *demoi* with a federal *demos* postulated by the constitution (the citizens of the Union), which gradually emerges as a political community through a dialectical process of collective self-constitution driven by the existence of an institution of collective representation (the European Parliament).[LXXIV] As Jürgen Habermas points out:

"The ethical-political self-understanding of citizens in a democratic community must not be taken as an historical-cultural *a priori* that makes democratic will-formation possible, but rather as the flowing contents of a circulatory process that is generated through the legal

institutionalisation of citizens' communication. This is precisely how national identities were formed in modern Europe. Therefore it is to be expected that the political institutions to be created by a European constitution would have an inducing effect. […] (T)he requirement of a common language – English as a second first language – ought not be an insurmountable obstacle with the existing level of formal schooling. *European identity can in any case mean nothing other than unity in national diversity*"[LXXV].

In fact, the Eurobarometer data shown in Chart I above illustrate the unlikelihood of the European emulation of the United States' nation (state) building, which was tragically beset by a conflict of allegiances that led to a civil war following an attempt at secession.

1.6. The Treaties governing the European Union grant Member States a predominant role in a *demoi*cracy where "the peoples of the Union govern together as many but also as one".[LXXVI] The peoples of the Member States are the "masters of the Treaties", and collectively exercise the amendment procedures set forth in Article 48 TEU.

Reaching member state status naturally became the prime aspiration of European substate nationalisms in the twenty-first century both for economic and political reasons. Upon achieving independence, prosperous substate regions retain the tax revenue they generate. Revenue is typically redistributed through the state budget to poorer regions, in accordance with the principle of national solidarity.[LXXVII] However, the benefits of secession are frequently overshadowed by the risks of losing unrestricted access to the larger market of the parent state, where richer regions can freely sell goods and services, as well as allocate excess resources and workers.[LXXVIII] Such drawbacks are absent if secession does not mean leaving the European Union. In such scenario, prosperous regions maintain access to the parent state's market and to the markets of other Member States. The economic risks usually associated with political independence are mitigated if not eliminated.[LXXIX] When compared to federal states, the European Union has very limited financial resources for promoting economic, social, and territorial cohesion. Budget transfers to poorer regions within the Union remain comparatively modest.[LXXX]

The idea of "independence in Europe" is equally driven by strong political motivations. By joining the Union, the political existence of substate regions becomes shielded by the federal principle, which provides for the equality of states before the Treaties and the respect

of national identities, as expressed in their fundamental political and constitutional structures (Article 4(2) TEU). Membership brings with it veto powers to ordinary treaty amendment procedures and to any further enlargement of the European Union (Articles 48 and 49 TEU), a seat at the tables of the European Council and the Council, the "Medusa-like" institution which plays a decisive role in the Union's most relevant decision-making procedures[LXXXI], and the right to appoint a Commissioner (Article 244 TFEU) and judges to the Court of Justice of the European Union (Articles 253 and 254 TFEU). The application of the principle of degressive proportionality determines an increase in the number of representatives to the European Parliament elected in the territory of the substate region elevated to the rank of a Member State (Article 14(2) TEU).

Substate regions can only aspire to hold significant sway over the European Union's political system by achieving membership. They currently play a secondary role as members of the Committee of the Regions, where they advise and oversee compliance with the principle of subsidiarity alongside many other local and regional authorities.[LXXXII] The importance of substate regions vis-à-vis national governments, which represent the Member States in the European Council and in the Council, has only been diminishing over the years with the increase in the transfer of competences to the Union.[LXXXIII] To mitigate this effect, the Lisbon Treaty meddle with the dogma of non-intervention into the Member State's territorial distribution of competences by granting regional parliaments powers to intervene in the early warning mechanism that monitors compliance with the principle of subsidiarity.[LXXXIV] But even this institutional innovation was said to open a "Pandora's box"[LXXXV] which may one day lead to the creation of a "Europe of a hundred flags".[LXXXVI] Secessionist aspirations are further encouraged by the financial resources provided by Brussels to substate regions through cohesion funds.[LXXXVII] This is rather ironic given that regional policy was originally created in the ECSC to reinforce Belgian national cohesion by rescuing the mining activity in a small region of Wallonia.[LXXXVIII]

1.7. "Independence in Europe" gives substate regions such as Scotland,[LXXXIX] Catalonia, or Flanders the best of both worlds. On the one hand, full autonomy and increased economic resources at the national (internal) level to develop and carry out policies that reflect their people's desires. On the other hand, political independence and direct representation in the decision-making bodies of the European Union, including veto power, at the supranational

(federal) level. It is thus crucial to determine whether this objective, which not surprisingly seems to be a prerequisite for achieving mass popular support for secession,[XC] is legally sound. I will begin by examining the legal arguments that nationalist movements put forward to achieve political independence for the people they represent, focusing on the right of secession based on the principle of self-determination of peoples (section 2). I will afterwards discuss whether substate regions can transform themselves into Member States of the European Union, by analyzing how European Union constitutional law addresses enlargements stemming from consensual and non-consensual secession processes in the Member States (section 3).

2. The principle of Constitutional Autonomy as SCL's foundation

One of the guiding principles and the foundation of SCL is the principle of autonomy, that is, the constitutional recognition of autonomy to federal units. As its etymology indicates, autonomy (auto nomos) implies the ability of an entity to create its own norms and institutions, and to be governed by them, without external interference.

The autonomy of the federative units translates into a capacity for *self-organisation* that manifests itself both in the power to draw up their own constitutions, establishing through them the regime of their superior governing bodies, and in *normative* autonomy (Fernández Segado 2003). This autonomy presupposes a power of public law by which, "by virtue of its own law and not of a mere delegation, it is possible to establish binding legal rules" (Fernández Segado 2003:58). In other words, public bodies or federated entities enjoy *political autonomy*, and not merely administrative autonomy, so that their provisions have the force of law – unlike what happens, for example, in the Colombian Departments or in the Chilean regions, whose provisions constitute mere administrative acts.

As Thorlakson (2003) has argued, it is the constitutional recognition of autonomy that ultimately distinguishes federal states from other types of decentralised systems (like federal-regional or unitary states):

> It is the *guarantee* of autonomy for each level of government that distinguishes a federal system from a unitary state and from other types of relationships between states. This captures the element that many writers have deemed to be of central importance – the contractual nature of federalism. What distinguishes

> federalism from a decentralised unitary state is whether the central government has the power unilaterally to alter the distribution of powers in the state. In federal systems, mutual consent is required before the political 'contract' between the federal government and the constituent units can be altered. Federalism should also be clearly distinguished from consociationalism, a non-territorial method of dividing power and autonomy between two or more groups. (2003:5).

Perhaps the Argentine Constitution best defines the autonomy of the federated entities. Article 122 clearly stipulates that "The Provinces make their own local institutions and are governed by them. They elect their governors, legislators, and other Provincial officials, without intervention by the Federal Government".

This autonomous capacity translates into the ability to establish own institutions, as enshrined in the Argentine constitution: "Each Province shall adopt for itself a constitution […]" (Article 5). Similarly, the Brazilian Constitution holds that "The States are organized and governed by the Constitutions and laws they adopt, observing the principles of this Constitution'" (Article 25) and the Venezuelan constitution recognises that "it is within the exclusive competence of the states", the power to "dictate their Constitution to organize the public powers, in accordance with the provisions of this Constitution" (Article 164, paragraph 1). In the Constitution of the United States, constitutional autonomy is contained in the *Guarantee Clause* of Article 4, section 4, which provides that "The United States shall guarantee to every State in this Union a Republican Form of Government […]", and in the *Tenth Amendment* (1791), which establishes that "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people".

As Astudillo Reyes argues, "the constitutional enunciation of the principle of autonomy in favor of the federative entities operates as a basis of validity for the existence of one or more legal systems within a national legal system" (2008:32), giving rise to a decentralised institutional context in which it is possible to clearly distinguish a central sphere of validity and a peripheral sphere. In turn, this principle of autonomy gives rise to the principle of "self-sufficiency" of local legal systems, a notion from which "the ultimate basis of validity of the norms that make up the local legal system is subordinated to the local constitution [...] true autonomous legal systems in which the local Constitution acts as the 'closing' norm of the system" (Astudillo Reyes 2008:34).

Argentine provincial constitutional texts stand out for explicitly recognising the principle of local constitutional supremacy over the entire provincial legal system. This sets them apart from Mexican federal states, where not all constitutions explicitly guarantee this principle.

Finally, these self-sufficient local constitutions must also be self-guaranteed:

> "The coexistence of a set of self-sufficient legal systems linked to the respect of the stipulations of the constitutional pact shows the mutual implication and nourishment that must exist between the theory of constitutional justice and the theory of the sources of law, to the extent that it becomes inexorable, on the one hand, the establishment of a system of guarantees of the general Constitution that protects the political unity of the State; and on the other hand, the existence of systems of local guarantees with the purpose of protecting the local Constitution. The first represents a jurisdiction of general constitutional "level" because it is directed to the immediate and direct "action" of the general constitutional norms; the others are raised as jurisdictions of particular constitutional "level" because they are destined to the direct and effective protection of the local constitutional norms, thus providing the first indications for a timely delimitation of competences" (Astudillo Reyes (2008:36).

The principle of local constitutional supremacy not only protects the local constitution but also lays the groundwork for a distinct set of mechanisms, institutes and functions forming the *local constitutional procedural law* (Brewer Carias 2003; Astudillo Reyes 2008; Suprema Corte de Justicia de la Nación 2005; Cienfuegos Salgado 2008). Furthermore, we can discern within the federal constitutional justice system a "*local constitutional justice*" sub-system. This sub-system focuses primarily on reviewing the constitutionality of the acts of the Federated States and of the Municipalities (Brewer-Carías 2003). Currently, Latin American constitutional doctrine (particularly in Mexico) has placed great emphasis on this new sector of SCL, which is directly connected to constitutional procedural law: "In our days we can affirm the configuration of a new sector of Constitutional Procedural Law that we can call local, which comprises the study of the different instruments aimed at protecting no longer the federal or national constitutions, but the ordinances, constitutions or statutes of the states, provinces or autonomous communities" (Ferrer Mac-Gregor Poisott, quoted by Cienfuegos Salgado, 2008:25).

3. Delimiting the sub-national constitutional space - the foundation and limits of local constituent power

Sub-national Constitutional space has been defined by Alan Tarr as a space or a margin left by a federal constitution to be filled by sub-national entities: "in most federal systems the national constitution is 'incomplete' as a governing constitutional document, in the sense that *it does not seek to prescribe all constitutional arrangements*. Rather, *it leaves 'space' in the federal nation's constitutional architecture to be filled by the constitutions of its subnational units*" (2007:2).

What does this sub-national constitutional space comprise? The answer will obviously depend on each institutional context. Tarr, however, in a comprehensive and comparative study, has identified the following items: (1) the power to draft a constitution; (2)the power to amend that constitution; (3) the power to replace that constitution; (4) the power to set goals of government; (5) the power to define the rights that the constituent unit will protect; (6) the power to structure governmental institutions of the constituent unit, including whether (7) the legislature shall be bicameral or unicameral; (8) the power to define the process by which law is enacted in the constituent unit; (9) the power to create offices; (10) the power to divide powers between governmental institutions of the constituent unit; (11) the power to determine the mode of selection for public officials of the constituent unit; (12) the power to determine the length of office and the methods and criteria for the removal of officials (13) of the constituent unit prior to the completion of their term of office; (14) the power to establish an official language; (15) the power to institute mechanisms of direct democracy; (16) the power to create and structure local government; (17) the power to determine who are the citizens of the constituent unit; (18) the power to establish voting qualifications for officials of the constituent unit (2011:1134).

Three types of limits demarcate this space: ***(a)*** *forbidden* subjects defined in the federal constitution, which states or provinces cannot regulate, and ***(b)*** the *basic principles* outlined in the federal constitution that provinces must follow when exercising their constituent power, and ***(c)***, *specific regulations* of the federal charter governing the internal organisation of provinces or states. While the first acts as a categorical *prohibition*, the latter two *impose* the *federal* order.

The degree or intensity of these limitations is inversely proportional to the space or margin of the SCL: the fewer limits contained in the federal constitution, the greater the sub-

national space or margin to create and innovate with new institutions. In this framework or space, the SCL develops, which is, in turn, a living expression of the principle of constitutional autonomy enjoyed by the federated states within a federal state structure that encompasses them.

The question of the extent of the powers of the sub-national constituent and the limits it possesses is crucial in this matter. One can begin with a broad understanding of the federal/national constitution as incomplete "in the sense that it relies extensively on the mechanisms established in state constitutions, and leaves almost all matters within the sphere of state power to be regulated by state constitutions and laws" (Williams, 1990:1). Although it might be assumed that the constitutions of all federal states should leave ample space to the federated entities to organise themselves, this is not always the case: "In some federal systems, the federal constitution also prescribes the political institutions and processes for the constituent units of the country, thus providing the constitutional architecture for the entire federal system" (Tarr 2011:1133), as in the case of Belgium and Canada, and the Brazilian, Venezuelan and Mexican federations in Latin America.

In other cases, "federal constitution is an 'incomplete' framework document in that it does not prescribe all constitutional processes and arrangements. Rather, it leaves 'space' in the federal system's constitutional architecture to be filled by the constitutions of its sub-national units, even while it sets parameters within which those units are permitted to act" (Tarr 2011:1133). Alberdi also adopted this broad conception, when he stated in *Elementos de Derecho Público Provincial*, that "the elements of the provincial law, in a federal state are all the power not expressly delegated by the constitution to the general government of the State".

The principle of autonomy – and within this, the principles of self-organisation and self-sufficiency – is not absolute; it is instead subject to limits, the extent and intensity of which varies in each federal design, since it must comply with the *principle of (legal) subordination*, on which the federal system is based (Bidart Campos 1998). Each federal system determines the extent of these powers and at the same time, places concrete limits (both *prohibitions* and *impositions*), although this will never be in a concrete or conclusive way, and thus sub-national space will always be diffuse.

As stated before, three types of limits can be identified: **(a)** *forbidden* subjects, **(b)** Constitutional *basis* to which the local constituent power must adhere, and **(c)** *specific regulations* of the federal charter.

For instance, Latin American constitutions often reflect a limited sub-national institutional capacity for innovation, echoing Fernández Segado's (2003) observation of a paternalistic or highly conditioned self-organising ability at the sub-national level. Latin American constitutions often reflect a limited sub-national institutional capacity for innovation, echoing Fernández Segado's (2003) observation of a paternalistic or highly conditioned self-organising ability at the sub-national level. A general observation of Latin American constitutions clearly shows that the sub-national institutional capacity to innovate is highly limited.

On the one hand, the constitution designates certain areas such as managing international relations, maintaining armed forces and issuing currency as the exclusive responsibility of the federal government and as *Prohibited subjects* for the states.

On the other hand, federal constitutions establish some guidelines in terms of basics that local constituents must follow. Regarding these *basics*, we can classify them into two groups: *general guidelines* (for example, respecting the republican form of government), as well as *regulations or specific indications* of the central constitution regarding the organisation of local powers (for example, how legislative branches must be composed, the time and form of elections, etc.).

In Mexico, for example, Article 115, states that "The states comprising the United Mexican States shall adopt a republican, representative, democratic, secular and popular form of government for their own organization. The states shall be divided into municipalities, which shall be the basis of the political and administrative organization", and Article 116 (reformed in 1987), reaffirms the principle of division of powers as an inviolable tenet in the organisation of state public power. In Brazil, Article 25 mandates the subordination of state constituent and normative power to the principles established in the federal constitution, including the republican form of government, the representative system, and the democratic regime, alongside the rights of human beings, municipal autonomy, and public administration accountability (Article 34).

The Venezuelan Constitution (1999), according to Article 159, establishes that states "are obligated to maintain the independence, sovereignty and integrity of the nation and to comply with and enforce the Constitution and the laws of the Republic". To this, Article 164, section 1 added the requirement that states' Constitutions shall be promulgated "in

accordance with the provisions of this Constitution", which requires for instance, the respect for the fundamental principles of Title I of the Constitution.

Finally, in Argentina, Article 5 lays the foundation for provincial constituent power, which must be subject to certain principles: "Each Province shall adopt for itself a constitution under the republican, representative system, in accordance with the principles, declarations, and guarantees of the National Constitution, ensuring its administration of justice, municipal government, and elementary education. Under these conditions, the Federal Government guarantees to each Province the enjoyment and exercise of its institutions".

In addition to these *generic* and rather *indicative* guidelines for how the federated entities should organise themselves, there are other more *specific regulations* or *indications* – which I have included in the third group. Here there is greater interference by the central state in local authorities. For example, in Mexico, the (very extensive) Article 116 of its federal constitutional text stipulates that the federal constituent regulate in great detail the political-state organisation of the Mexican federated states. The text outlines a series of questions to govern the organisation of the federated state. These include the duration of state public offices such as that of governor and legislators; the possibility (or impossibility) of re-election; the form of election; eligibility criteria for candidates; the number of representatives of the state legislature, establishing a minimum according to the state population; guidelines on budgets, public services, and the audit body of the federated entities; and rules on the composition and independence of the state judiciary department; on the selection procedure, on electoral processes, on the installation of Administrative Justice Courts, autonomous bodies, etc.

Brazil, for its part, regulates the organisation of the federal states in Chapter III (The Federated States") of Title III ("Organization of the State") and in Chapter IV ("organization of the municipalities"). It contains provisions regulating numerous aspects related to the organisation of the states, such as the number of members of the Legislative Assemblies, the term of office of State Deputies, the time of their election, their remuneration, the competence of the Assemblies, institutes of semi-direct democracy, such as the popular initiative, the election of the State Governor and Vice Governor, the term of the executive mandate – which is four years (Art. 28), as well as other provisions scattered in the Brazilian

constitutional text, such as the prohibition of immediate re-election for State Governors (Article 14, section 5).

Likewise, the Brazilian Constitution recognises the competence of the Superior Court of Justice to prosecute and judge, in the original jurisdiction, in cases of common crimes, officials inlcuding the Governors of the States and of the Federal District, the appellate judges of the Courts of Justice of Accounts of the States and of the Federal District, the members of the Councils or Courts of Accounts of the Municipalities (Article 105, section 1).

The Venezuelan constitution of 1999, although it establishes fewer requirements for the self-organisation of its states, regulates important aspects, such as the conditions for being elected governor, the term of office, the possibility of immediate re-election (and for a single term), the number of members of the state Legislative Councils ("Consejos Legislativos" is the new name given to the state legislatures in the 1999 Constitution), as well as their powers. It also makes reference to principles of national law regarding the organisation and operation of these Councils (Article 162); the main features of the mandatory state-level oversight body, the Comptroller General's Office.

The result of these *impositions* is that sub-national space is reduced (to a large extent), with little room for innovation and creation, and, furthermore, leads to a *homogenisation* and *equalisation* of local constitutions with each other and with the federal one. Ultimately, autonomy becomes a formal principle, at least as regards the capacity for self-organiation. Although it is argued that the basis of these impositions lies in the need to ensure that the political structures existing in the Federation and the states "be *minimally homogeneous*, and that these states be also homogeneous among themselves" (Fernández Segado 2003), excessive regulation can undermine local autonomy and call into question the federative organisation itself.

To that, we need to add that the 1999 constitutional reform eliminated the senate, a prerequisite for any federal system. That is why many authors and organisations (such as the Forum of Federation) have removed Venezuela from the list of federal countries.

In Argentina, Article 5 establishes the sole basis for provincial constituent power, without the federal constitutional text establishing any type of specific imposition, as is observed in other Latin American constitutions. While the American constitution exemplifies minimal federal regulation, with practically no reference to the organisation of the federated states,

Argentina's Article 5 mandates provincial constitutions to ensure the republican and representative system of government, the administration of justice, the municipal regime and primary education, broadly adhering to the principles, declarations and guarantees of the National Constitution. This Article is based on the *Guarantee Clause* of Article 4, Section 4 of the US Constitution, since it establishes that "Under these conditions, the Federal Government guarantees to each Province the enjoyment and exercise of its institutions".

Finally, in addition to these ***impositions***, there are also ***prohibitions***. Mexico contains a series of prohibitions in Articles 117 and 118 which, in general terms, align with the classic theory of federalism on powers typically belonging to central governments, such as minting money, taxing people or things who transit through and enter into or exit from the territory (Article 117), imposing tonnage taxes, deploying permanent troops or warships or waging war against any foreign power (Article 118). The Brazilian Constitution contains some prohibited powers scattered throughout its text. These include the power to establish religious cults or churches, to subsidise them, to restrict their operation or to maintain relations of dependence or alliance with them or their representatives. Collaboration in the public interest, through legislation is permitted, provided it does not discriminate on any grounds against any group of Brazilian citizens. Collaboration in the public interest, through legislation is permitted, provided it does not discriminate on any grounds against any group of Brazilian citizens. These prohibitions apply to both the states and the Union, the Federal District and the municipalities (Article 19). Furthermore, there are a series of constitutional limitations on imposing taxes (Article 150), such as the prohibition to create inter-state or inter-municipal taxes (Seijas Villadangos 2019).

Argentina also provides for a series of restrictions (mainly contained in Article 126), but these are much less detailed than the Mexican constitution and more permissive in several aspects (for example, the possibility of entering into international agreements, or the possibility of contracting loans from states or international organisations). Article 126 lists numerous areas prohibited to provinces. These include signing political treaties, regulating commerce and internal or foreign navigation, setting up Provincial customs offices, minting money, or establishing banks with the power to issue bank notes (without the authorisation of the Federal Congress). Provinces cannot pass Civil, Commercial, Penal, or Mining Codes (after the Congress has legislated on them); or enact special laws on citizenship and naturalisation, bankruptcy, or counterfeiting of currency or State documents. Provinces are

also prohibited from imposing tonnage duties; building warships or raising armies (except in the event of foreign invasion or of such imminent danger requiring prompt action, immediately communicating this to the Federal Government); and appointing or receiving foreign representatives. Furthermore, Article 127 forbids Provinces from declaring war on each other, since their *de facto* hostilities are considered acts of civil war, characterised as sedition or rebellion, and as such, suppressed and punished by the Federal Government in accordance with the law.From a comparison – albeit brief – of the constitutional texts, it is easy to see that the Argentine federation is an exceptional case in the Latin American context, where very detailed and regulatory constitutions predominate in the organisation of sub-national entities. The lack of regulation on the way sub-national states are organised expands the space of sub-national constitutional law available to them – space that the provinces have been able to take advantage of to a great extent, with the incorporation of new and modern institutions, rights and guarantees. In this sense, it can be affirmed that although Argentine federalism is quite decentralised politically compared to other federations, such as the Brazilian, Mexican, and Venezuelan ones, it is not decentralised in other aspects, such as fiscal matters, for example (Altavilla 2020).

4. The Residuary Clause and the thesis of Two Sovereignties

The "Residuary Clause" refers to a mechanism for the award of all those powers and functions that are not contemplated in the constitutional text, since the constituents cannot foresee, at a given moment, all the powers and functions that are or can be the responsibility of the State. The point is to determine which of the two orders of government will be responsible for those functions that are not listed. This point is important, because it significantly expands the power of the federated states:

> On its own, comparing enumerated exclusive state powers does not predict how the allocation of power in a federation may change over time. We must also consider the assignment of residual powers. For instance, the American and Australian constitutions were designed chiefly to enumerate a limited range of powers, clearly assigning federal powers and leaving the residual to the states. In Canada, the only federation of the six in which the constitution assigns residual powers to the federal level, the framers had the opposite task of enumerating a complete list of state tasks (Thorlakson 2003:9).

Returning to the concept of *incomplete constitutions*, when delimiting the sub-national space, it is crucial to determine which of the two powers holds this residual clause, that is, to which of the two levels all those competences that the constitution does not enumerate or foresee will correspond. This liminal principle of the system of distribution of powers between the central state and the member states, crucial in any federation, was not incorporated in the original text of the US constitution – the first modern federation in history – but was added two years after its entry into force, in December 1791 (along with the nine amendments known as the *Bill of Rights*). The Tenth Amendment states: "*The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people*" – although Madison itself considered that this amendment was superfluous and unnecessary, since the whole of the Constitution implied this principle (Dam 1977).

In Latin America, we can observe that in general, this clause plays in favour of the federated states: In Brazil, Article 25, section 1 provides that "Powers not forbidden to them [the states] by this Constitution are reserved to the States"; in the same sense the Mexican constitution, whose Article 124 declares that "The powers not expressly granted by this Constitution to federal officials, shall be understood to be reserved to the States". Argentina, in Article 121 (original 104, text incorporated in 1860 constitutional reform) provides that "The Provinces retain all powers not delegated by this Constitution to the Federal Government, and those they have expressly reserved by special covenants at the time of their incorporation".

The *Residuary Clause* is connected to the theory of co-sovereignty, or shared sovereignty between the two levels of government – a thesis elaborated and defended by the authors of *The Federalist Papers*, in particular, James Madison, who develops the point in Articles 39 to 51 of the Papers, and which would later have constitutional value with the incorporation of the *Tenth Amendment* in 1791, and Alexander Hamilton. Hamilton stated that "the plan of the convention aims only at a partial union or consolidation, the state governments would clearly retain all the rights of sovereignty which they before had, and which were not, by that act, *exclusively* delegated to the United States. This exclusive delegation, or rather this alienation of state sovereignty, would only exist in three cases: where the constitution in express terms granted an exclusive authority to the union; where it granted, in one instance, an authority to the union, and in another, prohibited the states from exercising the like authority; and where

it granted an authority to the union, to which a similar authority in the states would be absolutely and totally *contradictory* and *repugnant*" (No 32).

Madison, for his part, clearly differentiated this system of shared sovereignty from those of the unitary state, arguing that "But if the government be national, with regard to the *operation* of its powers, it changes its aspect again, when we contemplate it in relation to the *extent* of its powers. The idea of a national government involves in it, not only an authority over the individual citizens, but an indefinite supremacy over all persons and things, so far as they are objects of lawful government. Among a people consolidated into one nation, this supremacy is completely vested in the national legislature. Among communities united for particular purposes, it is vested partly in the general, and partly in the municipal legislatures. In the former case, all local authorities are subordinate to the supreme; and may be controled, directed, or abolished by it at pleasure. In the latter, the local or municipal authorities form distinct and independent portions of the supremacy, no more subject, within their respective spheres, to the general authority, than the general authority is subject to them within its own sphere. In this relation, then, the proposed government cannot be deemed a *national* one; since its jurisdiction extends to certain enumerated objects only, and leaves to the several states, a residuary and inviolable sovereignty over all other objects" (*The Federalist Papers*, No 39).

In federal theory, the power to dictate one's own laws is so broad that the federated states can be considered as true sovereign states. This is clearly established in Mexico's constitution, which states that Mexico is "composed of free and sovereign states in all matters concerning their internal regime" (Article 40). While Alberdi's draft of the Argentine National Constitution used the term "sovereignty" when referring to the provinces, the Convention of 1853 omitted it in the final text. However, although, unlike the Mexican Constitution, Argentina's lacks an explicit reference to provincial sovereignty, legal scholars and judicial rulings have, since the federation's inception, upheld this concept.

5. The Provincial margin of appreciation in SCL

It is no easy task to determine an intermediate or ideal point to delimit the space of sub-national constitutional law. The limitations imposed by the federal constitution are based on *the need to ensure that sub-national political structures are minimally homogeneous*, across states and with

the federation. But this homogenisation should not imply an imitation or replication of federal institutions – otherwise there would be no point in adopting a federal system.

In this sense, some federations have drafted certain principles or interpretative guidelines to make the requirement of homogeneity and internal coherence compatible with that of the *sub-national space*. Article 28 of the Bonn Basic Law establishes guidelines which bind the Länder to the constitutional principles contained in the German constitution. As Fernández Segado (2003) argues, the objective is to generate a certain homogeneity, but without demanding either full adequacy or uniformity.

German constitutional scholars developed the "*Hausgut*" principle. This term means *household*, *house*, and it refers to what is proper, to what belongs to the domestic domain. With this term, the literature refers to the existence of a certain nucleus of privative functions that is maintained by local authorities, of which the *Landers* cannot be deprived, and whatever such privative functions may be in particular, "the Land must retain in any case the free decision about its organization, including the fundamental organizational decisions contained in the Constitution of the Land" (Fernández Segado 2003:62).

In Argentina, local literature has identified this principle with the concept of "provincial margin of appreciation". The concept is taken from international law, where the expression "margin of appreciation" refers *to the space for manoeuvre that International organs and Tribunals are willing to grant national authorities*. The same can be said within federal countries, where local authorities and courts interpret and apply the law – especially the Constitution – considering their own history, culture and idiosyncrasy. According to this principle, it is possible for local authorities to give to a constitutional clause a different meaning from that assigned by the National Supreme courts, as long as it is consistent with local culture, history, traditions, etc.

Although it is true that interest in the study of sub-national constitutionalism has been relatively recent, Argentina has a long tradition of the study and interest in this branch of the legal system. This interest originated with the publication of Juan Bautista Alberdi's work, "*Elementos de Derecho Público Provincial*. Two doctrinal schools can be identified in Argentine constitutional history, one strictly constitutionalist, focused on the analysis and study of the national constitution but with particular attention to the political organisation of the provinces, exemplified by Manuel Estrada (1895), Segundo V. Linares Quintana (1956), and Germán Bidart Campos (1998). The second group meticulously analyses provincial public law itself. The main representatives of this group inlcude Juan A. González Calderón (1913),

Arturo M. Bas (1927), Juan P., Ramos (1914), Francisco Ramos Mejía (1915), and Clodomiro Zavalía (1941). Recently, three more schools can be identified: the Córdoba School, headed by Pedro J. Frías (1985) - followed by, among others, Iturrez (1985), Alfredo Mooney (1997), Antonio Hernández (2008), Antonio Hernández and Guillermo Barrera Buteler (2011); the Mendoza school with Dardo Pérez Guilhou (2003; 2004); and the Platense School with Ricardo Zuccherino (1976) as well as Mercado Luna (2000) from La Rioja.

Towards the end of the 19th century, Manuel Estrada, following classical American literature and, in particular, the authors of *The Federalist Papers*, adopted and interpreted the federal constitutional text from the broad viewpoint of provincial powers (1895: 326- 327). In the part on "Federal Law", he dealt with the "guarantee of local self-government" (1895: 347 et seq.), recognied by Articles 5, 105, 106, 107 of the constitutional text (in its 1853 original enumeration), referring to the "relative independence" of the provinces.

Joaquín V. González, with a very clear vision of the scope and extent of provincial public law, wrote, in 1897:

> Because the constitution of a province is a code that condenses, orders and gives imperative force to all the natural right that the social community possesses to govern itself, to all the original sum of inherent sovereignty, not ceded for the broader and more extensive purposes of founding the Nation.
>
> Then, within the juridical mold of the code of rights and powers of the Nation, there is room for the greatest variety, all that may arise from the diversity of physical, social and historical characters of each region or province or from its particular collective desires or aptitudes.
>
> Thus, they contribute to the development, vigor and improvement of national life, and reflect their influence on the progress of the public law of the entire Nation (1983:648/9).

These "local diversities" make up what has been called the *Provincial margin of appreciation*, which "reflects the peculiar manifestations of the particular and proper exercise of the constituent power of each province and of the City of Buenos Aires after the constitutional reception of its regime of autonomous government" (Ábalos, 2020). The expression is adopted by local doctrine from the concept developed in the field of international systems of human rights protection, where the doctrine of national margin of appreciation postulates the respect and deference of supra-national courts towards the interpretation made by the national States themselves of fundamental rights and their scope, especially on those points where there is no international consensus on sensitive issues (Barrera Buteler 2017). In this sense, what is sought is that the local constitutions and institutions receive and condense

regional particularities, and at this point, "respect for the local particularities that the different orders of government manifest in the exercise of their constituent power and in their own sphere of competence, is a key aspect" (Ábalos, 2020).

Barrera Buteler asks whether the concept of margin of appreciation can be transferred to the Argentine federation. He answers in the affirmative regarding the application and interpretation of Common Law (the different codes of private law, commerce, criminal law, whose regulation is centralised at the national level), since the Constitution itself has explicitly reserved to the provincial courts the power to apply these laws emanating from the Federal Congress, whenever things or persons fall under their jurisdiction (Article 75, section 12 and Article 116). This also implies the power to interpret it, from which it is "clear that the National Constitution has intended that the provincial courts interpret the contents of the substantive codes according to the local cultural reality and this may give rise to different interpretations of the same rule in one province and in another. But this cannot be a cause for scandal in a federation. In the United States there is diversity of substantive legislation among the states and not only diversity of interpretation" (Barrera Buteler 2017:503). This diversity is precisely the foundation of federalism, the idea that any community, state or province, can legislate, apply and/or interpret the law, according to their own particularities, and this will consequently give different outcomes in different states.

From this perspective, *"federalism is more compatible with diversity* than with *homogeneity* and this is the basis of the provision of the final part of section 15 of Law 48[XCI], which expressly excludes from the extraordinary appeal, on the grounds of Article 14, section 3, those cases in which is questioned 'the interpretation or application that the provincial courts make of the substantive codes'", according to Article 75, section 12, National Constitution) (Barrera Buteler 2017:503). This gives provincial judicial branches a great deal of autonomy and independence, since it means that both provincial legislation and the common national law (Civil, Commercial, Penal, Mining, and Labor and Social Security Codes) can be controlled neither by federal courts, nor the National Supreme Court – except when the norm or the interpretation expressly affect the National Constitution. In other words, the final judicial decision regarding provincial law and codified law rests with the Provincial Supreme Tribunals.

Assessing the provincial margin of appreciation for rights enshrined in the National Constitution or in treaties with constitutional hierarchy (Article 75, section 22) proves more

challenging, due to the Supreme Court's role as sole interpreter of this constitutional framework. However, this "does not prevent the interpretation of those rules that protect fundamental rights from being made by combining the single normative provision with the social and cultural reality that may be varied and diverse and, consequently, may admit differential nuances depending on whether they are applied in the context of one province or another. Above all, it is not possible to disregard the provisions of the local constitutions which, whenever possible, must be harmonized with those of the National Constitution and only set aside when there is total incompatibility between them" and, "in this task of harmonization, the role of the provincial courts is extremely important, opening a 'dialogue of courts'" (Barrera Buteler 2017:503).

The National Supreme Court of Justice has, throughout its history, laid down key jurisprudential guidelines. Most notable are: early precedents explicitly endorsing co-sovereignty, and more recent ones embracing the concept of "provincial margin of appreciation."

In one of the first rulings, "*Blanco, Julio v. Nazar, Laureano*" (1864), the Supreme Court held that, according to Article 105 (current Article 122), the provinces reserved the right to establish their own institutions for their internal regime, and that the federal government could not intervene, because if "the National Courts were to intervene in the internal government of the provinces, their magistrates would not be the agents of an *independent* and *sovereign* Power". It also held that "the provinces retain after the adoption of the general constitution, *all the powers they had before and to the same extent*, unless that the Constitution contains some express provision restricting or prohibiting their exercise" and with respect to federal justice, sustained that "its jurisdiction is *restrictive* by its nature, and in criminal matters can only be exercised by applying the laws of Congress"[XCII].

A year later, in "*Mendoza Hermanos v. Province of San Luis*" (1865) the Court said that it is "the only final interpreter of the Constitution", that "the independence of the Provincial Governments is circumscribed to the exercise of the Powers not delegated to the National government, and that neither the latter, nor their dignity suffer any detriment by appearing before a Court that they themselves have created to settle their controversies, being so that the same *sovereignty*, taken in its highest expression, can consent without disrepute to be judged by a Court of its own choosing". In this case, the province of San Luis was sued directly before the Supreme Court for establishing import duties. The province argued that

"in no case can a Province be sued by private parties before the National Courts", since "the Provinces are *sovereign*, and their independence and dignity would be undermined if they could be forced to appear before a Court". Faced with this argument, the Court replied that "according to Article 100, all cases that deal with points covered by the Constitution are within the jurisdiction of the Supreme Court and the lower Courts of the Nation; a provision that embraces the universality of the cases of this nature, without any exception"[XCIII].

In "*Plaza de Toros*" (1869) the Court reaffirmed that the provincial police power was considered as "included in the powers they have *reserved to themselves*, that of providing what is convenient for the safety, health and morality of their neighbors; and that, consequently, they may lawfully dictate laws and regulations for these purposes" and that, furthermore, since this was so, the "national justice would be incompetent to force the provinces" to permit an activity that it had previously prohibited, by virtue of that police power (in this case, bullfighting), "even if it [the bullring] could be qualified as an industrial establishment" [XCIV]. That same year, in "*Resoaglí v. Provincia de Corrientes*" (1869), it held that the National Constitution provisions were made to regulate the national government, "*and not for the particular government of the Provinces*, which according to the declaration of Article 105, *have the right to govern themselves by their own institutions*, and *to elect by themselves their governors*, *legislators and other employees*; that is, they retain their absolute sovereignty in all matters relating to the powers not delegated to the Nation, as recognized by rticle 104"[XCV]. In the case "*Casiás, Raffo and Co.*" (1873), the Court stated that the provinces are "*sovereign* and *independent states* of each other" [XCVI]; and in *"Sociedad Anónima Mataldi Simón Ltda. v. Prov. de Buenos Aires*" (1927) the Court referred to "the *two sovereignties*, national and provincial"[XCVII].

In the famous "*Bressani*" (1937) case – quoting the U.S. Supreme Court in the "*Texas v. White*" ruling of 1868 – the Argentine Supreme Court held that the National Constitution "... has intended to make one country for one people" but "has not set out to make one centralized Nation. The Constitution has founded an indestructible union of indestructible states". As regards the sub-national space, it is worth mentioning the passage in which the Court stated that "the constituent actors and eyewitnesses of the process that ended in the Constitution of 1853, established a unity not by suppressing the provinces – a path that had forced to evict a terrible experience – but by *conciliation* of the extreme diversity of situation, wealth, population and destiny of the fourteen states and the creation of an organ for that conciliation, for the protection and encouragement of local interests, whose whole is

confused with the Nation itself". Finally, with respect to the *principle of adequacy* and *homogeneity*[XCVIII].

Although it is true that in the following decades, the Court would abandon the expression "sovereign" to refer to the provinces – coinciding with a jurisprudence that validated federal advances and invasions of provincial competences[XCIX] – in recent rulings it again referred to the provinces as *sovereign states*. A notable case is that of "*Provincia de La Pampa v. Provincia de Mendoza*[C][CI], understanding that it should act, not as a judicial tribunal, but rather as an arbitrator, even applying, in an analogous manner, principles of international law. It held that the Court's jurisdiction is activated in those cases that are not a "civil case" in the concept developed by the regulatory laws of that competence (for example Law 48 or Decree-Law 1285/58) and as conceived by the jurisprudence of this Court. The original jurisdiction in those complaints requires only the existence of a conflict between different provinces produced as a consequence of the exercise of the non-delegated powers that are the result of the recognition of their autonomy. In short, "jurisdiction is limited to disputes which between entirely independent states could be the subject of a diplomatic settlement".

In the case "*Partido Justicialista de la Provincia de Santa Fe v. Santa Fe*" (1994), the Court established a series of very important guidelines regarding the provincial *margin*. It held that "Article 5 of National Constitution declares the union of the Argentine people around the republican ideal. But it is a particular union. It is the *union in diversity*. Diversity coming, precisely, from the federalist ideal embraced with the same fervour as the republican ideal". From this perspective, "federalism involves a recognition and respect for the identities of each province, which is a source of vitality for the republic, to the extent that it enables a plurality of trials and the search by the provinces of their own ways to design, maintain and improve local republican systems. This diversity does not entail any disintegrating force, but a source of fruitful dialectics, always framed by the supreme law of the Nation". Therefore, "the supremacy referred to in the National Constitution (Article 31) guarantees the provinces the establishment of their institutions and the election of their authorities without the intervention of the federal government (Articles 5 and 122), subjects them and the Nation to the representative and republican system of government (Articles 1 and 5) and entrusts this Court to ensure it (Article 116) in order to ensure the perfection of its functioning and compliance with those principles that the provinces agreed to respect when they concurred in the adoption of the National Constitution".

Finally, in the most recent precedent of the Court, "*Castillo v. Province of Salta*", the Supreme Court expressly includes the term "provincial margin of appreciation", in which it holds that "Article 5 of the National Constitution, in establishing the bases of provincial constituent power (which translate, at the same time, into a series of unrenounceable obligations for the provinces) expresses a 'provincial margin of appreciation' that does not conflict with the aforementioned Article 5 but, rather, sets forth a way of implementing educational competence [in this case] taking into account provincial particularities, in accordance with the weighting of their own constituents". Therefore, this "'provincial margin of appreciation' in educational matters makes it possible to understand (and validate) that certain jurisdictions of our federal State place emphasis, as happens in religious matters, on the teaching of subjects such as the promotion of the associative and cooperative spirit, the special knowledge of local history, culture and geography, productivity based on regional characteristics, among others", which allows (as the provincial constituent has concretely done) to include in the curricula specific contents linked to its own jurisdiction, "a characteristic aspect of the 'provincial margin of appreciation' which is connatural to the federal system established by Article 1 of the National Constitution"[CII].

This margin includes a space of free development without interference from the federal powers (neither of Congress, nor of the President, nor the federal courts, including the Supreme Court), both in the conception and sanctioning of the norm, and in its subsequent application and exercise, since it takes place in a reserved area (powers reserved by the provinces – Article 121 National Constitution) where they act with *sovereign powers*. It also translates into the idea of respect for the particularity, individuality and peculiarity with which the provincial convention adopts and makes the fundamental principles of the fundamental legal system (the national constitution) compatible with the local reality and particularity.

Once the province enacts the constitution, no external authority can approve or review it. Instead, there are two mechanisms for review: on the one hand, an ordinary mechanism, the judicial review, which is exercised only by the local judicial power – and only exceptionally and definitively, by the Supreme Court, through Extraordinary Appeal, and on the other hand, an extraordinary mechanism, of a political nature, which is a federal intervention (Article 6), ordered by the federal Congress.

This margin also covers *normative interpretation*, whether carried out by the bodies that implement the regulations or activate the institutions, or by the doctrine and local courts. In

the case of Argentina, this judicial interpretation is not limited to local regulations, but has a significant impact on federal legislation; while the normative production of substantive legislation (civil, commercial, criminal, etc.) is concentrated in the federal legislative body, the National Congress (Article 75, section 12), its application (and therefore, its interpretation) falls under the jurisdiction of both the federal courts and the provincial courts: "The reservation made in section 12 of article 75 left a sufficient margin for the provincial courts to adapt, as necessary, the provisions of those acts of Congress to the local idiosyncrasy, because the power of 'application' of those norms brings implicitly that of their 'interpretation'" (Barrera Buteler 2017:497).

This is not the case in other Latin American federations, such as Mexico, where the system of mandatory jurisprudence of the federal courts on the interpretation "of the Constitution, federal or local laws and regulations and international treaties" (Article 94, paragraph 10, Constitution of Mexico) is in force, or in Venezuela, where there is no local judiciary at all.

In conclusion, it can be argued that the sub-national space is quite broad in Argentine federalism and that, in general terms, the provincial constituents have been able to take advantage of it.

6. Historical trajectory and current situation - Sub-national Constitutional Law as a laboratory of rights and institutions

There are some historical periods that represent real advances in sub-national constitutional law, bringing with them important *innovations*, and other moments in which processes of "*assimilation*" or "*homogenisation*" occur, making sub-national texts similar to the federal one.

For example, in Argentina, two moments of innovation, which have significantly advanced provincial constitutional law, can be identified: those experienced in the first three decades of the 20th century, and those experienced in the 1980s and 1990s. In both processes, sub-national innovations ended up being included in the federal text (both in the constitutional reforms of 1949 and of 1994, respectively).

Similarly, moments of assimilation or homogenisation can also be identified. For example, the constitutions sanctioned in the 1850s, immediately after the national

Constitution of 1853, and the constitutions of 1949, sanctioned as a consequence of (and under pressure from) the new federal text of 1949. In both cases, the federal government put pressure on the provincial governments to sanction their texts, although in 1853 it did so with the aim of "completing" the federal constitutional process, with the sanctioning of the respective provincial constitutions, without additional requirements on how to sanction the new provincial constitutional texts. In 1949, however, there was strong pressure for the provincial texts to "resemble" the federal charter, which ended up being mere copies of it – there were even written instructions from the Ministry of the Interior on how to draft the "new" provincial constitutions (see Altavilla 2018). Rather than dictating specific content, the federal government's main pressure on provincial constitutions in the 1850s stemmed from the urgency of establishing a cohesive Argentina. This haste, however, sometimes led provinces to simply imitate the federal text. Rather than dictating specific content, the federal government's main pressure on provincial constitutions in the 1850s stemmed from the urgency of establishing a cohesive Argentina. This haste, however, sometimes led provinces to simply imitate the federal text.

Despite *these similarities* with the federal text, Argentine sub-national law also showed some innovations, for example, the restoration of *Cabildos* (a traditional institution of local government), some issues related to education, etc. Around 1870, provincial constitutionalism would begin to detach itself from federal constitutionalism, making the exercise of local constituent power more effective and creative

In the German federation, despite the notable differences between the *landers*, the existence of a common historical background and a strong process of assimilation have resulted in a process of homogenisation between the local constitutional texts, both in structure and content (Niedobitek 2013).

In the United States, Robert F. Williams (1990) identifies a "constitutional revolution" that occurred in the 1970s, both in state constitutional texts and in the judicial interpretation of the individual rights contained therein, preceded by a period of state constitutional revisions and reforms between 1945 and 1970, which modernised state constitutions. This has allowed for a "rediscovery" of state constitutional law, in its use both by trial lawyers (to assert rights that the federal constitution does not contain, for example), and by judges and magistrates themselves through judicial interpretation of state constitutions, mainly with

regard to fundamental rights, with a true "'explosion' of the state Bill of Rights in recent decades" supplementing the scant list of Bi*lls of Rights* of the federal constitution.

In recent decades, Mexican sub-national constitutionalism has been immersed in a stage of profound renewal. The interest in this specific branch of political law is due to multiple factors, including the fact that the main issues of Mexican constitutional law are the subject of permanent discussion; the dynamism of local political processes, the absence of a dominant political force such as the PRI (Institutional Revolutionary Party / Partido Revolucionario Institucional) and the consolidation of the legal principle of constitutional autonomy (Astudillo Reyes, 2008). However, the development of sub-national law in Mexico has been very recent, and only eight states (Veracruz, Coahuila, Guanajuato, Tlaxcala, Chiapas, Quintana Roo, Nuevo León and the State of Mexico) out of a total of 32 states have so far taken the first step.

What is certain is that beyond this spasmodic movement between *diversity* and *assimilation*, it is possible to convincingly argue that sub-national constitutional law is an interesting laboratory of rights and institutions, and its existence and presence provides a series of *comparative advantages* within the federal institutional design.

This feature was described early on by Justice Louis Brandeis, in his famous sentence: "One of the happy incidents of the federal system is that a single brave State may, if its citizens choose, serve as a laboratory; and try new social and economic experiments without risk to the rest of the country"[CIII]. And Justice Oliver Wendell Holmes similarly referred to this part of constitutional law, as "social experiments ... in the isolated chambers afforded by the several states..."[CIV].

Furthermore, *sub-national constitutional law is much broader than constitutional federal law*; it therefore provides for more rights and more guarantees, is more detailed and considers the particularities and peculiarities of the local community. It is also more extensive than the federal one. For example, while the Argentine National Constitution has one hundred and thirty articles, the constitutional text of the provinces exceeds 200 articles. In the American state constitutions, this breadth of local texts compared to the federal one can also be observed.

An intelligent, courageous and innovative use of this space brings important advantages:

- It enhances the ability of a federal system to *accommodate multiple political communities* within its constitutional regime;

- It duplicates the *mechanisms for protecting* individual rights (Carnota 2007);
- It strengthens the system of *checks and balances* between the branches of government;
- It can improve the *deliberative quality of democracy* within sub-national units and the federal system as a whole (Marshfield, 2011);
- It *expands* the rights established in the national Constitution;
- It refines them by incorporating local or regional elements and perspectives;
- It doubles (or triples) the spaces for *participation* and, therefore, for *control of citizens*;
- It doubles (or triples) the mechanisms of defence and protection of the constitutional order and fundamental rights;
- It implies a double guarantee for citizens: the *republican system* translates into a guarantee as it limits power, dividing it functionally. Federalism helps to strengthen this guarantee translated into the limitation of power, because it divides it again but from the territorial point of view (also functionally, because both provinces and municipalities must adopt republican and representative forms of government). Moreover, "state constitutions serve as limitations on the sovereign and plenary power of states to make laws and govern themselves" (Williams 1990:2);

In this way, sub-national constitutional law serves as a true *laboratory of rights* and *institutions* that allows (and encourages) innovation and the rapid and spontaneous creation of efficient constitutional responses to the problems that modern, constantly evolving societies pose to legal and political operators. Added to this is a greater "sensitivity" of the provincial constituent, being closer to the population to whom it provides legal-constitutional solutions to daily problems. This *immediacy* of the local constituent gives rise to very efficient solutions, as the history of provincial constitutionalism in Argentina has demonstrated.

Indeed, sub-national constitutional law has been an interesting precedent and antecedent of national or federal law: the *amparo* action [*Action of Constitutional Protection*] originated in the Mexican state of Yucatan in 1840, while the process of *amparo* was received only in the Reform Act of 1847, and in the Constitution of 1857, which would be the first to recognise

the *amparo* as a means of protection of human rights (Rodriguez 2017). In the United States, *judicial review*, the widespread jurisdictional control of constitutionality, was applied by the States before it was created by the Supreme Court in the famous *Marbury v. Madison* case of 1803: "Interestingly, several state courts had exercised this power long before 1803, and even before the federal constitution was ratified" (Williams 1990:265), citing as the first antecedent (in independent America), the case of *Holmes v. Walton* in the State of New Jersey in 1780.

In Argentina there are countless provincial constitutional antecedents that were later incorporated into the federal (constitutional and/or legal) order, a noteworthy one being the constituent cycles of the '50s and '60s, where the "new" provinces exercised their original constituent power (Chaco, La Pampa, Misiones, Santa Cruz, Chubut, Rio Negro, Neuquén) and the old provinces reformed their texts (San Luis, Santiago del Estero, Santa Fe), with innovations such as the constitutionalisation of political parties, municipal autonomy, supervisory bodies. Also significant is the constituent cycle of the 1980s and 1990s where nine provinces reformed their texts (La Rioja, Salta, Santiago del Estero, San Juan, Jujuy, Córdoba, San Luis, Catamarca and Río Negro). This was the immediate and most important antecedent for the federal constitutional reform of 1994, with significant contributions such as the incorporation of second and third generation rights, constitutionaliation of institutional guarantees for the defence of fundamental rights (amparo, habeas corpus and habeas data), supervisory bodies (such as the ombudsman), special state policies, municipal autonomy, among many others.

Despite this progress, the study of sub-national constitutional law still has many challenges ahead; in particular, its analysis and comparative study, both nationally and internationally. On this last point, Latin American dialogue is still lacking; the Mexican literature (which is very recent) does not draw much on American (North American or Latin American) literature, but is mainly based on European authors, which in many cases are old and outdated doctrines, especially regarding the concept of *autonomy*. The re*ference to the Italian and Spanish literature is striking. These start from an administrative* - rather than constitutional – sub-stratum and do not fully conceive the scope of the term *autonomy* nor develop a federal theory – since these are not federal countries, and beyond the great decentraliation fo their systems, they have resisted calling themselves federal countries, and their structure is ultimately not federal. Even in Brazil this point has not been significantly developed, and in Venezuela, after the 1999 reform, the sub-national space was severely limited. Therefore, it

is not a stretch to say that Argentina has not only a long tradition, but also that its doctrine and jurisprudence are at the forefront of federal issues in Latin America.

[I] CONICET – Siglo 21. Ph.D. in Law and Social Sciences (University of Córdoba, Argentina) with a Ph.D. Visiting in Political Science at Bologna University, Italy. Assistant Researcher at CONICET, Argentina. Researcher and Professor of Constitutional Law, Subnational Constitutional Law and Public Law, Siglo 21 University and National University of Córdoba. Visiting researcher at universities in different countries (Brazil, Denmark, Spain, Colombia, Italy, Switzerland, and the United States). He has been visiting scholar at Harvard University (USA). He has published books and more than thirty papers on topics related to his area of specialization in national and international journals and media. e-mail: cristianaltavilla@hotmail.com.

[II] The referendum was held in accordance with the Scottish Independence Referendum Act 2013 and the Scottish Independence Referendum (Franchise) Act 2013 adopted under the authority ceded to the Scottish Parliament by the British Crown through the Scotland Act 1998 (Modification of Schedule 5) Order 2013 No. 242, of 12 February. This authority was granted following the adoption of the Edinburgh Agreement on 15 October 2013, signed by both the Scottish Government and the UK Government.

[III] Piris, Jean-Claude, 2017, 'Political and Legal Aspects of Recent Regional Secessionist Trends in some EU Member States (I)', in C. Closa ed., *Secession from a Member State and Withdrawal from the European Union: Troubled Membership*, 240-264, Cambridge University Press, 73.

[IV] Regional Law 16/2014, 19 June, on the convening of a consultative referendum on the independence of Veneto.

[V] Italian Constitutional Court, Judgment No. 118/2015, 25 June, 7.2.

[VI] See Judgment No. 103/2008, of 11 September, ECLI:ES:TC:2008:103, Judgment No. 32/2015, of 25 February, ECLI:ES:TC:2015:32, Judgment No. 138/2015, of 6 July, ECLI:ES:TC:2015:138, and Judgment No. 122/2017, of 16 November, ECLI:ES:TC:2017:122.

[VII] Caplan Richard, Vermeer Zachary, 2018, 'The European Union and Unilateral Secession: The Case of Catalonia', 73 *Zeitschrift für öffentliches Recht* 747, 751, and Guidi Mattia, Casula Mattia, 2020, 'The Europeanization of the Catalan Debate: A «War of Attrition»?', in Closa C., Margiotta C., Martinico G. (eds.), *The Amorality of Secession*, 173-192, Routledge, 186-187.

[VIII] The complete wording of the declaration of independence can be read at https://www.lavanguardia.com/politica/20171010/431970027817/declaracion-de-independencia-catalunya.html.

[IX] Order PRA/1034/2017, of 27 October, adopted under Article 155 of the Spanish constitution, which authorizes the adoption of sanctioning measures against an Autonomous Community that fails to fulfil constitutional or legal obligations or that seriously undermines the general interest of the Spanish State.

[X] Judgment of the Supreme Court of 14 October 2019, case No. 459/2019, ECLI:ES:TS:2019:2997, at 488. This was the case of Oriol Junqueras, vice-president of the Catalan government at the time of the declaration of independence. While in detention, Junqueras was unlawfully prevented from taking office as a Member of the European Parliament after the European elections held in May 2019 – see Court of Justice (of the European Union), judgment of 19 December 2019, C-502/19, Oriol Junqueras, ECLI:EU:C:2019:1115, para. 92: "[The] existence of the immunity provided for in the second paragraph of Article 9 of the Protocol on the privileges and immunities of the European Union entails that the measure of provisional detention imposed on the person who enjoys that immunity must be lifted, in order to allow that person to travel to the European Parliament and complete the necessary formalities there."

[XI] Statement from the Presidency of the Spanish Government, "Concesión de indultos a condenados en el juicio del procés" (22 June 2021).

[XII] Sarmiento Daniel, 2018, 'The Strange (German) Case of Mr. Puigdemont's European Arrest Warrant', *Verfblog*; Carrel Severin, 2020, 'Extradition Case against Catalan MEP suspended in Scotland', *The Guardian*, Pinelli Lucas, Weyembergh Anne, 2020, 'La Justice belge refuse de renvoyer un responsible politique Catalan en Espagne: explications sur le mandate d'arrêt européen', *Justice en ligne*; Alba Domingo, 2021, 'Belgium again rejects Spain's extradition demand for Catalan politician Lluís Puig', *El National.cat.* The immunity of several Catalan European Parliament's members (including Puigdemont)

against whom European arrest warrants were issued was waived by decisions of the European Parliament adopted on 9 March 2021. The General Court of the Court of Justice of the European Union dismissed on 5 July 2023 actions brought against those decisions and against the refusal of the President of the European Parliament to defend the parliamentary immunity of those parliamentarians (Cases T-115/20 and T-272/21).

[XIII] Hobsbawm Eric J., *Nations and Nationalism*, 187.

[XIV] Anderson Benedict, 2006, *Imagined Communities: Reflections on the Origin and Spread of Nationalism*, Verso, 6.

[XV] Id., 6-7.

[XVI] Moreira Adriano, 1986, 'Nação', in 4 Polis 492, Verbo, 501.

[XVII] Renan Ernest, 1882, 'Qu'est ce que c'est une nation? Conference faite en Sorbonne, le 11 mars 1882', 2nd Ed., CL, 27: "The existence of a nation is (…) a daily plebiscite, as much as the existence of an individual is a perpetual affirmation of life."

[XVIII] According to Section 12 of Judgment No. 31/2010, of 28 June, ECLI:ES:TC:2010:31, the Spanish Constitution solely recognizes the "Spanish Nation, which is referred to at the start of its preamble (Article 2), and in which the Spanish Constitution is based (Article 2), and with which it specifically qualifies sovereignty, which, having been exercised by the Spanish people as its only recognized holder (Article 1, paragraph 2), manifested itself as a constitutive will in the Constitution's provisions". Similarly, the French Constitutional Council declared the legislative reference to the Corsican people as an integrant part of the French people included in Corsica's statute of territorial unity unconstitutional (91 Judgment No. 91-290 DC, May 1991, paras. 12 and 13). The French Constitution recognizes "only the French people, comprised of all French citizens", and therefore only the legal concept of "the French people" holds constitutional relevance (ibid.).

[XIX] Sieyès Emmanuel Joseph, 1833, 'Qu'est-ce que le Tiers État?', *Chez Alexandre Correard*, 159, for whom nations should be conceived as individuals in the "state of nature", existing only in the "natural order" (id., 164).

[XX] Gellner Ernest, 1983, *Nations and Nationalism*, Cornell University Press, 8-49, or Hobsbawm Eric, *Nations and Nationalism*, 9 and 14.

[XXI] Gellner Ernest, *Nations and Nationalism*, 6 (italics added).

[XXII] Id., 48-49.

[XXIII] Weber Max, 1946, *Essays on Sociology*, Oxford University Press, 78 (italics in the original).

[XXIV] Hobsbawm Eric, 1962, *Age of Revolutions: 1789-1848*, Vintage Books, 135: "The progress of schools and universities measures that of nationalism, just as schools and especially universities became its most conscious champions".

[XXV] Id., 9.

[XXVI] Wheeler Douglas L., Opello Jr. Walter C., 2010, *Historical Dictionary of Portugal*, 3rd ed., The Scarecrow Press, 1.

[XXVII] According to Ramos Rui, 1994, *História de Portugal: A segunda fundação (1890-1926) VI*, Editorial Estampa, 420: "In schools, the republicans wanted the Portuguese to learn more than just to read and write. […] Republican education (as defined by João Barros) ought to be a «patriotic education», a «citizens' course». Its aim was to turn children into fanatics of the motherland, letting them know Portugal and instilling in them «love for the land, the landscape, its products, its noble traditions, its thought, its art»". The "«objectification» of a «collective [national] consciousness», which *republicanization* sought to create", "was the aim of the work of the Republic" (id., 419) (italics in the original).

[XXVIII] Mattoso José, 1998, *A Identidade Nacional*, Fundação Mário Soares, 14. Póvoa do Varzim was back then a small fisherman village located north of Porto.

[XXIX] Hobsbawm Eric, *Nations and Nationalism*, 96.

[XXX] Spanish Constitutional Court, Judgment No. 51/2019, of 11 April, 5, b)..

[XXXI] Buruma Ian, 2011, 'Le Divorce', in *New Yorker*, 36.

[XXXII] Garben Sacha, 2010, 'The Bologna Process and the Lisbon Strategy: Commercialisation of Higher Education Through the Back Door?', in 6 *CYELP* 1, 210.

[XXXIII] Eco Umberto, 2012, 'Interview', in *The Guardian* ("Erasmus has created the first generation

of young Europeans"), Striebeck Jennifer, 2012, 'A Matter of Belonging and Trust: The Creation of an European Identity through the ERASMUS Programme?', in Feyen B., E. Krzaklewska (eds.), *The ERASMUS Phenomenon: Symbol of a New European Generation?*, 204 ("The Erasmus programme is claimed to be the Communities' best known initiative and has been regarded as a kind of identity programme"), and Feyen Benjamin, Kzaklewska Ewa, 2012, '«Generation ERASMUS»: The New Europeans? A Reflection', in Feyen B., E. Krzaklewska (eds.), *The ERASMUS Phenomenon: Symbol of a New European Generation?*, Peter Lang, 237 ("«The Generation Erasmus» is characterized (…) (by) a (s)upranational identification"). See, however Emmanuel Sigalas' empirical study (Sigalas Emmanuel, 2009, 'Does ERASMUS Student Mobility promote a European Identity?', in 2 *Webpapers on Constitucionalism & Governance beyond the State 1*, University of Hamburg, 19, which concluded that, although Erasmus students substantially improve their language skills and become acquainted with the culture of the host Member States, they do not become "archetypal European citizens with a strong sense of European identity".

[XXXIV] European Commission, 1996, 44 'Eurobarometer: Public Opinion in the European Union' 1, 36.

[XXXV] Van Gerven Walter, 2005, *The European Union: A Polity of States and Peoples*, Stanford University Press, 48: "(I)n the long term, public opinion in Europe is moving in a more internationalist and European direction".

[XXXVI] Fukuyama Francis, 2014, *Identity: The Demand for Dignity and the Politics of Resentment*, Farrar, 118.

[XXXVII] Secession differs from dissolution and expulsion. Dissolution refers to the creation of two or more states from the extinction of single parent state (such as the dissolution of Czechoslovakia in January 1993), while expulsion involves the coercive removal of part of a state's population and territory by the parent state (as occurred in the expulsion of Singapore by Malaysia in 1965). Secession can be either consensual (e.g. Montenegro's secession from Serbia and Montenegro in 2006) or non-consensual (e.g. Bangladesh's secession from Pakistan in 1971), depending on whether the parent state agreed to it or not.

[XXXVIII] The division between "civic" and "ethnic" nationalism can be traced back to two key distinctions. The first was made by Meinecke, Friedrich. Cosmopolitanism and the Nation State (Princeton University Press, 1970), at 10-18, who differentiated between "cultural nations" and "political nations". Meinecke characterized the former as nations founded primarily on a shared cultural heritage, and the latter as nations emerging primarily from a common political and constitutional history. The second distinction was made by–Kohn Hans, 1946, *The Idea of Nationalism: A Study on its Origins and Background*, MacMillan, 329-331, who identified the Rhine as the geographical boundary between "Eastern nationalisms" and "Western nationalisms". The former are organic and stem from a shared ethno-linguistic origin, while the latter are characterized by their voluntarist and rationalist nature stemming from a social contract. Ethnic nationalism observes the nation as an original communion of cultural characteristics, such as language, religion, or traditions, whereas civic nationalism views the nation as an open and diverse community of citizens who are "united in patriotic attachment to a shared set of political practices and values." (Ignatieff Michael, 1993, *Blood and Belonging: Journeys into the New Nationalism*, Penguin Canada, 7-8).

[XXXIX] Connolly Christopher K., 2014, 'Independence in Europe: Secession, Sovereignty, and the European Union', in 24 *Duke Journal of Comparative and International Law* 51, 98, and Requejo Ferran, Nagel Klaus-Jürgen, 2017, 'Democracy and Borders: External and Internal Secession in the EU, in 14 *EU Borders Working Paper Series* 1, 1.

[XL] ECJ, Case C-6/64, *Costa*, 1964 ECR I-00585, 594. Such limitation of "sovereign rights" ceases with secession from the European Union. Article 50 of the TEU allows Member States to regain the competences transferred to the Union after signing an agreement to leave the Union or after a maximum period of two years following notification to the European Council of their intention to leave the Union.

[XLI] According to some empirical studies, the extent of EU law is estimated to fall within the range of 10% to 20% of all applicable law in the Member States (Moravcsik Andrew, 2008, 'The Myth of Europe's «Democratic Deficit»', in 43 *Intereconomics* 331, 333.

[XLII] Judgment No. 92-308 DC, of 9 April 1992, Treaty on European Union (Maastricht I), para. 43.

[XLIII] Id., para. 44.

[XLIV] Judgment No. 92-313 DC, of 23 September 1992, Treaty on European Union (Maastricht II), para. 2

[XLV] Judgment of 30 June 2009, Treaty of Lisbon, 2 BvE 2/08, para. 252.

[XLVI] See Treaty Establishing the European Stability Mechanism, signed on 2 February 2012 (entered into force on 27 October 2012), and Regulation (EU) 2021/241 of the European Parliament and of the Council of 12 February 2021 establishing the European Recovery and Resilience Mechanism.

[XLVII] Milward Alan S., 1993, *The European Rescue of the Nation State*, University of California Press, 383. Blanco de Morais Carlos, 2010, 'A Sindicabilidade do Direito da União Europeia pelo Tribunal Constitucional Português', in *Estudos em Homenagem ao Professor Sérvulo Correia* I 221-255, Almedina, 250, considers that the transfer of "sovereign powers" to the European Union cannot "compromise the essential core of the exercise of sovereignty, either internally or externally, in a way that the state power becomes so meaningless that the actual meaning of national independence is reduced to a semantic figure and loses its practical meaning". Such would be the case of EU regulations that abolish the diplomatic representations of the Member States or that mandate the extinction of national armed forces, the latter of which however was already outlined in Article 9 of the Treaty on the European Defence Community, signed by the ECSC Member States in Paris on 27 May 1952. The French Senate's refusal to ratify the Treaty on 30 August 1954 put an end to the interconnected venture of establishing a European Political Community, and ultimately led to the European Defence Community's collapse. Brexit and, particularly, Putin's aggression to Ukraine in February 2022, revived the Member State's ambition to progressively adopt a common European defence (Article 24(1), 1st paragraph, of the TEU).

[XLVIII] The Covenant of the League of Nations was signed on 28 June 1919. This agreement was inspired on President Wilson's fourteen points delivered in his speech to Congress on 8 January 1918, which included the establishment of "clearly recognizable lines of nationality" (point 9) to define European borders, and the creation of a "general association of nations" for the "purpose of affording mutual guarantees of political independence and territorial integrity to great and small states alike" (point 14).

[XLIX] Milward Alan S., *The European Rescue of the Nation State*, 3-4.

[L] See the declaration of May 9, 1950, delivered by Robert Schuman: "In taking upon herself for more than 20 years the role of champion of a united Europe, France has always had as her essential aim the service of peace. A united Europe was not achieved and we had war. Europe will not be made all at once, or according to a single plan. It will be built through concrete achievements which first create a de facto solidarity. The coming together of the nations of Europe *requires* the elimination of the age-old opposition of France and Germany" (italics added).

[LI] This idea is implicit in the prescient speech of Maurice Faure, the then French Secretary of State for Foreign Affairs, during the debate that preceded the ratification of the Treaties of Rome by the French National Assembly: "There are not four great powers; only two, America and Russia. There will be a third at the end of the century, China. The emergence of a fourth, Europe, depends on you" (Débats (5 July 1957) Journal Officiel de la République Française (6 June 1957) at 3305).

[LII] van Middelaar Luuk, 2013, *The Passage to Europe: How a Continent Became a Union*, Yale University Press, 185-186.

[LIII] Id., 169. From the Portuguese State's perspective, "the ghost of an Iberian Union, which in the nineteenth century filled so many of the best Portuguese minds (Almeida Garrett, Oliveira Martins and Antero de Quental), who dreaded it or chose it as an alternative to the inadequacy of the state in the face of the ambitions of its citizens or the changes in the «balance of Europe», has finally disappeared (through European integration). I believe that it will be completely dissipated with the implementation of the political union that the Maastricht Treaty has already designed" (Lucas Pires Francisco, 2008, 'A Europa (O que é)', in *A Revolução Europeia: antologia de textos*, Gabinete em Portugal do Parlamento Europeu, 339-340.

[LIV] The Treaty establishing the Benelux Economic Union was signed on 3 February 1958 by Belgium, Luxembourg and the Netherlands ((381 *UNTS* 165 (it entered into force on 1 November 1960)).

[LV] Milward Alan S., *The European Rescue of the Nation State*, 304-373.

[LVI] Id., 162-171, 367.

[LVII] Id., 4. Populist radical right political parties have been recently following an ethno-nationalist Pan-Europeanism, which observes the European nation as an embodiment of the European culture of the "white race with roots in classical antiquity and Christianity" (Coudenhouve-Karlegy Richard, 1997, *Pan-*

Europa: Un grande Progetto per l'Europa unita, Il Cerchio, 27 and 116-117). They view the European Union as a bundle of ethnic communities united by a shared European civilization and reject the cosmopolitan civic Pan-Europeanism that arises from the shared values set out in Article 2 TEU (Fligstein Neil, Polyakova Alina, Sandholz Wayne, 2012, 'European Integration, Nationalism and European identity', 50 *Journal of Common Market Studies* 106, 111-115.

[LVIII] Schuman Robert, 2005, *Pour l'Europe 4th Edition*, Nagel, 26: "The European states are a historical reality; it would be psychologically impossible to make them disappear. Their diversity is a boon that we do not want to eliminate."

[LIX] van Middelaar Luuk, *The Passage to Europe*, 226-251.

[LX] The book was harshly criticized for its Soviet-style historiography (id., at 231), and even deemed an attempt to construct the historical pedigree of an "imagined community" (Kitromilides Paschalis M., 1994, 'Reviews. Jean Baptiste Duroselle, Europe: A History of its Peoples (translated by Richard Mayne), London, Viking, 1990', in 24 *European History Quarterly* 123, 123).

[LXI] Duverger Maurice, 1995, *L'Europe dans tout ses États*, PUF, 48.

[LXII] Habermas Jürgen, 2012, *The Crisis of the European Union: A Response*, Polity Press, 54 ff.

[LXIII] According to Haas Ernst B., 1968, *The Uniting of Europe: Political, Social and Economic Forces (1950-1957)*, Stanford University Press, 5, a political community exists when "specific groups and individuals show more loyalty to their central political institutions than to any other political authority, in a specific period of lime and in a definable geographic space".

[LXIV] Milward, Alan S., *The European Rescue of the Nation State*, 2.

[LXV] Pescatore Pierre, 1982, 'Foreword', in Sandalow T., Stein E. (eds.), *Courts and Free Markets, Perspectives from the United States and Europe*, I 7-10, Clarendon, at ix-x. Federalism is not limited to the political organization of states, as it does not conflate with the federal state, and it can refer to methods of dividing (dual federalism) or sharing power (cooperative federalism), and exhibit either centralizing (integrative federalism) or decentralizing trends (devolutionary federalism) (see also Lenaerts Koen, 2009, 'Constitutionalism and the Many Faces of Federalism', in 38 *The American Journal of Comparative Law* 205, 206-207, or Schütze Robert, 2009, *From Dual to Cooperative Federalism*, Oxford University Press, at 4-6).

[LXVI] Giddens Anthony, 2014, *Turbulent and Mighty Continent: What Future for Europe?*, Polity, 10, which adds that "to have any meaning, sovereignty must refer to real control over the affairs of the nation".

[LXVII] Neo-federalist integration theories thus differ from federalist integration theories as they do not envision the establishment of a federal state-like entity as the destiny of European integration.

[LXVIII] Pocock, J. G. A., 1975, *The Machiavellian Moment: Florentine Political Thought and the Atlantic Republican Tradition*, Princeton University Press.

[LXIX] van Middelaar Luuk, 2019, *Alarums & Exclusions: Improvising Politics on the European Stage*, Agenda Publishing, 123.

[LXX] According to Schmitt Carl, 1992, 'The Constitutional Theory of the Federation', in 91 *Telos* 26, 28, 29, 33 and 55-56, a federation differs from an international organization because the latter lacks a "political existence". Consequently, it does not affect the political existence of the state as a whole. The federation should also not be confused with the state (whether unitary or "federal without a federal foundation"). The state is a "sovereign political unit" representing the political expression of a people's will, and whose specific type and form of political existence is founded on that people's exercise of the constituent power. The federal *telos* of permanently uniting states and peoples by establishing a new political unit (the federation) whose purpose is to preserve the political existence of its members is absent from international organizations, which strive at improving cooperation between states without attempting to unite them politically (Beaud Olivier, 2007, *Théorie de la Fédération*, Presses Universitaires de France, 30, 268-272 and 278). The federation is thus characterized by a political dualism – two political entities (the federation and the member states) coexist within the same political space (the federation) – incompatible with the idea of state sovereignty (ibid.). It is a "half-way house" between a nation-state and an intergovernmental organization (Forsyth Murray, 1982, *Unions of States: The Theory and Practice of Confederation*, Leicester University Press, 6 and 16).

[LXXI] The proposition that the European Union is a federation of states finds strong doctrinal support.

See Beaud Olivier, 1995, 'Déficit politique ou déficit de la pensée politique?', in 87 *Le Debat* 32, 33 ("The current state of European integration is best described by the concept of federation –the implementation of the political idea of federalism."), Lucas Pires Francisco, 1997, *Introdução ao Direito Constitucional Europeu*, Almedina, 95 ("This option (federation) is more in line with the legal framework (of the Union)."), Dashwood Alan, 2004, 'The Relationship between the Member States and the European Union', in 41 *Common Market Law Review* 355, 356 ("(The European Union) is a federation of sovereign states."), Schönberger Christopher, 2007, 'European Citizenship as Federal Citizenship: Some Citizenship Lessons of Comparative Federalism', in 19 *Europe Review of Public Law 61*, 64 ("The European Union is uniquely European in the same sense that other federalisms are uniquely American, German or Swiss. It is not less a federal Union for that uniqueness."), Schütze Robert, 2009, 'On «Federal» Ground: the European Union as an (Inter)national Phenomenon', in 46 *Common Market Law Review* 1069, 1105 ("The European Union is a federation of states"), Constantinesco Vlad, 2010/1, 'Le fédéralisme? D'un anti-étatisme à un a-étatisme?', 355 L'Europe en Formation 41, 51 ("The European Union (is) the political entity that most closely resembles a federation"), Habermas Jürgen, *The Crisis of the European Union*, 13 ("(The European Union is a) federation beyond the nation state"), von Bogdandy Armin, 2012, 'Neither an International Organization nor a Nation State: The European Union as a Supranational Federation', in Jones E., Menon A., Weatherill S. (eds.), *The Oxford Handbook of the European Union* 761-776, Oxford University Press, 761 ("The European Union (…) is a supranational federation"), Nicolaïdis Kalypso, 2014, 'We, the Peoples of Europe', in 83 *Foreign Affairs* 97, 102 ("The European Union is a federal union"), or Rehling Larsen Signe, 2021, *The Constitutional Theory of the Federation and the European Union*, Oxford University Press, at vii ("(T)he constitutional nature of the EU, shrouded with mystery in the literature, is that of a federation").

[LXXII] Bickerton Chris J., 2012, *European Integration: From Nation-States to Member States*, Oxford University Press.

[LXXIII] Schütze Robert, 2020/8, 'Models of Demoicracy: Some Preliminary Thought', in *EUI Working Papers*, 44-45.

[LXXIV] Id., 23 and 44. The advent of a federal (European) *demos* was implicitly admitted by the German Federal Constitutional Court in its judgment on the Maastricht Treaty of 12 October 1993, 2 BvR 2134/92, 2 BvR 2159/92, 2, b1), when it declared that the citizenship of the Union, "although not characterized by an intensity comparable to that which follows from common membership in a single state", it "does lend legally binding expression to that level of existential community *which already exists*" (italics added).

[LXXV] Habermas Jürgen, 1995, 'Remarks on Dieter Grimm's «Does Europe Need a Constitution?»', in 1 *European Law Review*, 303, 306-307 (italics added).

[LXXVI] Schütze Robert, 'Models of Demoicracy: Some Preliminary Thoughts', 50.

[LXXVII] Vaubel Roland, 2013, 'Secession in the European Union', in 33 *Economic Affairs* 288, 292: "In the majority of cases, the seceding region has a higher per capita income than the rest of the country. This is no coincidence. The most prosperous regions are net contributors. They subsidise the other regions through the tax–transfer system. Thus, they develop a strong interest in secession.". González Richard, Clotet Jaume, 2012, 'Spanish Prisoners', in *New York Times*, describe the financial relationship between the Spanish substate regions of Catalonia and Madrid as "fiscal looting". In Scotland, exclusive control of oil resources in the North Sea is a key argument of independence movements, while in Flanders separatists have grown as the disparity between the Flemish and Walloon economies have widened (Connolly Christopher K., 'Independence in Europe: Secession, Sovereignty, and the European Union', 60 and 64).

[LXXVIII] Horowitz Donald. L., 2000, *Ethnic Groups in Conflict* 2nd Edition, University of California Press, 250-251, and Connolly Christopher K., 'Independence in Europe: Secession, Sovereignty, and the European Union', 94.

[LXXIX] Bongardt Annette, Torres Francisco, 2017, 'On States, Regions and European Integration – Editorial', in 52 *Intereconomics* 326, 326-327.

[LXXX] The Union budget amounts to around 1% of Member States' GDP, which contrasts with the 17% of the federal government of the United States of America (D'Apice Pasquale, 2016, 'Budget-related cross-border flows: EU versus US', VOX).

[LXXXI] Weiler Joseph H. H., 2001, 'Federalism without Constitutionalism: Europe's *Sonderweg*', in

Nicolaïdis K., Howse. R. (eds.), *The Federal Vision: Legitimacy and Levels of Governance in the United States and the European Union* 54-71, Oxford University Press, 55.

[LXXXII] Article 300(1) and (3) of the TFEU, Article 6, para. 1, and Article 8, paragraph 1, of the Protocol 2 on the application of the principles of subsidiarity and proportionality.

[LXXXIII] de Witte, Bruno, 1991-1992, 'Community Law and National Constitutional Values', in 18 *Legal Issues of Economic Integration* 1, 13.

[LXXXIV] Article 6 of Protocol 2 on the application of the principles of subsidiarity and proportionality.

[LXXXV] Fasone Cristina, 2017, 'Secession and the Ambiguous Place of Regions Under EU Law', in Closa C. (ed.), *Secession from a Member State and Withdrawal from the European Union: Troubled Membership* 48-68, Cambridge University Press, 59-60.

[LXXXVI] Fouéré Yann, 1968, *L'Europe aux cent drapeaux: essay pour server à la construction de l'Europe*, Presses d'Europe.

[LXXXVII] van Middelaar Luuk, *The Passage to Europe*, 265, or Walker Neil, 2017, 'Internal Enlargement in the European Union', in Closa C. (ed.), *Secession and Withdrawal from the EU: Troubled Membership* 32-47, Cambridge University Press, 40.

[LXXXVIII] Milward, Alan S., *The European Rescue of the Nation State*, 100-101.

[LXXXIX] "Independence in Europe" has been a campaign political slogan used by the Scottish National Party on numerous occasions since the latter part of the 1980s in the twentieth century.

(Gowland David, 2017, *Britain and the European Union*, Routledge, 188).

[XC] Guirao Fernando, 2015, 'An Independent Catalonia as a Member State of the European Union', in Cuadras-Morató X. (ed.), *Catalonia: A New Independent State in Europe? A Debate on Secession Within the European Union*, 189-223, Routledge, 190.

[XCI] Law 48, from 1863, stablishes the procedure of the Federal Extraordinary Appeal [*Recurso Extraordinario Federal*] before the National Supreme Court of Justice.

[XCII] CSJN, "Blanco, Julio c/ Nazar, Laureano, por sustracción de mercaderías a fuerza armada" Fallos 1:170, May, 30th, 1864.

[XCIII] CSJN, "Mendoza, Domingo y Hno. c/ Provincia de San Luis s/ derechos de exportación - cuestión de competencia", May, 3rd, 1865, Fallos 1:485.

[XCIV] CSJN, "Empresa 'Plaza de Toros' c/ Gobierno de Buenos Aires", April, 13th, 1869, Fallos 7:150.

[XCV] CSJN, "D. Luis Resoaglí c. Provincia de Corrientes por cobro de pesos", July, 31st, 1869, Fallos 7:373, en Ábalos, 2020.

[XCVI] CSJN, "Casiás, Raffo y Ca., y Casas y Ferrer C/ Don Tomás Armstrong", September, 6th, 1873, Fallos 14:18.

[XCVII] CSJN, "S.A. Mataldi Simón Limitada c/ Provincia de Buenos Aires", September 28th, 1927, Fallos: 149:260.

[XCVIII] CSJN, "Bressani, Carlos H. y otros c/ Prov. de Mendoza", June, 2nd, 1937, Fallos: 178:9.

[XCIX] The Court will begin to refer to the provinces no longer as sovereign but as autonomous – for example, in the cases "Berga", and "Cardillo", (Sagüés 2003:3).

[C] CSJN, "La Pampa, Provincia de c/ Mendoza, Provincia de s/ acción posesoria de aguas y regulación de usos", Desembre, 3rd, 1987, Fallos: 310:3520 (see Altavilla 2009).

[CI] Article 127 states that No Province may declare or wage war against another Province. Their complaints must be submitted to and settled by the Supreme Court of Justice. Their de facto hostilities are acts of civil war, characterized as sedition or rebellion, which the Federal Government must suppress and punish in accordance with the law".

[CII] CSJN, "Castillo, Carina Viviana y otros el Provincia de Salta - Ministerio de Educación de la Prov. de Salta s/ amparo", sentencia del 12 de diciembre de 2017, Fallos: 340:1795, voto en disidencia parcial del Ministro Rosatti.

[CIII] New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting), quoted by Williams 1990.

[CIV] Truax v. Corrigan, 257 U.S. 312, 344 (Holmes, J., dissenting), quoted by Williams 1990

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Indefinite detention of refugees ruled unconstitutional by the High Court of Australia – an opportunity for Europe to pause for thought?

by

Jock Gardiner and Silvia Talavera Lodos[I]

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Abstract

The High Court of Australia recently handed down the landmark decision of *NZYQ*, ruling the policy of indefinitely detaining non-citizen, non-visa holders with no prospects of resettlement to be unconstitutional. As governments around the world grapple with the challenges posed by mass migration, this article considers the consequences of the High Court decision in the context of the European immigration and refugee debate, focusing upon the constitutional and human rights-related lessons that may be learned.

Key-words

immigration, refugees, detention, constitutional law, European Union law, human rights

1. Introduction

On 8 November 2023, the High Court of Australia, the final court of appeal in the Australian judicial hierarchy, handed down a decision in the case of *NZYQ*, declaring the long-practiced policy of indefinitely detaining non-citizen, non-visa holders to be constitutionally invalid. As a result, over 140 individuals held in immigration detention were ordered by the Minister for Immigration to be immediately released. The decision overturned a 20-year legal precedent, coming just before the Supreme Court of the United Kingdom ruled that the legislation establishing the offshore processing deal between the British Government and their Rwandan counterparts was also unlawful, and the Albanian constitutional court's interim decision with respect to the refugee processing deal struck with Italy.

The purpose of this article is to consider the High Court decision in the context of the ongoing global conversation regarding the legality of policies and proposals aimed at addressing the challenges posed by the mass movement of people across sovereign borders. More specifically, this article seeks to contribute to the debate raging in Europe with respect to the constitutional and rights-based consequences of pursuing certain policy prescriptions to address the large numbers of migrants and asylum seekers arriving on the EU's southern and eastern borders and making their way to other European countries, by posing the following question: what constitutional and human rights lessons can be drawn from the Australian High Court's ruling that indefinite detention of non-citizens is unconstitutional?

In posing the above question, it must be recognised that the High Court decision derives from and relates to the specific constitutional and legal settings of Australia. Given the complexities involved in seeking to compare the Australian constitutional and administrative order to that of the EU or any of its member states, and the limits imposed on the authors in preparing this piece, the scope of the aim of this article is also limited – to raise points of conceptual comparison worthy of further future detailed exploration. In saying this, we argue that this topic is ripe for comparison, given that many politicians in Europe have specifically referred to Australia's deterrent-based policy settings as the model for how to establish an orderly refugee intake process in the face of high arrival numbers and large claim processing backlogs. Indeed, the 'stop the boats' slogan utilised by the British Sunak Government is an Australian invention, with the same political figures who put together Australia's refugee

processing regime working as advisers to the current British Government and appearing at far-right immigration conferences in European countries such as Hungary. As such, the High Court decision could be viewed as a glimpse into the future for those European leaders, and other leaders of liberal democratic countries, currently pondering the policy options available to them, and the consequences that might flow depending on what they choose to pursue.

This article is structured to first consider the legal and policy background to the High Court decision before then going on to analyse the reasons for the decision. The comparative conceptual analysis is then split into a constitutional section and a human rights section, followed by a conclusion.

2. Legal and policy background to the case

Australia's immigration policy settings have long been considered amongst the most restrictive and harsh in the developed world. Australia's externalisation and detention practices have served as inspiration for other countries,[II] and have been heavily criticised by the UN Human Rights Committee for breaching international obligations.[III]

The *Migration Act 1958* serves as the legislative basis for Australia's border protection policies. Since 1958 there have been a series of amendments, including the *Migration Legislation Amendment Act 1989* and the *Migration Reform Act 1992*. The former empowered officials to arrest and detain individuals suspected of entering 'illegally', while the latter made administrative detention mandatory for those lacking a valid visa (Section 189) and removed the maximum detention limit of 273 days.

The 'Tampa Affair' in 2001, marked a turning point in the politics of immigration in Australia.[IV] As part of a concerted election strategy to weaponise the issue of asylum seekers arriving by boat, the then government implemented a range of policy measures, including the 'Pacific Solution' – the Government's offshore processing regime. The Pacific Solution mandated that asylum seekers who arrive by boat in Australia be sent offshore to be processed, with processing centres setup on Nauru and Manus Island (Papua New Guinea) to ensure these individuals would be outside Australia's migration zone.[V] This policy was dismantled in 2008, and then re-established (albeit in a slightly different form) in 2011/12, along with the policy of turning boats back to their point of origin.

According to the Refugee Council of Australia, as of August 2023, the average number of days spent in detention under these policies was 703 days (almost two years). There are also a number of examples of individuals who have been held in detention for in excess of five years (Amnesty International, 2005). The conditions within detention centres both onshore and offshore have long faced criticism for their failure to ensure humane treatment.[VI]

The High Court of Australia has generally upheld the legality of Australia's restrictive policies. The case of *Lim*, concerning the detention of Cambodian refugees who arrived in Australia by boat in 1989, saw the Court grapple with where to draw the line between the Commonwealth Government's constitutionally enshrined power to formulate policies with respect to the entry and removal of non-citizens, and protection against arbitrary executive ordered detention. Specifically, the Court sought to determine when administrative detention crosses the border into punitive detention, which according to the doctrine of the separation of powers, is a power necessarily limited to be exercised by the judiciary. The principles relied-upon by the Court will be referred to later in this article. What serves as important background information, is that the Court ultimately found the core components underpinning legislation to be lawful, as it could not be construed as forming the basis for a punitive form of administrative detention – the Act imposed limits on detention periods and provided opportunities for the detainees to seek their release via removal.[VII]

In 2004, in the case of *Al-Kateb v Godwin*, the High Court held that so long as the purpose underlying the detention of an individual is linked to deportation or removal, whether either of these purposes can actually be given effect to at a particular moment in time is immaterial. To put arbitrary limits on what are complex policy issues, involving factors both within and out of the Government's control is to unnecessarily restrict the Commonwealth's constitutionally enshrined immigration powers. In coming to this decision, the Court gave short shrift to Australia's international legal obligations.[VIII]

Subsequent decisions have further strengthened the legal basis for what became known as the policy of 'indefinite detention', with the case of *Commonwealth v AJL20* going so far as to suggest that constitutional review ought to be limited to a consideration of the legality of formal legislation, and not the actions of the executive who give effect to it. As such, when the case of *NZYQ* came before the High Court, the reasoning of the majority of the Court in *Al-Kateb* – that it was legally permissible for an individual who had not been granted a

valid visa, who could not be deported, nor removed, to be held in immigration detention indefinitely on order of the relevant Minister – was the accepted and settled precedent governing this area of Australian migration law.

3. NZYQ v Minister for Immigration, Citizenship and Home Affairs and Anor

3.1 Facts

NZYQ is the pseudonym used to refer to the plaintiff in the case, a Rohingya man, who arrived in Australia by boat in 2012. Although he was assessed by the Australian Government as having a well-founded fear of persecution in Myanmar, under the Government's policy of refusing the granting of permanent settlement pathways for asylum seekers who arrive by boat, the individual was granted a temporary visa.[IX] After being convicted of child sex offences in 2015, his temporary visa was cancelled by the Minister for Immigration in accordance with his powers under the Act.[X]

As a non-citizen, non-visa holder, who was not able to be returned to Myanmar due to Australia's non-refoulement obligations, and who would be unlikely to be granted asylum in an appropriate third country due to his conviction, the Minister determined to hold the individual in immigration detention. Under sections 189 and 196 of the Migration Act, NZYQ could be held in detention until his removal, deportation, or the regularisation of his immigration status (the granting of a visa). These sections of the Act failed to provide specific timeframes or limits for when one of these three options had to be carried out.

The arguments put to the Court by the Plaintiff were two-fold: first, that the relevant section of the Immigration Act that gives the Minister the power to detain a non-citizen must be read in light of the possibility of removal, which was not possible in this instance; and/or, that in accordance with the doctrine of the separation of powers, the power to detain an individual involuntarily and indefinitely is a judicial and not an executive function (as it is punitive in nature), and therefore the section of the Act facilitating this ought to be deemed invalid. [XI]

The Government opposed the application, arguing that the previous decisions of the Court upholding the policy of indefinite detention, built-upon the precedent of *Al-Kateb*,

should be followed. The Government indicated that there were more than 90 individuals in a similar situation to that of the Plaintiff (including other individuals who had committed serious crimes) who would be released into the Australian community should the Court find in favour of the Plaintiff.[XII]

3.2 Decision of the Court

At a hearing on 8 November 2023, the Court delivered its orders, with reasons to follow, and issued the writ of habeas corpus (an order for the immediate release of NZYQ). The basis for its decision was that the sections of the Act giving the Minister the power to indefinitely detain an individual was in breach of the doctrine of the separation of powers and was therefore constitutionally invalid. It is for the judicial branch to punish, not the executive, and detention without real prospects of re-settlement or removal constitutes a form of punishment.

On 29 November 2023, the Court unanimously handed down its reasons for the orders made on 8 November.[XIII] It approached the questions before it in three steps. The first, related to whether the Court ought to reconsider the precedent set by the 2004 *Al-Kateb* decision, which served as the legal basis for the policy of indefinite administrative detention. The second, related to the question of how *Al-Kateb* ought to be reconsidered, in light of the decision to reconsider the precedent. The third, saw the Court construct the new test to be applied to determine whether executive ordered detention meets the substantive requirements stemming from the doctrine of the separation of powers: '...the constitutionally permissible period of executive detention of an alien who has failed to obtain permission to remain in Australia as coming to an end when there is no real prospect of removal of the alien from Australia becoming practicable in the reasonably foreseeable future...'.

The core principles underlying this decision, which are a re-interpretation of the principles set out in the High Court case of *Lim,* can be summarised as follows: first, in accordance with the principle of the separation of powers '[non judicially-ordered] detention is penal or punitive unless justified as otherwise'; second, 'for an identified legislative objective to amount to a legitimate and non-punitive purpose, the legislative objective must be capable of being achieved in fact. The purpose must also be both legitimate *and* non-punitive. "Legitimate" refers to the need for the purpose said to justify detention to be compatible with the constitutionally prescribed system of government'; and third, 'the

legitimate purposes of detention – those purposes which are capable of displacing the default characterisation of detention as punitive – must be regarded as exceptional.'

The Court found that while the legislative objectives underlying administrative immigration detention were constitutionally valid – holding aliens pending deportation/preventing aliens from entering the Australian community pending a visa determination – these objectives must have factual and temporal limitations to avoid falling foul of the abovementioned principles. The facts of this case demonstrated that the relevant legislation failed to anticipate a situation where 'there is no real prospect of the removal of the alien from Australia becoming practicable in the reasonably foreseeable future' and where their visa had cancelled, meaning that the legislative objectives could not be met, rendering the provisions punitive, in contravention of the doctrine of the separation of powers and therefore constitutionally invalid.

Interestingly, the Court signalled that although the policy arrangements in question are unconstitutional, there is nothing to prevent the Government from legislating an alternative preventative basis for detaining those considered to be a serious risk to the Australian community. One where the justification for continued detention is determined by a court. Such legislation already existed at the time of the Court's decision for individuals convicted of terrorist offences, for instance.

4. The response by the Australian Government to the High Court decision

In swift response to the High Court's decision, and without waiting for the detailed reasons, the Australian Government announced the need for new legislative measures to be passed by the Parliament 'to ensure community safety is protected'.[XIV] The new hastily drafted legislation, the *Migration Amendment (Bridging Visa Constitutions) Act 2023*, created a bespoke bridging visa for detainees who were in similar situations to NZYQ, and therefore had to be released from detention into the Australian community. Under this legislation all individuals released are obliged to respect a regime consisting of a number of conditions restricting both their conduct and movement. Whilst allowed in the community, they are subject to strict curfews, must wear tracking bracelets, are subject to restrictions on where

they are able to live, on their ability to work and face gaol time should they breach any of the visa conditions. This legislation is already facing several High Court challenges.[XV]

The Migration Act was subsequently amended further by the *Migration Amendment (Bridging Visa Conditions and Other Measures) Act 2023*, introduced on 16 November 2023. The amendment creates new criminal offences for those who fail to comply with certain visa conditions. In addition, it obliges visa holders to communicate specific personal information to authorities, limiting their right to privacy.

After the High Court published the reasons for its decision, the Government took steps to amend the *Criminal Code Act 1995* to establish a preventative detention regime. The *Migration and Other Legislation Amendment (Bridging Visas, Serious Offenders and Other Measures) Act 2023* gives the relevant Minister the ability to apply to a court for a 'community safety order'. This order allows the continued detention, pending removal or deportation for up to three years of specific individuals previously convicted of serious crimes. It is modelled on a pre-existing preventative detention regime that has been in place for a number of years for individuals convicted for terrorist-related offences, who are deemed to be too risky to release into the community post-completion of their sentence.

5. Reflections

5.1 Constitutional

By making the connection between indefinite administrative detention, punishment, and the important distinction between the powers of the executive and those of the judiciary, the High Court has drawn attention to the link between protection against arbitrary detention, the rule of law (in particular, the concept of legality) and the doctrine of the separation of powers. The reliance on constitutional principle for substantive rights and obligations is important in the Australian context, as there is no specific domestic human rights framework to rely-upon as a basis for legally enforcing well-established principles that exist in the EU and the Council of Europe (see the caselaw on Art 5 of the ECHR, for instance).[XVI] That being said, as the doctrine of the separation of powers is recognised as a fundamental component of the rule of law in the jurisprudence of the ECtHR,[XVII] and the CJEU (see A.K. and Others),[XVIII] European Member States of both jurisdictions ought to be aware of the

potential constitutional and human rights-based limitations to current policy efforts to replicate policies similar to those struck down by the Australian High Court.

The response of the Australian Government and the main Australian opposition party to the High Court decision,[XIX] possess similarities in both tone and substance to that of the UK Government to the Supreme Court decision.[XX] From a constitutional perspective, what is most striking in the reactionary discourse is the veiled disregard for what these courts have had to say. A shift from respectful deference to judicial rulings, to a posture of indifference and at times open hostility. We have seen the Australian Government pass legislation without having received the reasons for the High Court decision and the British Government using legislation to overturn what were findings of fact by the UK Supreme Court (deeming Rwanda to be a 'safe country') and undermine the jurisdiction of the European Court of Human Rights (ECHR). The customary references to the importance of judicial review to democracy, and our pride in adherence to the rule of law, in response to these sorts of judgments is no longer the discursive norm. Instead, we hear the political leadership of these countries employing populist metaphorical language to justify their deliberate disregard for what the courts have to say – equating harshness in approach with political strength and referring to the courts as 'roadblocks'.[XXI]

This then links to the meta-constitutional issue that liberal democracies across the globe currently face, including in the EU, which is how courts can continue to play their important role as protectors of minority rights in the face of a wave of policy proposals rooted in populist politics. That is, whether the authority of the judiciary, which is also reliant on popular support for its legitimacy (or at the very least a relationship of respect with the government of the day and the parliament), can withstand this kind of populist politicking. Such issues are even more pressing in jurisdictions such as the European Union, which has already seen the Court of Justice of the European Union's (CJEU) power to enforce adherence to core liberal democratic constitutional principles and norms challenged by the Governments of Hungary and Poland. The same can be said with respect to the blow-back received by the European Court of Human Rights (ECtHR) in response to a number of its decisions on similar issues. These flareups have had the effect of undermining the authority of these courts and in the eyes of some, their legitimacy.[XXII]

With the rule of law crisis in Europe in-part stemming from national constitutional identity arguments which were, as in the example of Hungary, built on the back of the politics

of immigration, it is not hard to foresee other traditionally less human rights-hostile European Governments testing the bounds of minority protection before the CJEU and the ECHR to give effect to their policy prescriptions.[XXIII] Indeed, with the European Parliamentary elections this year likely to be shaped by immigration and refugee issues, there is the real potential for 2024 to herald in a new EU politico-legal dynamic – one where the courts are called upon to consider the legality of EU agreements and policies developed and passed by EU institutions that undermine those rights currently protected by the Charter and the Convention. Or, in the case of Italy's agreement with Albania, EU Commission endorsed Member State policies.[XXIV]

As such, in many respects, the future legitimacy of the CJEU, the ECtHR, and with them, the fundamental and convention-based rights regimes, will be determined by how these courts manage to navigate the dangers that lurk in this policy field. If the situation in Australia is anything to go by, the courts will not be able to do it on their own – they will need advocates in the political realm to navigate through the choppy waters that lie ahead.

5.2 Human Rights/Immigration Law

While the High Court judgment is welcome, from a human rights perspective, the Australian Government's response raises a host of issues, the first of which is Australia's continued violation of international law. As a party to the *International Covenant on Civil and Political Rights* (ICCPR), the *Convention against Torture* and the *Refugee Convention*, Australia is obliged to respect, protect and fulfil the right to liberty and security of person (Art 9 ICCPR), the right to humane treatment in detention (Art 10 ICCPR), the right to freedom of movement (Art 12 ICCPR), the right to a fair trial and certain rights in criminal proceedings (Art 14 ICCPR), and the right to seek asylum (Art 1 of the Refugee Convention), and the right not to be penalised on account of an individual claiming asylums' illegal entry (Art 31 of the Refugee Convention).

Despite having been repeatedly admonished by the UN Human Rights Committee for failing to adhere to the abovementioned articles, Australia is set to continue breaching its obligations with respect to its treatment of asylum seekers by continuing its practice of mandatorily detaining individuals seeking asylum (whether it be indefinite or not).[XXV] That is, detaining asylum seekers while their applications are being processed, which directly infringes the right of these individuals to liberty, security and freedom of movement

(Commonwealth Ombudsman 2023; Committee against Torture 2022). This system has long been described as arbitrary (*Shafiq v. Australia* 2006), with the deterrent-based policy justification for locking people up relating to issues that go beyond the individual circumstances of the asylum claimants, which is contrary to Australia's human rights obligations with respect to the processing of refugee claims (*A v. Australia* 1997). While the High Court went some way in *NZYQ* to acknowledging Australia's human rights obligations concerning refugees, it did not invoke them as justification for its ruling, nor it did not go so far as to question the legality of using detention as a policy for deterring other asylum seekers from seeking to enter Australia.

Of equal and novel concern, also from a comparative perspective, is the legislation passed in response to the High Court decision. The Australia Government has decided to deal with the legal issues stemming from the decision by making rights-based distinctions based on citizenship status (which, it must be said, has long been the conceptual basis for its detention regime). While Australian citizens who have been convicted of serious crimes will be able to freely re-enter the community at the conclusion of their sentence, those in similar situations to NZYQ face the prospect of either being placed in court-ordered 'preventative detention' or being subject to draconian visa conditions. Individuals who have committed the same category of offence could be subject to different post-sentence regimes purely based on their citizenship status. It is an unfortunate extension of the 'good' versus 'bad' immigrant narrative, which seems to be fuelling similar discriminatory policies put forward in the United Kingdom and France. In the United Kingdom the recently introduced 'Safety of Rwanda (Asylum and Immigration) Bill 2023' severely limits the legal rights of those seeking asylum by preventing such individuals from challenging certain contested facts (Singer, 2023). In France, until it was challenged, the 'Bill to control immigration, improve integration' (n°1855) sought to restrict migrant access to certain government services.

The above discussion raises the more general question of whether legislated or constitutionally enshrined bills/conventions on human rights will act as a check on the harshest forms of policies adopted in Australia taking root in Europe. The answer, as hinted at by the French and British examples, is seemingly mixed. Despite constitutionally enshrined human rights protections being in place, EU Member States are not properly held accountable for violations or for deviating from established legal norms, like the principle of non-refoulement.[XXVI] That being the case, at least with respect to those seeking asylum in an

EU Member State, unlike Australia, in the EU there is a presumption against detention and a maximum limit on the length of such detention: 18 months according to Article 15(5) and 15(6) of the Return Directive. While the institutionalisation of the hotspot approach in the EU has called into question the force of the principle of the presumption against detention,[XXVII] the existence of such a presumption provides another important point of difference to the Australian system of mandatory detention.

With the EU Commission endorsing Italy's agreement with Albania to externalise refugee processing, along with the recent Dutch elections,[XXVIII] ongoing French legislative developments, British legislative developments, policy proposals put forward by the Germans,[XXIX] and ongoing heated debates around immigration policies in Hungary,[XXX] Poland,[XXXI] and even Sweden,[XXXII] there is no doubting that Europe is at a turning point with respect to how it ought to approach the processing and integration of those who seek to enter and stay. Mixed signals are being delivered at the judicial level as to just how willing/able courts are to step in and obstruct the implementation of these policies on human rights, constitutional or other grounds. On the one hand, the Albanian Constitutional Court ruling giving green light to the agreement with Italy eliminates any glimmer of hope of it being paralysed.[XXXIII] On the other hand, the French *Conseil Constitutionnel* has rejected a third of the articles of the migration law reform, which sought to introduce differences in the level of access to basic public services and work rights for non-French nationals, although most of them were disregarded on procedural grounds.[XXXIV]

While the implementation of more restrictive immigration measures may lead to short-term political gain for those in power or seeking it, such policies and actions will undermine two of the essential myths upon which the post- Second World War rights-based political discourse, and with it, liberal democratic constitutionalism are based – the fact that human rights are fundamental, and the fact that they are universal. How this debate plays out therefore clearly has ramifications beyond the topics of migration and immigration.

6. Conclusion

Australia has long been at the forefront of testing the constitutional and rights-based limits of immigration policies. Cited by leaders around the world, including in Europe, as an example of how to do things, what the High Court of Australia has had to say in *NZYQ* and

how the Australian Government has responded should therefore be of real interest to all countries seeking to address this area of public policy. As this article has established, while the generalisability of the court decision is somewhat limited by the peculiarities of Australia's legal system, the legal issues addressed, and the legal issues generated by the response to the decision offer European leaders the opportunity to consider the consequences of at least one of the policy paths currently open to them.

Constitutionally, the High Court decision demonstrates the potential for structural arguments (separation of powers) to be employed to challenge policies that push the boundaries of executive power vis-à-vis the treatment of non-citizens. Through the political response to the court decision, we also, however, get an insight into the consequences, both human and legal, of an undermining of the established, liberal democratic interinstitutional dynamic between courts and the elected polity, by populist politics. With the European courts (CJEU and ECHR) constantly battling claims of illegitimacy, this article has suggested that their inevitable involvement in the legal questions arising from immigration policies currently being formulated across Europe, creates a potentially explosive dynamic. One that has the potential to shape the future legal order of the EU.

From a human rights perspective, while it is more difficult to draw direct lessons from the decision of *NZYQ* and apply them globally (given Australia does not have a bill or charter of rights), the case is still usefully demonstrative of the limits of human rights protection in the face of populist policies. Australia has continuously ignored international rulings declaring its immigration policies to be in contravention of its international treaty obligations, with little domestic political or legal consequence. In response to the High Court decision, the Government has taken reactive steps that are arguably even more draconian in their human impact than that which existed prior. Whilst the EU, individual members states, and other countries may possess stronger domestic human rights protections, there are real questions to be asked as to just how robust they will prove to be in the face of the same populist political sentiment that has driven how the Australian Government has chosen to respond to what its highest court has had to say.

With so much at stake – constitutionally, the protection of rights, and in terms of the human lives involved – let us hope the Australian High Court decision, and the reactions that flowed, provide Europe with the impetus to pause for thought.

[I] Jock Gardiner (jock.gardiner@santannapisa.it) and Silvia Talavera Lodos (silvia.talaveralodos@santannapisa.it) are PhD Candidates at the School of Advanced Studies Sant'Anna in Pisa, Italy.

[II] For instance, the 'stop the boats' slogan, which featured prominently in the 2013 Australian federal election campaign, was used by the Sunak Government to justify the introduction of the Illegal Immigration Bill 2023. This legislative measure prevents individuals arriving in the UK via the English Channel from seeking asylum by detaining them, sending them back to their country of origin or a 'safe' third country. Furthermore, Australia's establishment of offshore detention centers for asylum seekers (beginning in 2012) and the practice of turning boats around and sending them back to their point of origin (beginning in 2013) has been cited and copied by various European governments, including the UK, Denmark, Greece, and Italy. For further insights, see Matera et al. (2023).

[III] See, for instance, Human Rights Committee, A v Australia, 3 April 1997, Communication no. 560/1993.

[IV] The Tampa Affair, occurring in 2001, was a significant incident in Australian immigration history. It unfolded when the Norwegian freighter MV Tampa rescued a group of distressed asylum seekers from a sinking boat near Christmas Island. The Australian Government controversially refused to allow the rescued individuals entry into Australian waters, sparking a heated political and humanitarian debate. See Feld, 2002.

[V] The Migration Legislation Amendment (Excision from the Migration Zone) (Consequential Provisions) Act 2001 amended the 1957 Migration Act allowing "offshore entry persons" to be transferred to "declared countries", namely Nauru and Papua New Guinea.

[VI] The UN Human Rights Committee verdicts in A. vs. Australia (1997), C vs. Australia (2002), Omar Sharif Baban v. Australia (2003), Ali Aqsar Bakhtiyari and Roqaiha Bakhtiyari v. Australia (2003), Danyal Shafiq v. Australia (2006), D and E, and their two children v. Australia (2006), Shams et al v. Australia (2007), Kwok Yin Fong vs. Australia (2009), M.G.C. vs. Australia (2015), Hicks vs. Australia (2015), F.J. et al. vs. Australia (2016), and Nasir vs. Australia (2016) have collectively found Australia guilty of violating Article 9 of the International Covenant on Civil and Political Rights.

[VII] *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1; see analysis by Crock, 1993.

[VIII] In his dissenting opinion, Judge Kirby stood alone in advocating for the application of human rights principles from the international legal order to interpret the Australian Constitution. See Kirby, 2020.

[IX] K. Connell, 'Asylum Seekers Finally Free from Limbo' Law Council of Australia https://lawcouncil.au/media/media-releases/asylum-seekers-finally-free-from-limbo (14 February 2023).

[X] See section 501 *Migration Act 1958* (Cth).

[XI] See Plaintiffs 'Notice of Filing' <https://www.hcourt.gov.au/assets/cases/08-Sydney/s28-2023/NZYQ-MICMA-Pltf.pdf> (1 September 2023).

[XII] See the arguments of Commonwealth Solicitor-General Donaghue, *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs & Anor* [2023] HCATrans 154.

[XIII] *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs & Anor* [2023] HCA 37

[XIV] These words belong to the joint media released by the Minister for Home Affairs and Minister for Cyber Security, Clare O'Neil, in response to NZYQ High Court decision on 14 November 2023. It is available online on https://minister.homeaffairs.gov.au/AndrewGiles/Pages/government-action-response-nzyq-high-court-decision-14112023.aspx.

[XV] According to the Australian Parliament, at least three challenges have been raised at the High Court, see Ferris & Love, 2023.

[XVI] European Court of Human Rights, 'Guide on Article 5 of the European Convention on Human Rights', 31 August 2022, 30-32.

[XVII] A. Tsampi, 'The Importance of the Rule of Law case-law of the European Court of Human Rights: an importance that finally…grew?' https://blogdroiteuropeen.com/2022/06/02/the-importance-of-separation-of-powers-in-the-case-law-of-the-european-court-of-human-rights-an-importance-that-finally-grew-by-aikaterini-tsampi/ BlogDroitEuropean, 2 June 2022

[XVIII] Judgment of the Court of Justice on 19 November 2019, *A.K. and Others v Sadownictwa and Others*, C-585/18, C-624/18 and C-625/18, ECLI:EU:C:2019:982.

[XIX] L. Tingle, 'The 12-hour rush to push through laws concerning the end of indefinite detention was alarming in its chaos' https://www.abc.net.au/news/2023-11-18/confusion-over-high-court-indefinite-detention-ruling-response/103119836 Australian Broadcasting Corporation, 17 November 2023.

[XX] R. Sagoo, 'A Supreme Court ruling on the Rwanda Policy need not lead to conflict with the ECHR'

https://www.chathamhouse.org/2023/10/supreme-court-ruling-uks-rwanda-policy-need-not-lead-conflict-echr Chatham House, 14 November 2023.

[xxi] See T. Harris, 'To stop the boats, Britain needs to take control (again)' https://www.telegraph.co.uk/news/2023/11/17/rwanda-plan-small-boats-channel-crossings-suella/ The Times, 12 November 2023.

[xxii] See a good discussion of these issues in U.A. Kos, 'Signalling in European Rule of Law Cases: Hungary and Poland as Case Studies' (2023) 23(4) *Human Rights Law Review,* 1-37.

[xxiii] See the discussion of the underlying conceptual basis for this line of reasoning in J. Scholtes, *The Abuse of Constitutional Identity in the European Union* (Oxford Academic Books, 2023), Chapter 5.

[xxiv] L. Cook, 'Top EU Official lauds Italy-Albania Migration Deal but a Court and a Rights Commissioner have Doubts' https://apnews.com/article/eu-italy-albania-migration-asylum-rescue-court-91a92ebe5a0ea0e4273609a7ad0eed47 Associated Press, 14 December 2023.

[xxv] Australia has been found to have breached its obligations by the UN Human Rights Committee on five occasions, see D & E v Australia, Communication No 1050/2002 UN Doc CCPR/C/87/2D/1050/2002 (25 July 2006).; Baban v. Australia, Communication No. 1014/2001, U.N. Doc. CCPR/C/78/D/1014/2001 (2003); Bakhtiyari v Australia, Communication No 1069/2002, UN Doc CCPR/C/79/D/1069/2002, 6 November 2003; C. v. Australia, Communication No. 900/1999, U.N. Doc. CCPR/C/76/D/900/1999 (2002); A v. Australia, Communication No. 560/1993, U.N. Doc. CCPR/C/59/D/560/1993 (1997).

[xxvi] The principle of non-refoulement prevents states from returning persons to territories where they may be subjected to persecution or serious harm, or where their life or freedom would be threatened (Article 33 Refugee Convention). Some EU Member States have been found guilty of violating this principle under the European Convention on Human Rights (see for instance Safi and Others v. Greece, Hirsi Jamaa and Others v. Italy). For more information on recent legal developments in Europe that could hinder the application of this principle, see Jakulevičienė, 2023.

[xxvii] The hotspot approach, launched by the European Commission in May 2015, provides a platform to facilitate the collaboration between national authorities and European agencies in frontline Member States facing significant migratory challenges at their borders.

[xxviii] See the analysis of S. van Oosten, 'Why did the Netherlands vote for Wilders PPV? Implications for Migration Policy' https://www.compas.ox.ac.uk/2023/why-did-the-netherlands-vote-for-wilders-pvv-implications-for-migration-policy/ Oxford Centre on Migration Policy Society (Compas), 4 December 2023.

[xxix] See discussion of these in K. Connolly, 'CDU seeks to win back German voters with its own Rwanda asylum plan' https://www.theguardian.com/world/2023/dec/17/cdu-german-voters-rwanda-asylum-plan-refugees-immigration The Guardian Online, 17 December 2023.

[xxx] For instance, see H. Segarra, 'Dismantling the reception of asylum seekers: Hungary's illiberal asylum policies and EU responses' (2022) East European Politics https://doi.org/10.1080/21599165.2023.2180732.

[xxxi] See the debate that took place in the lead up to the last general election G. Baranowska, 'Poland's Sham 'Migration' Referendum' https://verfassungsblog.de/polands-sham-migration-referendum/ Verfassungsblog, 11 October 2023.

[xxxii] See analysis by A. Bailey-Morely and C. Kumar, 'The rise of the far rights in Sweden – and why it's vital to change the narrative on immigration' https://odi.org/en/insights/the-rise-of-the-far-right-in-denmark-and-sweden-and-why-its-vital-to-change-the-narrative-on-immigration/ Overseas Development Institute, 14 December 2022.

[xxxiii] Despite the opposition party challenging the agreement before the Constitutional Court, the Court ultimately determined that the agreement did not encroach upon Albania's territorial integrity or jurisdiction, thus deeming it consistent with the constitutional framework. Within Italy, the agreement successfully secured approval from both the Chamber of Deputies and the Senate, pending only ratification by the Albanian parliament. The original version of the official press release can be found at https://www.gjk.gov.al/web/Njoftim_per_shtyp_3025_1.php.

[xxxiv] The 'Bill to control immigration, improve integration' (n°1855) was passed in December 2023, after a negotiation process between the government and the opposition. The right and far-right successfully introduced restrictive measures. Some of the provisions included restrictions on immigrants' access to social benefits and citizenship for their French-born children and the introduction of immigration quotas. Aware of the likely unconstitutionality of some of the provisions, President Macron asked the *Conseil Constitutionnel* to examine the text. The Court rejected 35 articles, most of them because they were not deemed to be connected to the purpose of the law. See Decision no. 2023-863 DC of the French *Conseil Constitutionnel* at https://www.conseil-constitutionnel.fr/decision/2024/2023863DC.htm.

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PERSPECTIVES ON FEDERALISM
Centro Studi sul Federalismo
Piazza Arbarello, 8
10122 Torino - Italy
Tel. +39 011.15630.890
Mail to: castaldi@csfederalismo.it,
delledonne@csfederalismo.it