



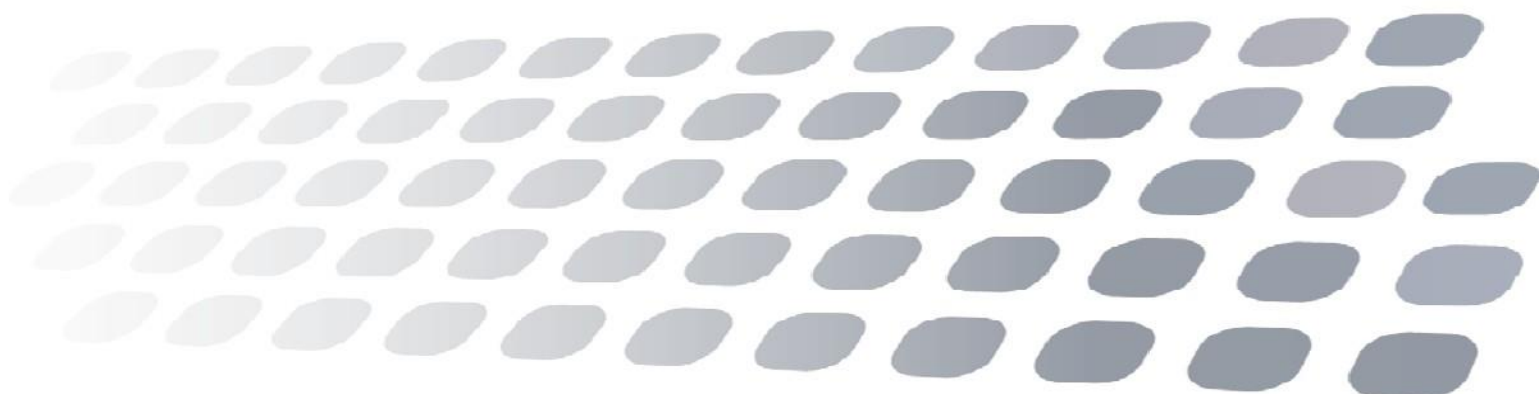
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What Brexit now?
Possible implications for the UK and the EU

by

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Perspectives on Federalism, Vol. 11, issue 3, 2019





Abstract

Brexit is closer now due to the bombastic victory of the Conservative Party at the British general election. However, this does not mean that its physiognomy is clear at all. No less interesting is its impact on the progress of European integration.

Key-words

Brexit, United Kingdom, European integration



Brexit means ... we do not know it yet, although the results of the general election held on 12 December 2019 seem to suggest that Brexit is closer now due to the bombastic victory of the Conservative Party. This does not mean that Brexit will be immediate. Probably, the British government will respect the deadline scheduled for the end of January but after that the extension period will start until the end of December 2020 and, according to some, this is just [the end of the beginning](#).

Before it has even happened, Brexit has already destroyed the unity of the United Kingdom and has shown the inadequacy of the British constitution, as said by [Bogdanor](#), amongst others. Something similar seems to emerge from the [Conservative Manifesto](#) where important reforms were announced.

While the reference to the Human Rights Act reminds us of the debate on a British Bill of Rights that started in 2005, the functioning of the Royal Prerogative clearly refers to the intervention of the UK Supreme Court in the prorogation case ([Miller and Cherry](#)), where the Court declared the prorogation void. Food for thought, but also grounds for concern.

Even after the election, uncertainty still rules in many respects. Due to the British electoral system, the [Brexit Party](#) disappeared, precisely to ensure that Brexit would finally arrive, thanks to Johnson's victory. The division of the pro-European front was highly damaging. The Liberal Democrats [lost significantly](#) after their great results in the European elections. The [Labour Party](#) paid the price of its ambiguous position on Brexit and perhaps a too radical manifesto. After the SNP's success Nicola Sturgeon has already announced its intention to ask for a new referendum. But an agreement like that which occurred before the 2014 Scottish Independence referendum is unlikely and the risk here is that of a Catalan scenario. Northern Ireland is the other seismic area. [Schedule 1 of the Good Friday Agreement](#) refers to the possibility of a poll on a United Ireland. However, the process to convene it needs the evaluation of the British Secretary of State for Northern Ireland, 'if at any time it appears likely to him that a majority of those voting would express a wish that Northern Ireland should cease to be part of the United Kingdom and form part of a united Ireland'. The role of the Secretary of State does not seem to be a detail in the design of this process. The UK risks waking up more dis-united than ever and this is just the first effect of this curious process called Brexit.



If Brexit seems closer, its physiognomy is far from being clear, as [Menon](#) suggested. What kind of future relationship with the EU will be negotiated by the end of 2020 is anyone's guess, especially because Johnson has ruled out a Norwegian or European Economic Area option: he wants to break free from the single market, but no comprehensive trade deal has ever been negotiated by the EU in such a short time. Nor has the UK managed to negotiate a comprehensive trade deal with major partners in the three years since the Brexit referendum. Johnson also pledged not to extend the transition period further: an extension that can be asked just once more for one or two years. The risk of a 'No Deal Brexit' thus looms large.

What seems clear though, is that rather than a global Britain playing a major role on the world stage, we may soon be confronted with a torn-apart UK, forced to choose between following the US or the EU.

For the EU, Brexit is an historic loss. It's the first time that a Member State has decided to leave the Union. And the fact that several others are asking to join it – but have been blocked by France so far – is of little comfort. At the same time it can be a political opportunity. Without Brexit it is unlikely that Permanent Structured Cooperation on Defence would be started. Without the British leadership of the countries less interested in deepening integration, the strengthening of the EU may turn out to be easier. The fact that the European Council was able to approve the Commission's proposal of the Green Deal, notwithstanding the Polish attempt at vetoing it, points in that direction. In the end the best historical answer to Brexit would be a comprehensive reform of the EU. The Conference on the future of Europe can pave the way. It does not need great fantasy as most elements are already on the table. Since the 2008 financial crisis and the 2011 sovereign debt crisis the need to complete the economic and monetary union has been recognized. The 2012 [Commission Blueprint](#), the 2012 [Four Presidents Report](#), and the 2015 [Five Presidents Report](#), have essentially clarified the steps needed to create a banking, fiscal and economic union. Furthermore, various Reports of the European Parliament (such as the [Bresso-Brok Report](#), the [Verhofstadt Report](#), and the [Berès-Böge Report](#) have highlighted the institutional reforms needed to establish a political union. The [Monti Report](#) (by the High Level Committee on own resources), and the various proposals that emerged during the 2019 European election campaign regarding the creation of European taxes, such as the Carbon tax, the Digital Tax, the Financial Transactions Tax – all targeting



subjects currently able to avoid taxation at national level or to externalize their negative externalities towards the collectivity – have made clear what kind of its own resources the EU could count upon to provide the European public goods required by European citizens, as suggested by the Eurobarometer. In this case an historical loss may be transformed into an historical opportunity.

In this issue we cover a variety of jurisdictions and topics.

On the global level, [Mariagrazia Alabrese](#) offers an interesting analysis of the concept of food security as emerging from the WTO Agreement on Agriculture and from the FAO's definition. [Myriam Di Marco](#) analyzes the Israeli-Palestine Conflict in light of Swiss federalism to see whether the Swiss case can help in solving the turbulence in the area. In his article [Ibrahim Harun](#) deals with Devolution and Peacebuilding in Kenya by focusing on Marsabit County. In their essay [Najibullah Nor Isak and Ali Yassin Sheikh Ali](#) examine the development of fiscal federalism in Somalia and compare this jurisdiction with Nigeria and Ethiopia. [Adriano Dirri](#) deals with the role and place of oil and gas politics in the Iraqi federalism, starting from the vague provisions included in the 2005 Iraqi Constitution. Jumping from Africa and the Middle East to Europe, [Demelsa Benito Sánchez](#) offers a detailed analysis of the Directive on the Fight against Fraud to the Union's Financial Interests with particular attention on the Spanish case.

We hope that our readers enjoy this issue and wish them all the best for the new year.

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Food security: different systems, different notions

by

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Abstract

Food security is a hugely important and complex issue. Such complexity is demonstrated, *inter alia*, by the lack of a consistent definition of food security under the international policy framework. Of the various elements that can affect food security, trade in agriculture plays a significant role both in positive and negative terms. This article considers the concept of food security as emerging from the WTO Agreement on Agriculture (AoA) and discusses it in the light of the most commonly accepted definition of food security (i.e. the FAO's definition). The analysis highlights a bifurcation in the concept at stake, depending on the forum considered. According to the AoA, food security is conceived as an exception. It does not consider the individual condition, but focuses either on a country's agricultural self-sufficiency or on the suitability of food self-reliance at national and global levels. While within the UN agencies, a multifaceted and multidimensional concept emerges.

Key-words

food security, WTO Agreement on Agriculture, exceptional rules, right to food, agricultural self-sufficiency



1. Introduction

Eradicating hunger and all forms of malnutrition is a central pillar of the Sustainable Development Goals (SDGs), and a prerequisite for achieving the entire 2030 Agenda for Sustainable Development. According to the latest editions of the report on *The State of Food Security and Nutrition in the World* issued by the FAO, IFAD, UNICEF, WFP and WHO (SOFI report) ‘the decline in hunger the world had enjoyed for over a decade is at an end, and hunger is again on the rise’. The 2019 report shows that although the global level of undernourishment has stabilized, the absolute number of undernourished people continues to increase^I.

Thus, the scenario is developing in the opposite direction to that envisioned by the 2030 Agenda for Sustainable Development^{II} and the UN Decade of Action on Nutrition 2016–2025^{III} which both call on all countries and stakeholders to act together to end hunger and prevent all forms of malnutrition by 2030. Hence, despite the profusion of initiatives by the international community, there is still a lack of food security and the situation is getting worse. Interestingly, the 2019 SOFI report notes that hunger has been increasing in many countries where economic growth has slowed down and that ‘the majority of these countries are not low-income countries, but middle-income countries and countries that rely heavily on international trade of primary commodities’ (FAO et al. 2019: viii). Indeed, international agricultural trade plays a key role in both enhancing and hindering the food security status at global, national and individual levels. Moreover, the relevance of the topic has been increasing since the ‘UN Declaration on the Rights of Peasants and Other People working in Rural Areas’ was adopted in December 2018^{IV}. In fact, the Declaration aims, *inter alia*, to strengthen food sovereignty which, in turn, provides a powerful criticism of the global food system and of the significant role of international trade in that system (Clapp 2017: 92).

The present article examines how the multilateral legal system considers food security and what form food security actually takes under international trade rules. First the article provides a succinct analysis of the most common international definition of food security, that is the FAO definition (section 2). It then sets out the main connections between agricultural trade and food security (section 3) and touches on the food security regime



under the legal framework of the WTO Agreement on Agriculture (section 4). Lastly, it reflects on the concept of food security emerging from the WTO legal system and on the possible significance of its divergence from the FAO's notion.

2. Food security: how the concept first emerged and evolved

Food security is a very important and complex issue. It has a multifaceted and multi-dimensional nature as reflected in the many attempts to define it in research and policy usage. Even a few decades ago, approximately 200 definitions were reported in published writings (Smith et al. 1992). It has also been the subject of countless international conventions, declarations, and resolutions (Shaw 2007).

The concept of food security has evolved significantly over time. A major landmark in its history can be traced back to the 1974 World Food Conference^V, convened by the UN after the food crisis (aggravated by the oil crisis) in the early 1970s. As an outcome of the conference, a resounding Universal Declaration on the eradication of hunger and malnutrition was adopted. The definition of food security found in this document reads: 'Availability at all times of adequate world food supplies of basic foodstuffs to sustain a steady expansion of food consumption and to offset fluctuations in production and prices.' It was a food supply-based definition, where food security was a synonym for the availability of food.

In 1996, two decades after the 1974 World Food Conference, a new world meeting on food security was triggered by the election of a new director-general of the FAO (Jacques Diouf from Senegal, the first African director-general of the FAO). The summit's main documents are the *Rome Declaration on World Food Security* and the *World Food Summit Plan of Action*. However, the most important outcome of the World Food Summit was the definition of food security, which was formally endorsed at the global level. It reads as follows: 'Food security exists when all people, at all times, have physical and economic access to sufficient safe and nutritious food that meets their dietary needs and food preferences for an active and healthy life'.

The focus was thus now on the access to food and not only on the presence or availability of food. This paradigm shift was also due to Amartya Sen's theories (Sen 1981)



which highlighted the fundamental idea that in famine situations, it is often not the availability of food that is the critical factor, but people's access to it.

In 2007/8 a new global food crisis occurred which was linked to the financial crisis and triggered a spike in food prices worldwide. As a consequence, in 2009 world leaders gathered in Rome for a new food summit and unanimously adopted a declaration pledging renewed commitment to eradicate hunger. Most importantly, the 2009 World Summit on Food Security brought about a new and more specific definition of food security:

Food security exists when all people, at all times, have physical, social and economic access to sufficient, safe and nutritious food to meet their dietary needs and food preferences for an active and healthy life. The four pillars of food security are availability, access, utilization and stability. The nutritional dimension is integral to the concept of food security^{VI}.

3. The 'modern' notion of food security and its connections with trade in agriculture

According to the most common notion of food security, i.e. the FAO's definition, food security rests on the availability of quantitatively and qualitatively adequate food, access to that food, a safe and nutritionally appropriate utilization of food, and the stability of the three aforementioned dimensions over time (Simon 2009). It is central to our analysis to understand how each of the four pillars (availability, access, utilization and stability) is intensely influenced by trade in agricultural products (Matthews 2014; Clapp 2015).

First, availability refers to the amount of food that is available in a country or area through all forms of domestic production, imports, food stocks and food aid. Trade can affect availability. In fact through food imports, internal food reserves can be increased for those countries that are not self-sufficient. On the other hand export restrictions and prohibitions can endanger countries that experience food shortages and who are most in need of obtaining agricultural commodities from abroad.

Second, regarding access, three dimensions are taken into consideration. Physical access is a logistical dimension requiring food to be available where people can actually reach it. Economic access implies that people have the financial ability to regularly acquire adequate food without compromising other essential needs, such as housing or education. Socio-cultural access refers to the social barriers that limit the access of some groups to food due



to gender or social reasons (Bellows et al. 2016). Trade mostly impacts the economic access, as it can boost economic growth and promote access to food. In addition, the open market can lead to low prices (more affordable for consumers). From a negative viewpoint, small farmers may suffer from low food prices which may also exclude them from international trade circles if they are not competitive or are not able to comply with high food standards within the global food supply value chains.

Third, the pillar of utilization highlights that food security does not just refer to the quantity of food consumed, but also the quality and nutrients. A number of elements affect this issue, such as the selection of food commodities, their conservation and preparation as well as the absorption of nutrients (which implies that a body is in good health). Food utilization is thus related to clean water, sanitation and health care. This dimension, in fact, not only refers to nutrition but also to other elements that are related to the use, conservation, processing and preparation of food commodities. It further highlights the problems involved in food safety. The link between trade and utilization is related to the fact that agricultural trade affects dietary regimes and food preferences (e.g. in terms of the nutritional quality of the food available). This can help protect against malnutrition, but it can also favour unhealthy food choices (making junk food cheaper than healthier food). Likewise, there are potentially negative effects involved in traditional food since imported food may be cheaper and replace the traditional and typical foods from a geographical area. This last phenomenon can affect people's *food preferences*, which are related to traditional and culturally acceptable food (*'food security exists when all people, at all times, have ... access to ... food to meet their ... food preferences'*).

Finally, stability is related to the need that the abovementioned three pillars are stable over time and that they are not negatively affected by natural, social, economic or political factors. Thus, trade effects on availability, access, and utilization are able to threaten a stable environment for the realization of food security.

4. The WTO Agreement on Agriculture and food security

The topic of food security within WTO regulation needs to be discussed under the terms of the Agreement on Agriculture, which has been in force since 1995. It is worth mentioning that even before the WTO was established, within the GATT 1947 a special



regime was already in place, which aimed to protect national food security. Indeed, article XI:2(a) provides an exception to the obligation of eliminating quantitative restrictions and allows for ‘export prohibitions or restrictions temporarily applied to prevent or relieve critical shortages of foodstuffs’. A similar provision would be introduced by article 12 of the Agreement on Agriculture that will be referred to in the final part of this section.

The Agreement on Agriculture does not include a definition of food security since, as noted, ‘food security is not a matter for the rules *per se*, but is something separate [...]’ (Smith 2012). However, it does devote ample attention to food security. This is probably due to the idea that was one of the driving forces during the Uruguay round of negotiations which resulted in a special regime for agriculture, i.e. States did not accept that agricultural products should be treated in the same way as other products, partly because agriculture has always been considered as a ‘sensitive’ sector due to its major contribution to food security.

Food security is taken into consideration throughout the various parts of the Agreement: starting with the Preamble, then the articles related to the three pillars (market access, domestic support, and export competition) which the regulation of trade in agriculture is based on, and concluding with the norm devoted to the continuation of the reform process that was envisaged when the Agreement was negotiated. Without going into detail regarding the relevant rules, it is worth looking at how food security was addressed in order to understand the concept of food security emerging from the WTO legal system.

Paragraph 6 of the Preamble to the Agreement on Agriculture reports the Member States’ note regarding the will ‘that commitments under the reform programme should be made in an equitable way among all Members, having regard to non-trade concerns, including food security and the need to protect the environment’. The issue of food security is therefore characterized as a ‘non-trade concern’ to which due regard must be given. Its description as a non-trade concern emerged during the ‘mid-term review’^{VII} of the Uruguay round and it weakened the way in which the food security issue was addressed within the WTO law. Food security became *one* of the possible concerns to be considered in designing trade rules. In fact, participants in the negotiations recognized that factors other than trade policies had to be taken into account in the conduct of their agricultural policies. Following the same line, article 20 of the Agreement on Agriculture - which deals



with the continuation of the reform process to be initiated one year before the end of the implementation period (i.e. starting from 2000) – highlights that Members shall take into account ‘non-trade concerns, special and differential treatment to developing country Members, and the objective to establish a fair and market-oriented agricultural trading system’. Food security was therefore included in the agenda for the continuation of the reform process (i.e. the Doha Development agenda) not as an autonomous chapter of the discussion but as one of the non-trade concerns. The stall of the trade talks which had started in Doha and the disengagement of some major players, such as the USA^{VIII}, resulted in what has been called the death of the development agenda (Martin A.-Mercurio B. 2017). Not surprisingly the proliferation of free trade agreements has become a huge phenomenon with important implications for food security. Nevertheless, any dramatic changes in the treatment of food security-related issues are neither reported in the regime reserved to sensitive and/or highly sensitive agricultural products and staples, nor in the notion of food security emerging from the different legal contexts (FAO 2012).

Several other articles in the Agreement explicitly address food security under each of its three pillars. With regard to market access, Annex 5 introduces exceptions to the so-called ‘tariffication’ – under certain conditions – for a) primary agricultural products and their worked and/or prepared products and b) primary agricultural products that are the predominant staple in the traditional diet of a developing country Member. Thus, in specific cases reflecting non-trade concerns, such as food security, some products that are strictly related to basic nutritional needs are subject to special treatment. In other words, States may be allowed to keep non-tariff measures in order to shield their agricultural production from competition from foreign products in order to guarantee national food security.

As far as domestic subsidies are concerned, the so-called ‘green box’ includes an exception to the reduction rules of domestic subsidies in the case of public stockholding for food security purposes^{IX} and domestic food aid^X, among many others. This means that these trade rules allow for the purchase (also at administered prices for developing countries^{XI}) of agri-food products in order to create national food stocks and for distribution to vulnerable people.

Finally, in relation to the export-related measures, article 12 of the Agreement needs mentioning, which, as mentioned above, is devoted to export prohibition and restrictions.



According to the relevant pillar, export subsidies and other methods used to make exports artificially competitive are subject to the reduction commitment (which, after the Nairobi Ministerial Conference, became an elimination commitment)^{XII}. In addition, exports shall not be restricted or prohibited. This export prohibition rule, in accordance with article XI:2(a) GATT, finds an exception in the case of critical shortages of foodstuffs. If any WTO Member applies such an exception, it needs to observe several provisions provided by article 12 of the Agreement on Agriculture which, among other conditions, requires States to give due consideration to the effects of such a prohibition or restriction on the importing Member's food security (Anania 2014). In the emerging regulatory framework of GATT 1947 (and also present in GATT 1994), article 12 was grafted onto the conclusion of the Agreement on Agriculture. This article introduces a number of obligations on those states which establish restrictions or vetos on export under the terms of article XI:2(a) GATT. The manner in which article 12 has been drafted is worthy of attention because it refers back to article XI:2(a) GATT by clearly presenting itself as a specification of the rules as applied to the agricultural sector (Alabrese 2018).

5. Concluding remarks: an 'old-fashion' notion of food security

The brief and incomplete reference to the articles explicitly dealing with food security^{XIII} clearly shows the concept is framed in a way that appears to be coherent within the WTO legal system. Food security is conceived as an exception, a valid reason for permitting exceptions to the general trade rules. Since trade rules limit national states, this means that the exceptions extend States' powers in relation to food security matters. Such an assumption confirms the recognition by WTO Member States of the connection between trade and food security.

With regard to the notion of food security that can be drawn from the Agreement on Agriculture, it should be noted that food security is considered at the national and global levels, and not at the individual and household levels. The idea of food security expressed in the Agreement does not consider the individual condition, but focuses either on a country's agricultural self-sufficiency or on the suitability of food self-reliance at the national and global levels^{XIV}. This highlights the bifurcation in the concept of food security, depending on the forum considered.



On the one hand, within the UN agencies, a complex and multidimensional concept emerges which results in the definition issued at the end of the 1996 World Food Summit organized by FAO and extended in 2009. On the other, in the same period the international trade forum, during the Uruguay round (1986-1994) which gave birth to the WTO and the Agreement on Agriculture, still relied on a supply-based definition of food security. It retained almost the same notion of food security that was outlined in the 1974 World Food Conference (*'Availability at all times of adequate world food supplies of basic foodstuffs to sustain a steady expansion of food consumption and to offset fluctuations in production and prices'*) focusing on the availability of food, while access to food, individual nutritional needs and food preferences were totally missing.

One could argue that a state-level notion of food security was the only one conceivable during the Uruguay negotiations as Members were focusing on international trade rules. If this focus was related to the interests and the mandate of the Member States, then the same should apply considering the current round of negotiations for the continuation of the reform process. However this is not the case. The food security concept emerging from the current negotiating round shows a different framework embodying the individual dimension and, as a consequence, the right to food^{xv} which was lacking in the multilateral debate in the Uruguay round. In fact, if, according to the current 'Doha development agenda' trade is supposed to lead to development 'with a view to raising standards of living'^{xvi} it must give due consideration to people and their basic needs.

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ⁱ FAO, IFAD, UNICEF, WFP and WHO. 2019. *The State of Food Security and Nutrition in the World 2019. Safeguarding against economic slowdowns and downturns*. Rome, FAO.

ⁱⁱ *Transforming our world: the 2030 Agenda for Sustainable Development*, adopted by the UN General Assembly Resolution, 25 September 2015, A/RES/70/1.

ⁱⁱⁱ *United Nations Decade of Action on Nutrition (2016 – 2025)*, adopted by the UN General Assembly Resolution, 1 April 2016, A/RES/70/259.

^{iv} *United Nations Declaration on the Rights of Peasants and Other People working in rural areas*, adopted by the UN General Assembly Resolution, 17 December 2018, A/RES/73/165.

^v This conference was held in Rome under the auspices of the UN. It was the second conference dealing with food issues at an international level. The first one was convened by President Roosevelt in Hot Springs, Virginia-USA in 1943 during WWII (Conference on Food and Agriculture). The Hot Springs Conference triggered the creation of the FAO which was established in 1945.

^{vi} FAO, *Declaration of the World Summit on Food Security*, 2009, note n. 1, available at <http://www.fao.org/tempref/docrep/fao/Meeting/018/k6050e.pdf>.

^{vii} See *Summary of main points raised at the twelfth meeting of the negotiating group on agriculture – Note by the Secretariat*, MTN.GNG/NG5/W/93, 13 January 1989, paragraph 28; and in particular *Mid-term Meeting*, MTN.TNC/11, 21 April 1989, p. 10-11.



^{VIII} See the Opening Plenary Statement of USTR Robert Lighthizer at the WTO Buenos Aires Ministerial Conference in 2017, available at <https://ustr.gov/about-us/policy-offices/press-office/pressreleases/2017/december/opening-plenary-statement-ustr>, a section of which reads as follows: «we need to clarify our understanding of development within the WTO. We cannot sustain a situation in which new rules can only apply to the few, and that others will be given a pass in the name of self-proclaimed development status. There is something wrong, in our view, when five of the six richest countries in the world presently claim developing country status. Indeed, we should all be troubled that so many Members appear to believe that they would be better off with exemptions to the rules. If in the opinion of a vast majority of Members playing by current WTO rules makes it harder to achieve economic growth, then clearly serious reflection is needed».

^{IX} Annex 2 to the Agreement on Agriculture, paragraph 3.

^X Annex 2 to the Agreement on Agriculture, paragraph 4.

^{XI} See Annex 2, paragraph 3, note 5 which makes it clear that in the case of administered prices, the difference between the acquisition price and the external reference price is accounted for in the AMS (subject to reduction). On this topic it is worth mentioning the peace clause introduced by the so-called Bali Decision (Ministerial Decision, *Public stockholding for food security purposes*, 11th December 2013, WT/MIN(13)/38), confirmed by the General Council decision WT/L/939. The subsequent Nairobi Decision WT/MIN(15)/44, December 2015 did not change the framework.

^{XII} Ministerial Decision, *Export Competition*, 19th December 2015, WT/MIN(15)/45.

^{XIII} Article 10.4, Agreement on Agriculture was not mentioned since it does not include an explicit reference to food security even though its relevance to the topic is undeniable.

^{XIV} See FAO, *Trade reforms and food security. Conceptualizing the linkages*, 2003, p. 35, according to which: 'Food security is traditionally discussed in terms of either food self-sufficiency or food self-reliance. The former requires production of food in the quantities consumed domestically, while the latter requires domestic availability. Self sufficiency rules out imports as a major source of supply while self-reliance has no such restriction'.

^{XV} See *Developing countries and non-trade concerns (prepared by Mauritius)*, Attachment 5, G/AG/NG/W/36/Rev.1; *The need for flexibility in national policy design to address non-trade concerns (presented by Norway)*, Attachment 6 G/AG/NG/W/36/Rev.1; *Summary report on the twentieth meeting of the Committee on agriculture special session – Note by the Secretariat*, 9 September 2003, TN/AG/R/10.

^{XVI} See the Preamble to the Agreement establishing the World Trade Organization.

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Aspects of Swiss Federalism in Aid of the Israeli-Palestinian Conflict

by

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Abstract

Israel is a small nation, it features natural areas that are poor in resources, has a mixed population with different languages and religions, boasts a strong army and holds a crucial geographical position: attributes shared with Switzerland. Both nations have a lot in common. Can Switzerland help the Israeli-Palestinian Conflict? Considering also recent developments in the geopolitics of Middle East, the article analyzes different elements of the Swiss federal system that might contribute to social cohesion in the Land. For example, the organization of the political government, divided in the executive (seven members from different areas of the territory, without a President or a Premier) and legislative power (with two chambers). or the federal economic system with a fiscal equalization between poor and rich zones, cooperating with Palestine and distributing resources under the control of a unique federal capital, Jerusalem. Finally, the importance of military service as a system for the integration of multiple parts of society is analysed.

Key-words

Federalism, Switzerland, Israel-Palestinian Conflict



1. Introduction

‘The history of federalism shows that it takes two to federate. That is to say, if the federation is to have any chance of success, both parties must be willing to accept the ties between them in the proper federal spirit and have a strong desire to live up to their provisions. This does not seem to be a realistic possibility under present conditions’ (Elazar 1989). These words were written by Daniel J. Elazar (1934-1999) in 1989, following the rejection of a bi-national state in Palestine first by the British Government in 1946 and then by the United Nations in 1947 (Siniver 2015: 86-91; Marzano 2018: 114-116). They were written before the Intifadas, the Oslo Accords, the Camp David Accords and the wars with Lebanon. Almost 30 years later, the situation has not progressed far beyond that description. And the same set of key obstacles seem insurmountable, unresolvable, almost obsolete: ‘symbolic and emotional demands; timing; the problem of a federal political culture; the will to act; demographic concerns; fear and mistrust between Jordan and the Palestinians; and the problem of drawing borders’ (Elazar 1989). It seems like a deadlock, offering no way out. Yet certain events in the recent history of the Middle East could bring about a change in the situation: ‘good timing’ of sorts. First of all, the Pan-Arabism project and the rise of Arab nationalism are losing their hold on the population: many years have passed since the Six-Day War, and frustration is growing among the population in the West Bank. Also, international politics is changing: United States President Donald Trump’s decision to move the US Embassy to Jerusalem (Tibon and Landau 2018) and end financial support for the Palestinian people (Mindock 2018) could be regarded as ‘stimulating’ the conflict, while Switzerland and the Netherlands have suspend payments to UNRWA (Al Jazeera 2019). The Trump administration also recently announced that Israeli settlements in the Palestinian territories are not in breach of international law (Jakes and Halbfinger 2018). The State of Israel, meanwhile, has demonstrated its commitment to improving its economic, social and security systems with a view to resolving the conflict with its neighbours (Jordan Pipeline for Israeli Gas Set for Completion by End of 2019 (Tayseer and Benmeleh 2018)). Things, then, are changing. In light of these and others developments, it is no surprise that talk has once again turned to the possibility of a federal model for Israel and Palestine. In an interview with an Italian journalist, Israel’s President Reuven Rivlin put forward the concept of a



confederation of Arab cities in the West Bank based on different tribes (Molinari 2016), while Professor Mordechai Kedar proposed that a confederation of eight states in the West Bank could represent an acceptable solution (Kedar 2012). President Trump has proposed a confederal system for Jordan and Palestine (Abu Toameh 2018), while recent laws have legalized Jewish settlements and made the division of Jerusalem impossible (Sheindlin 2018). Do these elements create fertile ground for federalism? ‘The federal government will oversee matters of security, foreign relations and macro-economic policy. The proposal does not prevent two states being created in the future, but addresses the real needs of the people who live in the land today’, explain Emanuel Shahaf and Arieh Hess, co-chairs of the Federation Movement in Israel (Hess and Shahaf 2017).

Our intention, then, is not to propose a fully federal system for Israel, and nor do we presume to offer a solution that might resolve the conflict. Our aim, instead, is to present different elements of the Swiss federal system that might contribute to social cohesion, with a focus on political, economic and social aspects. We have chosen to concentrate on Swiss, rather than American, federalism because Israel is a small nation, with a population of just under 9 million. It features natural areas that are poor in resources, has a mixed population with different languages and religions, and boasts a strong army: attributes shared with Switzerland. With its Constitution written over two years (1846-1848) following an awful, bloody civil war and rural riots caused by poverty (Maissen 2015: 214-226), Switzerland established a federal system based on a desire to cooperate, because the alternative – returning lands to France, Germany and Italy – was considered worse (De Rougement 1969: 13-14). The Swiss example would seem to confirm that ‘federalism is born first of all from necessity’ (Mueller and Giudici 2017: 9), but can it be of benefit to Israel? And if not, what is the alternative?

2. Federalism

Various aspects of federalism can help resolve stalemate situations in which neither side wishes to relinquish any of its sovereignty, considering it to be equally valid and vital. The solution sought in such cases should not reduce the terms for a single party (often the poorest one) or lead to subordination; rather, it should create conditions that incorporate and satisfy the needs of all (De Rougement 1969: 13-14; Duchacek 1988: 11).¹ In fact, both Arabs and



Jews have a right to remain in Israel/Palestine. Ahad Ha'am (1856-1927), whose ideas inspired the *Brit Shalom* Association, founded in Jerusalem in 1925, believed that Jews had a 'national right' to remain in the land, while Arabs had the 'right of residence' (Marzano 2018: 101-103). This led to efforts to compromise and establish a bi-national state of Palestine, a project later taken up by Judah Leon Magnes (1887-1948) who developed a 'federal states of Palestine' plan to be proposed to the UN in 1947, before the decision was made to divide into two states (Magnes 2010). Given the impossibility of reconciling the rights of the two peoples, attempts were made on various occasions to propose federalism, or a modified version thereof. The concept of federalism seeks to bring together various aspects of the societies that find themselves sharing the same territory, demonstrating the advantages of collaboration and compromise. Israeli society is a multicultural entity made up of people from different parts of the world, which can benefit from a political system of this kind (De Rougement 1969: XVIII; Linder 2010; Basta and Fleiner 1996). According to Stéphane Dion, Canadian Ambassador and Special Envoy to the European Union, 'il est d'ailleurs conforme à l'esprit du fédéralisme que d'encourager les identités plurielles' (Dion 2017).

2.1. Political Government in Switzerland

The first element of Swiss federalism that might be of benefit to this area of the Middle East is the organization of the government, divided into executive and legislative powers.

Executive power in Switzerland is held by seven members representing seven departments (Foreign Affairs; Home Affairs; Justice and Police; Defence, Civil Protection and Sport; Finance; Economic Affairs, Education and Research; Environment, Transport, Energy and Education) and a Chancellor. All seven members meet to decide upon significant issues for each ministry, and make decisions by mutual agreement. No one can pass resolution without the consent of the entire government. Decisions cannot be made unilaterally. They receive a four-year mandate that can be renewed, voted upon by the two federal chambers. The elected President of the Confederation remains in office for just one year (on a rotation basis) and only represents the Government externally (he or she does not hold power over the other members). The executive in Switzerland is collegial and representative of society, with members from the various cantons, cultural zones, and major political parties. Its remit is to find solutions through collaboration and mediation (Koller and Thuere 2012: 34), and by consulting Parliament and the business world. A similar



executive system could operate in Israel, with seven members representing the various groups within the society (drawn, for example, from the Arabic, Russian, Ashkenazi Jewish, Sephardic Jewish, and Latin Catholic communities).

Legislative power in the Confederation is divided across two chambers: the National Council and the Council of States. The first represents the Swiss population and consists of 200 deputies (one per 37,500 inhabitants). The number of deputies for each canton is proportional to the size of its population (Zurich has the most members at 35, while Appenzell has just one). The second chamber, meanwhile, operates according to an egalitarian system: each canton has two members, regardless of its size (with the exception of semi-cantons, which have only one¹¹), and therefore has a total of 46 deputies. This important chamber redresses the potential for imbalance between bigger and smaller cantons in the decision-making process. Finally, the two federal chambers are elected by the Swiss people (Mueller and Giudici 2017: 46-48).

The Swiss system is the only of its kind in the world, and might usefully be applied in Israel to resolve the significant problem of demography in a democratic state. If the Jewish population were no longer the majority, justifying a Jewish ‘democratic’ state could be problematic (Segre 2006; Della Pergola 2007). If the two federal chambers hold equal decision-making power, however, then demography plays a secondary role (limited to the second chamber). Decisions cannot be made without consulting the other chamber (based on the egalitarian system). If Israel were divided according to its existing districts (based on Israel CBS and Palestine PCBS figures published in 2018), and membership of the ‘National Chamber’ assigned in accordance with the Swiss model (one member per approximately 40,000 inhabitants), the composition of the ‘Israeli Federal Parliament’ would be as follows:

District	Population	No. of Members, National Council	No. of Members, Council of States
Jerusalem D.	1.108.900	27	2
Northern D.	1.425.700	35	2



Haifa D.	1.013.900	25	2
Central D.	2.157.500	53	2
Tel Aviv D.	1.406.400	35	2
Southern D.	1.272.100	31	2
West Bank D.	2.881.957 ^{III}	72	2
Gaza D.	1.899.291	47	2
Tot. No.	13.165.748	325	16

Percentage of members from 'Palestinian Districts'	36,6	33,3
Percentage of members from 'Israeli Districts'	63,4	66,6

Based on the above calculations, the National Council would have 325 members (36 percent from Palestinian territories and 63 percent from Israeli Districts), while the Council of States would have 16 members. This would address demographic misgivings regarding the growth of the Arab population, as the two chambers would retain equal status. Even if the latter grew faster than its Jewish counterpart, leading to an increase in the National Council, membership of the Council of States is fixed to two representatives for each district, ensuring that the balance would remain^{IV}.

This would also redress rural areas' concerns regarding lack of political representation (an issue raised in relation to Eilat and the Negev region, for example, Mahler 2016: 123) enabling their issues to be discussed in the federal chambers.

2.2. Judicial Power

Let us now consider the third branch of power in a democracy. Judicial power is important because of its independence from policy-making and because it guarantees equality for all citizens. In a federal system, it serves an additional valuable function: based on a decentralised model, the various branches of the Swiss Federal Courts are located in different cantons, to ensure the involvement of the whole nation. In Switzerland, the Federal Court is the Supreme Judicial Authority for civil, criminal, administrative and constitutional



matters; it has administrative autonomy and is subject only to the law (as stated in art. 188 of the Federal Constitution). Its seven courts are located across three cities, corresponding to Switzerland's three linguistic cultural zones: two public law and two civil law courts are located in Lausanne (a French-speaking city), two social security courts are based in Lucerne (in the central, German-speaking region), while the criminal court is located in Bellinzona (in the Italian-speaking area). St. Gallen has a patent court and federal administrative court^V. The Federal Supreme Court 'oversees' the uniform application of federal law in the various cantonal courts; federal judges do not review the facts (unless a serious error has been made), but merely examine whether cantonal judges have acted in accordance with the constitution and the law. The Federal Supreme Court is the court of last instance. As of 1 January 2009, the Confederation requires cantons to resolve local matters through the cantonal courts. Each canton therefore has its own court, with the same remit as the Federal Court but on a local level. The Constitution of the Canton of Ticino, for example, includes the following passage: 'They decide independently and are bound by law; they cannot apply cantonal rules that are contrary to federal law of the cantonal constitution'^{VI}.

A similar arrangement could be introduced in Israel, improving the general decentralisation of the major courts. The current system provides for a Supreme Court and courts in each district. The Supreme Court 'shall hear appeals against judgments and other decisions of the District Courts' and

shall be competent to [...] order State and local authorities and the officials and bodies thereof [...] to do or refrain from doing any act in the lawful exercise of their functions, [...] to order courts and bodies to hear, refrain from hearing a particular matter or to void a proceeding improperly taken; to order religious courts to hear a particular matter within their jurisdiction or to refrain a particular matter not within their jurisdiction, [...] the court may quash a proceeding taken or a decision given by the religious court without authority^{VII}.

Similar to the Swiss system, then, Israel's Supreme Court holds authority over and supervises the district, magistrate, labour and religious courts (Groppi et al. 2006: 234-74). A notable divergence from the Swiss system is the existence of religious courts, subdivided by religious faiths (rabbinical, Islamic, Druze and Christian). A legacy of the Ottoman 'millet' system, they deal with issues pertaining to individuals' personal status, such as marriage and family inheritance (De Bernardi 2011: 49; Quer 2011: 67-70)^{VIII}. This inherited system was



designed to protect private and personal aspects of the lives of subjects (who later became citizens), preventing interference with either religious minorities or the Jewish majority when the state of Israel was founded. In a progressively secularised society, religious courts are increasingly at odds with non-religious communities. Examples of this are civil marriages celebrated in Cyprus, or state-approved conversions not recognized by the courts: in 2014, 364,000 Israeli inhabitants from Russia were recognised as Jews by the State but not under the Halakha (Jewish law). Will the Supreme Court and the religious courts collaborate in future, for the good of society? Possibly so, as things already appear to be changing:

the court has recognized marriages of Israeli residents performed abroad as well as private ceremonies of individuals forbidden to marry; [...] also recognized the right to alternative burial, years before the Knesset set this right into law. [...] In the Kaplan case, the Supreme Court ruled that public television could operate on the Sabbath. [But...] there are also cases in which the Supreme Court hesitated to intervene, preferring to leave the decision in the hands of other bodies. One example is the issue of conversion [...] or the issue of drafting yeshiva students.

As regards Judicial Power, things are beginning to move, gradually, ‘in light [of] processes underway in Israeli society’ (Shetreet 2001).

3. Federal economic system

What can we say about the economy? Today, Israel is considered ‘an economic miracle’ due to the ‘resourceful use of substantial capital imports over the years coupled with the country’s success in rapidly and productively absorbing immigrants’. Over the last five years, average annual growth of 3% has been recorded. The unemployment rate of 4.2% is down compared to 2016 (4.8%), as is public debt, which is below 60% of GDP. The inflation rate remains very low (0.4%). Israel is also referred to as the “start-up nation”, thanks to the proportion of investments in research and development, equal to 4.3% of GDP. These figures make Israel the world leader in terms of start-ups per inhabitant. In 2017, exports increased by 3.5% (41.2 billion euros), and imports increased by 8% (55.3 billion euros) (Diplomazia Economica Italiana 2018).

Israel has a solid and dynamic economy, then, despite military conflicts and wars with its neighbours. What is the nature of its relationship with Palestine in this regard?



The Palestinian economy is overwhelmingly dependent on Israel. At the same time, the ongoing conflict with Israel has a huge economic cost on the Palestinian economy – in both the West Bank and Gaza. Since the First Intifada in 1987-1993, the Palestinian economy has experienced three decades of economic losses, with little change of recovery now in sight. An in-depth study in 2015 estimated lost Palestinian GDP growth over the two preceding decades at around half of the potential growth under non-conflict conditions. [...] Israel is the Palestinians' largest trade partner, although there has been a significant increase in Palestinian trade with other markets in recent years. Since the mid-1990s, Israel has been an almost exclusive destination for Palestinian exports, taking on average more than 90 per cent of total Palestinian exports of goods, including unregistered exports (Gal, Yitzhak and Rock, Bader 2018).

Meanwhile, much of the workforce employed in companies and factories in Israel comes from neighbouring territories. Recent studies indicate that the economic relationship between the neighbours is waning: collaboration is required in different fields^{IX}.

But what was the original economic project for Israel and Palestine?

Despite the partition plan, Resolution 181 of the UN General Assembly concerning the 'Future government of Palestine', adopted on 29 November 1948, demonstrated a will to establish economic collaboration for the good of both States:

The objectives of the Economic Union of Palestine shall be: (a) A customs union; (b) A joint currency system providing for a single foreign exchange rate; (c) Operation in the common interest on a non-discriminatory basis of railways; inter-State highways; postal, telephone and telegraphic services, and ports and airports involved in international trade and commerce; (d) Joint economic development, especially in respect of irrigation, land reclamation and soil conservation; (e) Access for both States and for the City of Jerusalem on a non-discriminatory basis to water and power facilities^X.

More than a mere collaboration between the two States, it was envisaged as an 'Economic Union', particularly as regards transport, public services such as communication, and natural resources. The latter is fundamental for uniform growth, without discrimination between richer and poorer districts: the Southern District, for example, where Negev is located, has few natural resources due to its climatic conditions (Della Pergola 2007: 120; Mahler 2016: 123), giving rise to a dramatic imbalance of population, resources and urban infrastructure. The UN, then, envisaged an 'Economic Union' in which districts would support one another, to avoid inequality in terms of economics and development. An example of such a system,



based on mutual cooperation for the general welfare of the country, can be found in Switzerland.

Switzerland has rich and poor cantons for three main reasons: 1) differences in tax collection capacity, as production activities, tax payers, real estate and natural resources are not evenly distributed across the territory); 2) differences in service production costs in the various areas, mainly attributable to the geographical and territorial characteristics of the cantons; 3) differences in socio-demographic composition, whereby populations with a greater proportion of minors compared to older citizens will receive less contributions. The official web site of the Confederation states that

[r]esource equalization is based on the resource potential of the cantons. It is made up of the taxable income and assets of natural persons and the taxable profits of companies. The potential levels are used to divide the cantons into financially strong and financially weak cantons. Financially weak cantons receive freely disposable financial resources from the financially strong cantons (horizontal resource equalization) and from the Confederation (vertical resource equalization). Tax competition is maintained in the process. Cost compensation concerns excessive costs associated with geographical/topographic and socio-demographic factors which, for structural reasons, result in higher costs for the provision of public goods and services. The Alpine cantons, for instance, incur greater winter road maintenance costs (Federal Department of Finance 2019).

Israel also has poorer districts (such as the Southern district including the Negev region, largely as a result of geographical/topographical factors) and richer districts (such as the metropolitan area of Tel Aviv). A vision of fiscal equalisation between districts in Israel and Palestine would see taxes becoming the primary resource, supported by the federal system as a secondary resource. It would establish a system of collaboration in the fields of economics and taxation that would benefit both parties in the region, in keeping with the initial plan contained in Resolution 181 of 1947. The distribution of resources to aid uniform growth, as happens in Switzerland, would fall under the control of a specific economic commission in the federal capital: Jerusalem.



4. Federal capital: Jerusalem

In light of recent decisions by certain major governments and international organisations, discussing Jerusalem as capital may seem counterproductive and provocative. When US Vice President Mike Pence confirmed that the US Embassy would be moved to the Knesset in Jerusalem, Prime Minister of Israel Benjamin Netanyahu told him they were on the right side of history, while Arab deputies displayed a banner stating ‘Jerusalem is the Capital of Palestine’ (Davidovich 2018).

The problem, in fact, lies not in recognising Jerusalem as the capital, but rather in identifying its ‘owner’. The symbolic importance of this land is beyond dispute: both Israel and Palestine want Jerusalem as capital, primarily for religious reasons. Regarded by the former as the capital of the Kingdom of David since 1000 BC, its significance to the latter derives from its status as Islam’s third most sacred site, while Christians consider it a holy place in the life of Jesus. UN Resolution 181 recognised its multifaceted importance, giving it international status:

The City of Jerusalem shall be established as a *corpus separatum* under a special international regime and shall be administered by the United Nations. The Trusteeship Council shall be designated to discharge the responsibilities of the Administering Authority on behalf of the United Nations.

Continually seeking to balance the interests of Arab Christians and Muslims on one side, and religious and secular Jews on the other, makes resolving the issue of its *status* difficult. The UN proposes that Jerusalem could be a separate, independent body with its own police force. Della Pergola, meanwhile, suggests Jerusalem can aspire to be: the capital of a predominantly Jewish State and a capital of the Jewish world; a great multicultural and multi-religious metropolis, of importance to the three monotheistic religions; the capital of a predominantly Arab Palestinian State (Della Pergola 2007: 204-208). Which of these alternatives is the most attractive? Which possibility might lead to less wars and greater collaboration for the common good of its inhabitants, while avoiding mass migration?

In keeping with the position adopted in this paper, we would support the second solution: Jerusalem as the capital of a federal district system in Israel. Both peoples lay claim to the city, and neither wants to relinquish it. If Jerusalem were to become the capital of



both, with a government and various ministries, it would belong to both. In our opinion, both would benefit in different ways. For Palestine, it would mean peace for the settlements and security in the area, while for Israel it would increase the importance of its second political core (after Tel Aviv). Jerusalem, in fact, is also of strategic and economic significance for Israel and Palestine's development: 'Jerusalem is a unique city, and part of its uniqueness come from its several and varied neighbourhoods. Although the whole may be greater than the sum of its parts, it is clear than the loss of some would diminish the character of the whole' (Mahler: 322-23).

Otherwise, the situation will remain unchanged: the government of Israel will recognise Jerusalem as its 'complete and united' capital in accordance with the 'Basic Law: Jerusalem, Capital of Israel' passed in 1980, and the Palestine Liberation Organization will consider Jerusalem to be the capital of the Palestinian state, as declared in Palestine Declaration of Independence in 1988.

In this context, it is interesting to note that the decision to establish Bern as the capital of Switzerland also derives from a religious war, albeit without the symbolic significance surrounding Jerusalem, which is entirely unique. Lucerne was originally favoured as federal capital due to its geographical centrality and because its selection would have led to approval of the new nation by 'ancient Switzerland'. The canton was subsequently ruled out, however, as it had been a leader in the *Sonderbundkrieg* – a civil war between Catholic and liberal cantons that had ended the year before the birth of Confederation (1847) – and because the majority of its population did not support the new federal constitution, leaving Bern and Zurich as candidates. The latter was already a cosmopolitan power with excellent infrastructure, and making it stronger would have created significant disparities between cantons. Neither famous nor economically strong, Bern was chosen because it could grow and be presented as a capital for all citizens.^{XI} In another context, in another time, and involving different religions, Jerusalem should be the capital of all citizens in this part of the world, because each considers the city 'to be their own': a very important theoretical basis for the establishment a federal capital (Di Marco 2018). Jerusalem would serve as the '*corpus separatum*' that unites and controls the collaboration between Arab and Israeli districts.



5. Defence: Army

The State of Israel is often the focus of international news for many reasons: its military strategy, its patronage relationship with the US, its natural resources and the recent agreements with neighbouring Arab states, such as Egypt and Saudi Arabia. It holds a crucial geographical position in the Middle East; not only as the meeting place of multiple religions, but also for economic, political and financial reasons. It is fundamental to ‘protect’ this crucial position with an internal, stable society, despite its multiculturalism.

And building a multicultural united society requires other elements, including a large, strong army, another aspect that Israel shares with Switzerland.

In his proposal for the Jewish state, Herzl wrote: ‘The Jewish State is conceived as a neutral one. It will therefore require only a professional army, equipped, of course, with every requisite of modern warfare, to preserve order internally and externally’^{xii}. A strong, modern army is required for an extended family like Israeli society, based on tribal and ethnic-religious interests, for two main reasons: internal security and to improve social cohesion. This is still the case today in Switzerland: compulsory military service for young males over the age of 18 is an opportunity discover the various parts of the country. Soldiers from (Italian-speaking) Ticino are often sent to Swiss German regions, while soldiers from (French-speaking) Lausanne are sent to regions in Graubünden, and so on. Through military service, the Confederation seeks to create a union among soldiers from the various regions, promoting a sense of belonging to the nation^{xiii}.

Israel has a similar system. Regarding new immigrants to Israel, the IDF website states that

[r]ecruits with incomplete educational backgrounds are given opportunities to upgrade their level of education, and career officers are encouraged to study at the IDF’s expense during their service. The integration of new immigrant soldiers is facilitated through special Hebrew-language instruction and other programs. Active in nation-building enterprises since its inception, the IDF also provides remedial and supplementary education to civilian populations and contributes to the absorption of newcomers among the population at large^{xiv}.

The army facilitates integration because it introduces soldiers to different fields and areas of society. To understand the relevance of the army, it is worth noting that in 2017, Israel



spent 4.7 % of its GDP on the military (defence spending totalled 19.6 billion in 2017, a two billion dollar increase from the previous year) (Ahronheim 2018).

Discussions around defence and the army not only focus on spending – and whether it is necessary to spend so much – but also on compulsory service, aimed at defending the Biblical Jewish State (Mahler 2016: 269). Military service is mandatory for Jewish Israelis (both male and female), but not for non-Jewish Israelis (i.e. Arab Israelis, whether Muslim or Christian), for religious, ethnic and political reasons (they could not engage in combat with their fellow Arabs). This separation in society is less pronounced among younger generations, with a greater number of young Arab Israelis seeking to join the army in recent years (Corbin 2016); the vast majority of the non-Jewish population do not perform army service, however, as they feel discriminated against, and do not enjoy the same privileges and advantages in society (Speyer 2014). The Druze Muslim minority are an exception in this regard; they have served Israel in the army, in exchange for protection, since the establishment of the State, and continue to serve, despite the recent approval of the Nation-State Law by the Knesset in July 2018, which they also perceived as discriminatory. The situation of the Haredi community (particularly in Jerusalem) is more complicated: following the decision of the Supreme Court on 12 September 2017 to remove their total exemption from any military service, there were debates as to their role^{xv}. In fact, ‘the Ultra-Orthodox do not consider military service a vital need because they claim that Torah study protects the state of Israel no less than military service, and so there is no justification for leaving the *yeshiva* in order to serve in the army’ (Sapir and Statman 2019: 217). Yet there is no specific *Halakhic* ban on military service, preventing political leaders in particular from believing the reported motivations. The debate remains open (Sapir and Statman 2019: 213-224).

Israel is a multicultural society, with different culture and faiths. Collaboration among the various sections of the population is fundamental to the stability of the state over time (Mahler 2016: 272; Grief 2008)^{xvi}. Arab Israelis’ reluctance to join the army out of fear of fighting against their brothers is understandable but, as noted at the beginning of this short paper, the Israeli policy is changing. In recent days, Netanyahu was engaged in seeking ‘non-aggression’ agreements with neighbouring countries (Gadzo 2019): if engaging in combat with their fellow Arabs was removed from the equation, could Arab Israelis serve in the army? It might represent a good turning point.



6. Problems and perspectives

The Middle East is changing in terms of international policy and laws, internal dynamics among nations (with the discovery of natural resources) and the balance of power in accordance with the relevant interests. Israel is at the centre of the Middle East: it understands partnerships with powers (previously the USSR, later the US) and knows that it is a strategic nation for maintaining international balance. Precisely because of its very specific nature, it requires internal stability that facilitates social cohesion.

In light of its size, multiculturalism and strategic importance, this paper aimed to present some essential aspects of the Swiss system that might be applied to resolving the Israeli-Palestinian conflict.

We first considered the organization of federal power, divided into three branches. We examined the executive branch, a seven-member collegial government whose decisions must be made collectively, without a president or prime minister. Different groups from across the country are represented, as elected by the federal chambers. The legislative branch, meanwhile, is subdivided into two federal chambers, one based on the proportional system, according to the size of the population, and the other featuring two representatives from each canton. In this way, a balance of power is achieved between big cantons, such as Zurich with more than one million inhabitants, and small cantons such as Ticino, with 330,000 inhabitants. This system may usefully be applied to Israel, by dividing the territory into different districts, which each elect their own deputies. Rural areas such as Eilat and Negev would also be represented in the federal government. As regard judicial power, finally, we considered the importance of locating courts across the territory, to create cohesion and collaboration among different districts. The biggest obstacle in this regard is the relationship between the state and the religious courts, but scholars suggest that some progress is being made in this area.

We proposed that Switzerland's economic system might also be applicable to Israel. The latter's economy is growing every year thanks in large part to technology, research and development. This growth would be even greater if spending on military conflicts was cut, particularly those involving neighboring states. Federal-style cooperation with Palestine, which depends on Israel for 90 percent of its exports, would be of benefit to the whole



region. It would also be of benefit to all districts, with distribution of all resources under the control of a single federal capital, Jerusalem.

In order to achieve social cohesion in a population with different cultures and mentalities, the capital must be for everyone, available to all and meet the needs of all. Otherwise, the state will remain fragmented, based on emerging political forces. A capital should serve as a central part of a federal state, granting freedom to the districts but defended by a strong and stable army. This is the final aspect proposed in this paper: Like Switzerland, Israel has a professional army that gives young people the chance to get to know each other, work together and trust each other, regardless of faith or culture. The army offers an opportunity to build a new generation of Israelis, recruited from across the territory, defending their land as a whole.

As mentioned in the introduction, we do not wish to propose a fully federal system for Israel, and nor do we presume to offer a solution to the conflict; we are aware that authoritative figures have been proposing federalism for the region throughout the history of the State of Israel. The final report of the UNSCOP presented on 31 August 1947 supported Independence for Palestine based on two different plans: partition and federation. 'Partition was the most practical and realistic as to afford both communities the change to pursue their national aspirations', thus seemingly offering the only hope of removing the issue from the arena of conflict (Siniver 2015: 86). But, following introduction of the partition with Resolution 181, wars broke out. What is the current situation? Ahad Ha'am wrote of a *national right* for Jews and a *right of residence* for Arabs. Precisely due to their coexistence and resistance to relinquishment on both sides, a compromise had to be made in the form of a bi-national state. These two rights still coexist. And both populations also have national, ethnic and religious claims, while suffering from a lack of legitimacy and therefore sovereignty. For Jewish people, historical factors (pogroms in Eastern Europe and the Shoah, as well as failure to integrate into European societies (Calimani 2002: 433-471)) support theological reasons (Weizmann 1971: 62)^{xvii}: biblical thought has been central to the establishment and running of the state of Israel. And while religion may contribute to social cohesion in some countries, everything is more complicated in Israel: Jews came (and come) from different parts of the world, bringing different worldviews. For Palestinian people, meanwhile, issues revolve around the Nakba catastrophe: the loss of their land and the desire to claim it back (Della Pergola 2007: 236; Alimi 2007: 45)^{xviii}. Neither population enjoys



‘univocal legitimacy’ in the eyes of their Arab neighbours or world states, who are divided according to political and economic convenience. Finally, the narrative that has emerged on both main sides in recent years has increasingly contributed to instilling hatred in younger generations. This narrative, complete with fictional historical facts, separates rather than unites, giving rise to dangerous ideologies (Maissen 2015: 80)^{XIX}.

These complications are not easily resolved, particularly in the current situation of political stalemate: Israel risks returning to the polls for a third time if no agreement is reached between the major leaders of the elected parties (Heller 2019). A new social cohesion development project that can withstand current challenges could represent a turning point, because after all, ‘what would be the alternative?’^{XX}.

The Middle East zone is changing for the international policy and laws, for the interior play among nations (with the discovery of natural resources) and for the balance of power according to the interest. Israel is in the middle of the Middle East: it knows what it means partnership with powers (before with URSS, after with US) and it knows that it is a strategic nation for the international balance. But, precisely of its particularity, it needs internal stability that promotes social cohesion.

In this contest, due to its territorial dimension its multiculturalism and its strategic importance, it was our aim to present some essential points of Switzerland that can help the Israeli-Palestinian conflict.

In the first point, we proposed the organization of the federal power, divided in three parts: in the executive, a collegial government formed by seven members, who cannot take decisions without consulting all of them, there is therefore no president or prime minister as in a Republic (different groups from the whole territory can be represent, elected by the federal chambers); in the legislative, subdivided into two federal chambers, one is based on the proportional system, depending on the population, and the other one establishes two representatives for each canton, district. In this way, in Switzerland it is balanced the power of the big canton (as Zurich with more one million of inhabitants) compared to small cantons (as Ticino with 330 thousand inhabitants). For Israel it can be useful and helpful dividing the territory in different districts and proposing to vote own deputies. Also, the rural areas (as Eilat and Negev) will be represented in the federal government. For the judicial power, the third one, it is important to extend the courts in whole territory, in order to create the cohesion and the collaboration between different districts. The big obstacle with this power



is the relationship between the state and the religious courts, but something is moving also in this field according to scholars.

We proposed not only a similar political system as in Switzerland for Israel, but also a similar economic one. Israel's economy is growing every year thanks to technology, research, development and so on. It could even more if it did not spend in military conflicts especially with neighboring states. If it cooperates with Palestine, which depends on Israel for 90 percent of the export, in a federal system the whole region would benefit. Indeed, all the districts would benefit, in a collaboration between poor and rich zones, distributing resources under the control of a unique federal capital, Jerusalem.

In order to reach a social cohesion in a population with different cultures and mentalities, it is important to have a capital that is for everyone, available to all, that meets the needs of all. Otherwise, the state will remain fragmented according to the emerging political forces. A capital, central part of a federal state from which liberty is released to the districts but defended by a strong and stable army. And this is the last aspect we proposed in the paper: as in Switzerland, Israel has a professional army thanks to which young people can get to know each other, work together and trust each other, regardless of faith or culture. Army can be a good opportunity to create a new generation of Israelis fighting and defending their land, all the land, recruited from all the districts of the territory.

As we wrote in the introduction, we do not want to propose a complete federal system for Israel, and we have not the presumption of resolving the conflict, but as we know there have been authoritative voices that have proposed federalism for this region in the history of the State of Israel. The final report of the UNSCOP presented on August 31 granted the Independence of Palestine following to different plans: partition and federation. 'Partition was the most practical and realistic as to afford both communities the change to pursue their national aspirations', so this scheme seemed the only hope of removing the issue from the arena of conflict (Siniver 2015: 86). But, after the passing of the partition with the Resolution 181, wars broke out. Now, where are we? Achad Ha'am wrote about a *national right* to Jews and a *right of residence* for Arabs. Precisely because of their coexistence and the lack of renunciation on both sides, a compromise had to be made for a bi-national state. These two rights still coexist. And both populations have also national, ethnic and religious claims, suffering from a lack of legitimacy and therefore sovereignty. For Jewish people, the historical reasons (pogroms in Eastern Europe and the Shoah, and failure to integrate into



European societies (Calimani 2002: 433-471)) support theological ones (Weizmann 1971: 62)^{xxi}: the establishment and life of the state of Israel have always been accompanied by biblical thought. And even if religion in some countries can be a factor of social cohesion, everything is more complicated in Israel: Jews came (and come) from different parts of the world with different mentalities. For Palestinian people instead, there is the question that revolves around the catastrophe of the Nakba: the loss of their land and the will to claim it back (Della Pergola 2007: 236; Alimi 2007: 45)^{xxii}. Both populations do not find ‘univocal legitimacy’ (among them, from their Arab neighbours and world states are divided according to political and economic convenience). Finally, the narrative (on both main sides) that has been created in recent years generates more and more hatred in the new generations. A narrative (with fictional historical facts) that separates rather than unites developing dangerous ideologies (Maissen 2015: 80)^{xxiii}.

These listed complications are not easily solved, especially in this period of political stalemate: Israel risk returning to the elections a third time, if there is no agreement between the major leaders of the voted parties (Heller 2019). The project of a development for a new social cohesion that can face the challenges of today can be the turning point, also because ‘what would be the alternative?’^{xxiv}.

. One of the reasons used extensively by the Remain side during the Brexit debates was that leaving the EU would be financially damaging for the UK.^{xxv}

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ⁱ Writing almost 30 years ago, Ivo Duchacek observed that, given Israel’s two strong national and religious communities, (Arabs and Jews), cohabitation must be pursued, despite the obstacles, because they live in the same territory and neither side wishes to relinquish its right to exist (Duchacek 1988: 11).

ⁱⁱ The semi-cantons are Obwalden, Nidwalden, Basel Stadt, Basel Landschaft, Appenzell Ausserrhoden and Appenzell Innerrhoden.

ⁱⁱⁱ We insert the data of Palestinian Authority in order to understand the whole territory of West Bank and not only the areas of Samaria and Judea.

^{iv} The wellness of Israeli’s Prime Minister Benjamin Netanyahu to annex part of the West Bank’s territories can be analyzed from this point of view; not just as an election promise. (Holmes 2019)

^v For more information on the remit of each court, see Bundesgericht. ‘Bundesgericht’, www.bger.ch/index.htm.

^{vi} ‘Constitution of the Republic and Canton Ticino’, Article 73(2), www.admin.ch/opc/it/classified-compilation/20012210/index.html.

^{vii} Knesset. 1984. ‘Basic Law: The Judiciary’, www.knesset.gov.il/laws/special/eng/basic8_eng.htm.

^{viii} This status was considered of divine origin, and therefore untouchable, by the Ottoman Empire. Since the law could not be applied to non-Muslim subjects, the Caliph preferred to set up religious courts that would take care of the faithful of the other two ‘Religions of the Book’. (De Bernardi 2011: 49. See also Quer 2011:



67-70).

^{IX} Also for the donations: 'In the absence of any viable political settlement, which would resolve the major contentious points of the conflict, provide equal, independent policy and governance space to both parties, clearly define the role of "third parties" and donors, and finally, would bring an end to the occupation, aid cannot play the function of an instrument for economic development or peace-building' (Taghdisi-Rad 2011: 200)

^X 'Resolution 181 (II). Future government of Palestine', <https://unispal.un.org/DPA/DPR/unispal.nsf/0/7F0AF2BD897689B785256C330061D253> (29 November 1947).

^{XI} See Historisches Lexikon der Schweiz. 'Bundesstadt'. www.hls-dhs-dss.ch/textes/d/D10102.php.

^{XII} Herzl, 'The Jewish State', www.jewishvirtuallibrary.org/quot-the-jewish-state-quot-theodor-herzl.

^{XIII} Of course, it has not always been this way. The first time the Swiss army fought a foreign power, rather than in a civil war, was in 1838. 'For the first time that century, the Swiss federal army clearly manifested its intention to protect Swiss neutrality in the face of the threat from France to intervene militarily in the country; it was an unmistakable demonstration of confederal solidarity. It seems that the reasons for the fundamental reform of the military structure can be found in the strong tradition of mutual understanding developed by five centuries of collective security policy' (Eschet-Schwarz, André. 1994. "Can the Swiss Federal Experience Serve as a Model of Federal Integration?". *Constitutional Design and Power-Sharing in the Post-Modern Epoch*, ed. Daniel J. Elazar, 176. D.J. (ed), Lanham: University Press of America). It is interesting that in this period, the army was a militia and two men were recruited for every hundred inhabitants on the basis of economic quotas. Only in 1874 did the obligation extend to all young males. (See Senn, Hans 2002: 536-42).

^{XIV} Israel Ministry of Foreign Affairs. "The State: Israel Defence Forces (IDF)". www.mfa.gov.il/mfa/aboutisrael/state/pages/the%20state-%20israel%20defense%20forces%20-idf-.aspx.

^{XV} Agencies. 2017. 'Israel arrests 36 protesters seeking end to compulsory military service'. *TRTWorld*, 26 November. www.trtworld.com/mea/israel-arrests-36-protesters-seeking-end-to-compulsory-military-service-12638.

On March 2018, a bill calling for the exemption of yeshivot students from military service provoked threats of dissolution of the coalition government. (Agencies. 2018. 'Haredim e l'esenzione dalla leva, una legge che divide il governo'. *Moked*, 12 March. <http://moked.it/blog/2018/03/12/haredim-lesenzione-dalla-leva-legge-divide-governo/>).

^{XVI} The situation is also complicated due to the problem of boundaries in Israel which have not been internationally recognized (see Mahler, Gregory S. 2016: 272; Grief, Howard 2008).

^{XVII} Chaim Weizmann wrote against the Uganda Plan: 'To exchange Zion for another country is impossible for us because Zion is interwoven into our entire history and only there can we realize what is told in an ancient legend about a giant whose strength was restored by contact with the earth. When the Jewish people comes into contact with its historic land again, it will once again become the eternal people as it was formerly' (Weizmann, Chaim. 1971).

^{XVIII} 'Nationalism is one such political consciousness. Palestinian nationalism began to develop prior to the occupation and outside what was later to become the occupied territories'. (Alimi, Eitan. 2007: 45).

^{XIX} In Switzerland too, we have a narrative that helps to create social cohesion, a patriotism built upon different episodes from our history to create heroes (Maissen, Thomas 2015: 80).

^{XX} The new Nation-State Law approved in 2018 may further divide society rather than uniting it. It must be remembered, however, that Israel has always defined itself as "Jewish and democratic": with this law, Israel reaffirms its essential belonging to Jewish culture without neglecting the democratic and secular aspect. (Cf. Oz-Salzberg, Fania 2018; Shoval, Zalman 2018)

^{XXI} Chaim Weizmann wrote against the Uganda Plan: 'To exchange Zion for another country is impossible for us because Zion is interwoven into our entire history and only there can we realize what is told in an ancient legend about a giant whose strength was restored by contact with the earth. When the Jewish people comes into contact with its historic land again, it will once again become the eternal people as it was formerly' (Weizmann, Chaim. 1971).

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(Cfr. Oz-Salzberg, Fania 2018; Shoval, Zalman 2018)

^{xxv} A MORI poll in May 2016 showed that 88% of the UK's most prominent economists believed that a UK exit would be financially damaging (Ipsos MORI 2016).

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Devolution and Peacebuilding in Kenya, fact or illusion?

The case of Marsabit County

by

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Abstract

Devolution and the associated mechanisms of governance, such as power-sharing, limited government, a reformed system of public administration and civic engagement, and its features that include the protection of minorities, inclusivity and socio-economic development, are all parts of the wider mosaic of peacebuilding. In Kenya, the devolution of political, fiscal and administrative powers to 47 counties is built on the promises of enhancing democracy, building peace, and ensuring the equitable distribution of resources. This article investigates whether devolution has delivered on the promise of greater inclusion, accountability and peace in the Marsabit County. The investigation revealed that the adaptation of a devolved system in Kenya has radically transformed Marsabit County: socio-economic development has improved, and significant progress is recorded in the health and education sectors. Critical challenges remain and these include the prevalence of ethnic conflict, endemic corruption, limited resources, an inequitable distribution of resources and non-inclusivity.

Key-words

Kenya, devolution, ethnic conflicts, Marsabit, Socio-economic development, Resource distribution



1. Introduction

Decentralisation is increasingly viewed as a potential solution to some of the problems that Africa is facing (Bancati 2009). In Kenya, the devolution of political, fiscal and administrative powers to 47 counties is built on the promises of enhancing democracy, ensuring the equitable distribution of resources, the inclusion and participation of minorities in government, as well as enhancing checks and balances, and protection of the separation of powers (Ghai 2015). Debates over federalism and decentralisation took place in Kenya at independence in 1963 with the nation initially establishing a devolved government commonly referred to as ‘*Majimbo*’ (Nabwire 2018 & Gertzel et al. 1969). Thus, Kenya’s first constitution provided for *Majimboism* with a central government and seven regional administrations (Coast, North-Eastern, Eastern, Nairobi, Rift Valley, Western and Nyanza). The executive authorities were vested with a Governor (Article 72(1) of the Kenya Constitution 1963) and a Prime Minister (Article 75(1) of the Kenya Constitution 1963) with regional executives at the regions’ headquarters. In addition, the legislative authorities were vested with two houses of parliament – the Senate and the House of Representatives (Article 34(2) of the Kenya Constitution 1963). Nonetheless, political leaders and elites were divided on the suitability of *Majimboism* or any form of decentralisation in Kenya. During negotiations an ideological split emerged as the communities perceiving themselves as minorities pushed for a federal republic, while dominant groups such as the Kikuyu and Luo pushed for a unitary system. Jomo Kenyatta and Oginga Odinga were major opponents of *Majimbo*: Kenyatta’s intention was to rule Kenya under Kikuyu hegemony; Odinga thought a unitary system would be best for Kenya, in the sense that it would promote national identity and unity. *Majimbo* was dismantled less than 2 years after independence. (Ogot 1995).

The constitution was amended in 1964 and 1969, resulting in the end of devolved and multiparty system in Kenya. The House of Representatives and Senate were merged to form the National Assembly, while the Head of State and Prime Minister were consolidated to create a strong presidency with unlimited powers (Gertzel 1966).

The post 1964 era witnesses the continued existence of, the powerful provincial colonial administration and its use as a major agent of the executives up the 2000s^{II}. The successive Kenyan presidents – Jomo Kenyatta (1963-1978) and Daniel arap Moi (1979-2002) – both



used centralised state power and resources to favour their regions and exclude other communities from public opportunities and development (Bosire CM, 2015 and Muigai G, 2004). Bureaucratic inefficiencies related to the centralisation of power caused a further decline in access to resources and development (Ibid.). The public service became an appendage of the executive through which the president, his family, ethnic group, and close political associates amassed wealth through rent-seeking and the illegitimate and primitive accumulation of the resources of the state (Sihanya 2011). This resulted in regional and other geographical inequalities, marginalisation and disenfranchised citizens of their constitutionally guaranteed rights. Dissent was expressed in the form of political party opposition, a vibrant civil society and international support for political and legal reforms (Ibid). Mwai Kibaki come to power in the year (2002-2007) through such change, however, corruption, ethnic favouritism and inter-communal violence continued during his two terms in the office.

The Northern Frontier Districts (NFD) are the regions that Kenya's successive presidents marginalised and excluded the most.^{III} The Truth, Justice and Reconciliation Commission reports found that Northern Kenya – taken to consist of the former Northern Frontier Districts, the Upper Eastern and North Rift Valley provinces – suffered particularly harsh economic marginalisation as a result of biased or indifferent state policies (TJRC Vol. 1 2013: xv). The implication is that marginalisation in this region occurred with hardships often passed on to subsequent generations through a cycle of limited education and employment opportunities. The Commission noted further that women, minority groups and indigenous people suffered state-sanctioned discrimination. As a result, the NFD suffered gross violations of human rights on account of their ethnicity, limited resources and continued conflicts in the region (TJRC Vol. 2C 2013: 28). The complex underlying causes of violations and marginalisation in the NFD include centralised power, a culture of impunity, inter-ethnic competition, uneven development, under-employment and patriarchy (Ibid.).

The 2007 post-election violence, which resulted in death and destruction, resulted in intensified calls for fundamental constitutional changes.^{IV} A devolved system was adopted in 2010 to address some of the challenges discussed above. It is expected to enhance democratic governances, fostering unity by recognising diversity, addressing historical injustices which resulted in glaring disparities in regional development. Devolution is also expected, in the



long run, to tackle ethnically motivated violence by lowering the stakes in the competition for the presidency, a persistent cause of ethnic violence in Kenya.

The adaption of the devolved system in Kenya has radically transformed the previously forgotten NFD. The region's, including the Marsabit County, have witnessed the county government's expansion of the functions, such as agriculture, county health services, county transport, cultural activities, county education, and public works and services, which fall under its ambit since the devolved system was adopted^V. As a result, socio-economic development is being enhanced, women and youth are getting empowered, and access to education and health care services has improved.^{VI} However, endemic corruption, perennial conflicts and limited resources is decelerating the success of devolution in the county.

Therefore, this article investigates if the devolution has delivered on the promise of greater inclusion, accountability and peace in Marsabit County. The article proceeds as follows: the next section appraises the objectives of devolution in Kenya and evaluates the implementation of these objectives under the first and second county government in Marsabit. The article then examines the challenges that impede the realisation of devolution objectives in Marsabit. It ends with a conclusion that argues that both county and national government need to settle ethnic conflicts and cultural rivalries to foster peace and realise the objectives of devolution in Marsabit.

2. Devolved system in Kenya

In August 2010, Kenya promulgated a new constitution whose provisions included the devolution of political, fiscal and administrative powers from the national government to 47 counties.^{VII} The constitutional provisions under Chapter 11 of the 2010 Constitution represent a fundamental shift in the state structure in Kenya, from centralised unitary system to a devolved government.^{VIII} The decentralisation of power to 47 counties under the leadership of democratically elected governors indicates a move towards more inclusive and accountable county institutions that would be able to deliver better services. It was also hoped that devolution would bring the government services closer to the people, enhance democratic and development gains by giving marginalised communities an increased stake in the political system and enabling local solutions to be found for local problems.



The constitution also requires ‘each level of government to perform its functions and powers in a manner that respects the functional and institutional integrity of the government at the other level’ (Art 189 of the Kenya Constitution). Art 1(4) of the Kenya Constitution, 2010, stipulates that the sovereign power of the people is exercised at (a) the national level; and (b) the county level. Kenya’s historical experiences informed the inclusion of these constitutional clauses specifically to protect counties from having their powers usurped by the national government, as previously happened under the old constitutional order.

The 2010 Constitution sought to ensure that the exercise of presidential and gubernatorial powers is checked and in the process enhance national cohesion. The executive has been delinked from the legislature and a number of checks and balances introduced to curb executive dominance, as was the practice before. The executives will be subjected to horizontal, vertical and normative checks and balances. Horizontal checks are in the form of an independent and empowered bicameral parliament,^{IX} an independent and administratively empowered judiciary, and commissions and independent offices.^X Vertical checks are in the form of a devolved system of county governments, a restructured public service and an empowered civil society. The 2010 Constitution stipulates that the president, the governance and the entire public service be subjected to normative standards in their exercise of constitutional, statutory and administrative functions. Furthermore, the Constitution has established various measures to ensure that the president has the support of Kenyans beyond his or her ethnic base. The constitution also calls for the composition of executive and legislative systems that reflect the country’s diversities.

Other affirmed intentions of the devolved system in Kenya include the protection of minority rights and marginalised groups,^{XI} enhancing democratic governance, fostering peace and unity by recognising diversity, Scott-Villiers rightly notes that ‘devolution in Kenya is aimed at reducing incidents of violence arising from the politicisation of ethnicity’ (Scott-Villiers 2017:247). He argues further that, ‘politicised ethnicity had long been one of the active mechanisms that governed the distribution of goods, rights and responsibilities in the Kenyan state’ (Ibid.248). Therefore, devolution is expected to lead to a more inclusive and accountable national and county institutions that are able to deliver better services for all and in turn reduce the tension and divisions that cause conflict.

Objectives of devolution in Kenya is provided in article 174 (a)-(h)^{XII}. Objectives is achieved while observing national values as set out in Article 10 which includes; -



a) Patriotism, national unity, the sharing and devolution of power, the rule of law, democracy and the participation of the people;

b) Human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and the protection of the marginalised;

(c) Good governance, integrity, transparency and accountability and

(d) Sustainable development (Article 10 (2) (a)-(d) of the Kenya Constitution 2010).

The above national values and principles of governance seek to diffuse, if not eliminate altogether, the ethnic tensions fuelled by perceptions of marginalisation and exclusion.

County governments have been in place since the March 2013 general election, and much effort and resources have been dedicated to implement their functions. The county governments have to build new institutions and develop capacity from scratch to enable them to perform their functions and exercise their powers.

3. Marsabit County – a brief background

Marsabit is the largest county in Kenya with its population having increased from 291,077 in 2009 to 459,785 in 2019 (KNBS, 2019).^{xiii} The county's physical environment is marked by desert or semi-desert conditions with the exception of Mount Kulal (close to Loiyangalani), Mount Marsabit (where Marsabit Town is located), and Hurri Hills (in North Horr).^{xiv} As a result, arable farming is limited to only 3 per cent of the county's total land area and mainly in the areas around Mount Marsabit (Fratkin & Roth 2005). For this reason, the livelihood systems of the area's inhabitants have historically depended on pastoral production with farming in the region, which remains limited, only commencing after the advent of the colonial era. In the other remaining areas, pastoralism is the predominant form of land use.

Marsabit is composed of four sub-counties and these are Laisamis, Saku, North Horr, and Moyale.^{xv} In addition, the county is home to a number of ethnic groups, the major ones being the Borana, Gabra, Rendille, Burji, Samburu, Turkana, Dessanetch, Walu, and Somali communities (Ibid.). Historically, nearly all ethnic groups in the county engage in pastoralist livelihoods. The Gabra and Rendille communities herd camels, cattle, goats, and sheep, whereas the Borana and Samburu largely herd cattle, and the Burji are entrepreneurs and small-scale farmers.



3.1 Marsabit prior to devolution

Prior to independence, Marsabit was part of the Northern Frontier District (NFD) in what was also known as Northern Frontier Province (NFP). Ghai rightly noted that the NFD was not fully integrated into Kenya until shortly before independence (Ghai 2015). As the British prepared to relinquish their control over the Kenya Colony, their authorities decided to transfer the NFD to the Somali Republic. These plans inspired hope of reunification between Kenyan Somalis and their ethnic brethren (Ibid.). However, ethnic groups in Marsabit, are divided on the issues of secession. The Borana, with the exception of the Waso Borana,^{xvi} were not interested in the creation of a Greater Somalia (Branch 2011: 28-35). At the same time, ethnic groups such as the Garreh, Somalis and Rendille supported secession. The Borana feared that their merger into Somalia would lead to a loss of Borana lands and political rights. Although the Borana and Somalis belonged to the same linguistic family and practised nomadic pastoralism, there were certain religious and cultural differences between them that influenced against the realization of a united front (Schlee 2008).

The Somalis are largely Muslim while the Borana (apart from few of Isiolo Borana) follow customary practices linked to the Oromo Gadaa system. It is also important to note that various Borana viewed Oromia (Region of Ethiopia) and not Somalia, as their 'homeland' (Arero 2007). The Majority of Borana speaks Oromo language whilst Somalis largely speaks Somali language. The ethnic groups that supported secession joined the Somali nationalist party called the Northern Province Progressive People's Party (NPPPP) and campaigned for secession (Ibid.). In the end, the overwhelming majority of the inhabitants of the NFD voted for secession in a referendum, which the colonial government organized in 1962, the results of which were rejected by the Kenyan government. Even so, Britain suggested that the NFD be given new regions (under a system of regionalism) which would have given Somalis in Kenya greater autonomy, however, the offer was rejected by the Somalis (Ghai 2015).

The Kenyan government was staunchly opposed to secession because they did not wish to lose a fifth of the new country's territory and feared that it would stoke dangerous centrifugal forces (either in the form of demands for self-rule or new secessionist movements) that could threaten Kenya's stability (Arero 2007). The Kenyan government's rejection of the results of the 1962 referendum led the dissatisfied NPPPP to launch a guerrilla war under the umbrella of the Northern Frontier District Liberation Front



(NFDLF). The guerrillas attacked government outposts and used weapons they acquired from Somalia to gain an advantage in the previously largely dormant regions. The Kenyan government responded by through draconian emergency powers, which were retained until 1969, with great brutality and overwhelming forces and thus, resulted in a successful containment of the rebellion (Ghai 2015). Nonetheless, the end of the ‘*shifita* war,’ as the conflict is popularly known, did not bring back , the stability and relative security experiences during the colonial (and pre-colonial) period.

The elimination of the threat of secession meant that the government had few incentives to devote further resources to the NFD. The region, much like its colonial predecessor, is considered to be of low potential. Both Kochore (2016:499-500) and Arero (2007:294) noted that the colonial and successive post-colonial government in Kenya did not do much to develop Marsabit, hence the area was classified as a low potential area. As a result, the communities in Marsabit did not imagine themselves as part of Kenya, owing to their social, economic and political marginalisation (Arero 2007). The public services provided to the local population remained very limited. The *shifita* guerrillas took advantage of the subsequent neglect of the area and transformed themselves into actual bandits; for the next few decades incidences of murder, robberies, and other criminal acts made Marsabit a highly dangerous and volatile place (Branch 2011: 28-35). The deaths of two prominent leaders in Marsabit – Daud Dabaso Wabera, first District Commissioner of the NFD and Isako Umuro, Member of Parliament – were attributed to the secession and *shifita* war. (Schele and Shongolo 2012).

3.2 Marsabit County as a devolved unit

The Jomo Kenyatta government dissolved the NFD and the Somali-dominated regions were changed to the North Eastern Province while the Borana regions, Isiolo and Marsabit districts were transferred to the new Eastern Province. Marsabit County came into existence with the promulgation of Kenya’s new constitution in 2010. The devolved government of the new county was established in 2013 after a period of extensive preparation. Devolution has enabled the development of regions, including rural areas, which were severely underdeveloped. The merits of devolution are visible in Marsabit as noted in the improved service delivery and passing of development plans that are more localised. Additionally, public services have now become more accessible to the residents due to subsidiarity and local control and management brought about by the devolution (Czuba 2018). This



transformation has been possible because of the decentralization of budget allocation, of which Marsabit County has been a major beneficiary.^{xvii} The resources that the county government manages and the power that comes with it also made the office of the governor very attractive to political agents in the county.

Political competition in Marsabit has been complex due to its history and geographical location. The devolution has intensified local political competition, cases of conflicts increased and the major ethnic groups felt that ‘it’s their time to eat!’ – Meaning, they are expecting to gain something, such as the potential of promised jobs and contracts, from the political process (D’Arcy and Cornell 2016). Interestingly, there is no outright majority ethnic group in the county. As a result, alliances were formed by like-minded ethnic groups to form voting blocks in order to get the governorship and elective positions and upon getting powers, the politicians divide up county executives and departmental heads amongst themselves. Parties in the government wield huge county resources and reap huge rewards, and opposition parties are left to wither. These ‘negotiated democracies’ have been found to be inclusive enough to maintain short-term stability, in the long-run lead to exclusive services delivery based on patronage rather than needs. Since adoption of devolved system, inter-clan conflict over the scarce resources such as (grazing, water points and fertile lands) have increased in magnitude and intensity. In addition, longstanding tensions pitting dominant ethnic groups against minorities are exacerbated by the electoral context for county leadership. Consequently, expectations that devolution would lead to peace has not been fully realised in Marsabit County.

3.3 First county government – ReGaBu Alliance

The first governor of Marsabit Ukur Yattani. Ukur, who is from the Gabra tribe, was elected under the new 2010 Constitution by the coalition of ethnic groups known as *ReGaBu* (Rendille, Gabra and Burji). This coalition provided for interethnic cooperation in the divisive politics in Marsabit, which was also meant to reduce Borana’s domination of the political discourse in the county. Ukur, in order to obtain Burji and Rendille support, offered them positions of the deputy governor and senator, respectively. He also sought to expand the alliance to include smaller communities that might give it an electoral edge over the Borana; to this end, the position of the female Member of Parliament was offered to the



Garreh. The ReGaBu alliance took 22 seats from the 33 Members of County Assembly (MCAs). Thus controlling both county executives and Assembly.

However, the relationships between the most powerful Marsabit politicians worsened considerably after the 2013 elections. Governor Ukur's political calculus changed in that, although the *ReGaBu* coalition and the unification of the Gabra allowed him to become the governor, *ReGaBu* and Gabra were expecting political rewards for their support. Unfortunately, Governor Ukur is said to have side-lined both *ReGaBu* and his Gabra constituents with the major beneficiaries said to be his immediate clan, which is Gabra-Gar. Czuba noted that sub-ethnic favouritism was common; 10 out of 25 county directorships were given to Gabra-Gar (Czuba 2018: 23). Czuba also mentioned that contracts and government tenders were given to Ukur's closest allies (ibid: 24). This unequitable pattern of allocating government positions and contract led to discontent not only among the defeated Borana but also political agents representing the Burji, Rendille and, to a lesser extent, the non-Gabra-Gar. Hence, Ukur lost the governorship in 2017 to the new political alliance, *KAYO*,^{xviii} which is led by Governor Mohamed Ali.

3.4 The second county government – *KAYO* alliance

Mohamed Ali, a Borana, was elected the second county governor after the 2017 general elections. On their own, the Borana do not have a sufficient number of voters to win county elections in Marsabit, as a result, Mohamed and his associates set out, to construct a new interethnic alliance that intended to unseat Ukur. Thus, the *KAYO* alliance was formed a few years before the 2017 general elections. Governor Mohamed won the seat on the distribution of elective seats amongst the major tribes in a way similar to the success of the *ReGaBu* alliance. The position of deputy governor was given to Burji, and the senatorial seat went to Rendille. In addition, Governor Mohamed secured the support of the representatives of small (non-Garre) Somali clans known as the 'corner tribes' (Aden 2014). True to his words, Governor Mohamed included all ethnic groups in his executive and nominated minorities and youths in the county assembly. He asserted that he would distribute resources and opportunities across the county and that no one would be excluded from his government services.^{xix} The *KAYO* alliance controls all executives and the county assembly, thus enabling it to pass any policies and regulations easily.



3.5 Performance of ReGaBu and KAYO in Marsabit

One of the most frequently cited argument in favour of the devolved system is that it will have a positive impact on public basic needs in marginalised regions such as Marsabit. Devolution's ability to allow government to tailor decisions to the specific demands and needs of the local population is perceived as enabling the matching of resources with citizens' needs in a cost effective way. The transformation is visible in Marsabit: previously marginalised communities, including minorities, are now enjoying the fruits of devolution with services and government resources reaching every corner of the county. The minorities are represented in the county assemblies and executives. Their voices and needs are provided for. Nonetheless, many still feel that opportunities are given to elites and governors colleagues.

Schedule four of the Kenya Constitution 2010 distributes functions and powers between the national and county governments. The county governments have various functional areas. These include agriculture; county health services; the control of air and noise pollution; cultural activities; county transport, including roads, street lighting, traffic and parking, public road transport, ferries and harbours; animal control and welfare; and trade development and regulations. Further functions include, county planning and development; pre-primary education; and county public services, which includes water and sanitation, firefighting services and ensuring public participation in administration and governances. This section briefly appraises how both the *ReGabu* and *KAYO* government have performed in the areas of Health Services, Education, Agriculture and implementation of public participation.^{xx}

3.5.1 Health Services

The Kenya constitution 2010 provides a legal framework that guarantees an all-inclusive rights-based approach to health services in Kenya. Article 43 of the constitution provides that Kenyans are entitled to the highest attainable standards of health, which include a right to healthcare services such as reproductive health care. Article 53 provides the rights for every child to basic nutrition, shelter and healthcare. The constitution proclaims further that minorities and marginalised groups should have access to water, health services and infrastructure.

The health sector was the largest services sector to devolve under new 2010 constitution yet it faces various challenges. The rationale for devolving the health services was to allow



the county government to design models and interventions that matched the unique health needs in their context. Nonetheless, Marsabit County has fewer health facilities per 100 square kilometres with patients traveling long distances and days to reach these limited health amenities (Elliott and Abella 2005). The problem of distance is complicated by an unreliable public transport service, specifically for residents of North-Horr, Loiyangalani and Laisamis. Sometimes the people use camels and donkeys to transfer the critically ill to the health facilities and oftentimes the long distance to these facilities result in deaths before they reach health centres. Thus, the sparsely and far-away located health services are a burden and risky particularly for the critically ill, children, elderly and expectant women.

The *Regabu* Government built a Level 4 hospital in North-Horr and increased medical personnel and Ophthalmology at the Marsabit Referral Hospital.^{xxi} The *KAYO* alliance is building modern facilities at the Marsabit Referral Hospital, Renal units were operationalised in 2018 and now provide dialysis to county residents.^{xxii} In addition, the construction of the Kenya Medical Training Collage at the Hospital began in 2017/18. Similarly, *KAYO* built a mother and child complex with bed capacity of more than 50 and established the *KAYO* medical insurance scheme for county workers and residents. An impressive 26 new maternity rooms were built and a number of health centres refurbished by *KAYO*. *KAYO* committed 30% of gross county revenue to health in order to strengthen their commitment towards health. Finally, the adaptation of devolved system has witnessed an increase in the number of health personnel in Marsabit from 330 in 2015 to 623 in 2019 (CIDP, 2019).

The improved infrastructures, facilities and services will offer improved health services to the residents of Marsabit. The completed medical training college, will develop skills and provide the much-needed health practitioners in the vast county. Both *Kayo* and *Regabu* governments have shown commitment to the health sectors. These are encouraging signs of devolution in that, the county resident will benefit greatly from this development. In fact, a study conducted by Rare and Ombui (2017:470) confirms that health sectors have improved greatly under the devolution in Marsabit.

3.5.2 Agriculture

Agriculture is also one of the key sectors whose functions have been devolved under the Constitution of Kenya, 2010. It remains the mainstay of the Kenyan economy and, accounts for about 24 per cent of GDP and 74 per cent of employment (GoK, 2008). The sector has



direct implications on at least two critical areas that the county has to address and these are food security and youth employment. It is thus important that the devolution in the sector be carried out in a way that addresses the aforementioned challenges and do not worsen them.

About 80 per cent of the Marsabit County residents are pastoralists deriving their livelihood from livestock and livestock-based products. About 10 per cent of the total population practises subsistence agriculture and resides mainly around Mount Marsabit in the divisions of Central and Gadamoji. The mountain area receives high rainfall and thus provides a suitable location for agriculture and economic development in the county.

Agro-pastoral systems involve about 16 percent of the population while both livestock and food crops combined account for 50% of the income among agro pastoralist (GOK, 2013c). Crop production is limited to a few areas due to the low and erratic rainfall received in most parts of the county. The contribution of the Agriculture sector to youth employment in Marsabit is very high; approximately 70 percent of the labour force in the rural areas is employed in agriculture (GOK, 2013). Although agriculture remains the main economic activities in the county, the sector is exposed to environmental, economic, and social constraints that affect productivity. Environmental conditions, such as droughts, floods, and water scarcity, affect production and the marketability of livestock and agricultural products. Devolution is enabling the county government to invest more in agriculture and livestock. Under the *Regabu*, Livestock production was supported through the construction of sale yards, livestock pens, market stalls and sinking boreholes. Whilst *KAYO* government allocated more than Ksh 380 million in the 2018/2019 financial year to development and growth of agriculture sectors.^{XXIII}

3.5.3 Education

The Constitution of Kenya 2010 stipulate that every child has a right to free and compulsory basic education (Article 53 (1) (b)). Article 55(a) provides that the states shall takes measures, including affirmative action programmes to ensure that the youth access relevant education and training. Constitution also provides that special opportunities be given to children belonging to minorities and marginalised groups (article 56 (b)). To give effect to the Constitution, the Basic Education Act (No 14 of 2013) was passed into law to regulate the provision of basic education and adult education in Kenya. Similarly, a number of policy



relevant to education were adopted, the recent one include Medium Plan Term of Vision 2030 (2013) and Policy Framework for Education and Training (2012).

Kenya's 2010 constitution devolves the provision of pre-primary education, village polytechnics and home crafts to the county governments. Similarly, Section 26(1) of the Kenya Basic Education Act No. 14 of 2010 stipulate that county government are responsible for the funding the development of required infrastructure for the institutions providing Early Childhood Development and Education (ECDE) services. ECDE is one of the most important levers for accelerating attainment of Education for All goes, as well as the Millennium Development Goals. (National Policy Framework for Education and Training). In view this, the county government and stakeholders are expected to expand opportunities for young children to access ECDE services.

The provision of basic education in the Marsabit continues to face numerous challenges in spite of the government efforts to provide basic education to all its citizens. Children, particularly those in the county's rural areas, are engaged in pastoralist activities and hence there are reported cases of a low participation in formal schools. Pastoralist are confronted with a myriad of challenges that include the under development of infrastructures and schools, rampant insecurity due to lack of sufficient law enforcement agencies, vastness of the arid lands and cattle rustling. All these impedes children's chances to access education. Buma and Begi (2016:129) in their recent study on the social-cultural factors impeding children's access to early education, revealed that the majority of the children in Turbi division in Marsabit County, do not have access to early childhood education. They noted that factors such as taking care of livestock's, participation in traditional ceremonies, and female genital mutilation hinder the development and growth of the ECSs in the area.

Since independence, national plans and solutions have largely failed to provide adequate solutions to the challenges faced by the county's education sector. Net enrolment rations in pre-primary, primary and secondary schools remain far below those of the national level.^{xxiv} The county has few educational facilities and endures low access, retention, completion and transition rates.^{xxv} In addition, there is a severe shortage of teacher's with teachers from other regions of Kenya not willing to work in some regions due to problems of insecurity.

The first county government made ECD their key priority areas. A number of ECD Centres were built and training for more 160 caregivers provided under *Regabu* government. Similarly, *KAYO* increased ECD and built centres across all four sub-counties, and allocated



more funds to the youths and polytechnic skills development.^{xxvi} Therefore, there is positive development in early childhood education, thus obligation of children's rights to education gradually being fulfilled. Research conducted by Rare and Ombi (2015:470) on the effects of devolution in improving living standard of Marsabit county, revealed that the devolution in Marsabit County has positive results in all education levels and specifically growth and expansion recorded in the early childhood programs.

3.5.4 Public participation and inclusivity

Public participation is an empowering process, which enables local people to do their own analysis, take command and gain confidence (Chambers, 2002). Strengthening public participation and governance is a core element of Kenya's strategy to accelerate growth and address long standing inequalities. The 2010 Kenya constitution and laws have expressly mandated government officials, systems and processes to guarantee public participation and actively promote it.^{xxvii} The Kenya constitution demands transparency, accountability, participation and inclusiveness in governance, and thus envisions a strong participation of citizens, right from the grassroots, in decision-making processes. This is guaranteed through devolution and platforms provided for this purpose.

The County Government Act of 2012 requires that the county governments ensure the public participation, coordinate the participation, and develop the capacity of the public to participate (The County Government Act, 2012, Section 87-89).^{xxviii} Moreover, the Public Finance Management Act of 2012 requires public participation in county public finance matters through the establishment of a County Budget and Economic Forum (Public Finance Management Act of 2012).

Both *Regabu* and *KAYO* have passed public participation and civic education bills.^{xxix} In expanding their services across the county, *Regabu* supports the listing of a new ethnic in Kenya, commonly referred to as *WAYU*. *KAYO* has gone further than that in enhancing public participation in all its programmes and activities. Nevertheless, a growing number of scholars and researchers have been critical of county government. Bulle and Omubui (2016: 179) contend that under *Regabu* 'Public participation is done in a hurry by the executive and as such many people are left out of decision making in budget and other government programmes' they further noted that nepotism, clannism and ethnic favouritism by county executives in youth employment was common under the *Regabu*. (ibid. 179). Similarly, Czuba



(2018:23) notes that the *Regabu* regime gave preference on employment, county contracts and public services to governor Ukur's closest clans, particularly the *Gabra-Gar*. Nonetheless, *KAYO* is improving the interactions between citizens and the government.^{xxx} In addition, people are closer to democratic processes that affect their lives directly. More efforts are needed to enhance public participation, inclusivity, peace and conflict resolution; as discussed below, conflict has been and continue to be the biggest challenge to development, co-existence and harmony in the county.

4. Challenges that impede the realisation of objectives of devolution in Marsabit

4.1 Ethnic conflicts

The formation of a devolved system in Kenya has witnessed a change in the nature of the conflict owing to the political developments in the country. Competition over the control of administrative units or competing claims over boundaries has escalated in different regions of Kenya. The Marsabit County has experienced a wave of violent conflicts, where major ethnic groups (Borana, Burji, Gabra, Garreh, Dassenetch and Rendille) are competing for limited arable land; access to and the utilisation of resources such as water and pasture; politico-administrative units' boundaries and for inclusivity in employment and government opportunities. Traditionally, the majority of conflicts in the county have been caused by competition over grazing space and water for livestock and sporadic cases of revenge killings.^{xxxI} Cattle rustling was very common and seen as one of the cultural practices, which were sanctioned and controlled by the clan elders; such raids were carried out in order to obtain bride-wealth or as a rite of passage.^{xxxII} However, the motivations of such practices have changed as rustling is now carried out to increase one's own wealth or for commercial purposes. The small arms that are easily available through porous borders fuel the conflict in the county.^{xxxIII} In addition, the ever-increasing fierce conflict between the communities is a source of concern amongst themselves and security forces (Schlee 2008 & Gray et al. 2003).^{xxxIV}



4.1.1 *Conflict within the county*

Members of the Borana and Gabra communities have politically and economically dominated Marsabit for years. This dominance has created growing resentment from smaller communities, such as the Rendille, Dessanenach and Burji. The Gabra and the Borana are traditionally seen as one community since they speak the same language and share settlements and pasture. However, the perception of dominance and inferiority within members of the Gabra led to a gradual and increasingly assertive challenges at the social, political and economic level to notions of Borana ‘supremacy’ in the county.^{xxxv} Various cases of conflict between the Borana and Gabra have been reported over the years with one such conflict being the ‘turbi’ massacre, where more than 56 people were killed.^{xxxvi} This was followed by revenge killings a few days later, where 10 people were executed in broad daylight in Bubisa. (Huka 2014)^{xxxvii} In May 2019, 11 Gabra elders were killed in the border town of Forolle (Ombat & Ngasike 2019). In November 2019, 10 people were killed, among them two police officers in a retaliatory attack (Komu & Walter 2019).^{xxxviii}

Cases of conflict between the Gabra and Dessanach have also been reported. Conflicts between the two groups, which occurred between 1915 and 1996, resulted in many deaths, several injuries and the destruction of properties (Witsenburg 2012). Yet again, the conflict between Gabra and Rendille was attributed to cattle rustling and revenge killings (Schlee 1991). Similar conflicts have also been reported between the Samburu and Borana,^{xxxix} Garreh and Burji, Borana and Gareeh. (Schlee 2007). Political leaders have attributed these conflicts to competition over pastures that arose from the drought conditions, cycles of livestock thefts, growing political tensions between the groups over the political developments in the county and land issues (Scott-Villiers 2017). Ethnic violence in the Marsabit County has resulted in the loss of hundreds of lives and property and adversely affected human security. It also heightened tensions and hatred between the communities. Eventually, increasing conflicts have affected the livelihood of all the ethnic groups in the county in a negative way. (Cynthia 2000).

4.1.2 *Spillovers from border areas*

Moyale District, which is in Marsabit County, borders Ethiopia,^{xl xli} Moyale is geopolitically and economically important to both the Kenyan and Ethiopian governments. The dominant ethnic groups on both sides of Moyale are Borana, Gabra, Garreh and Burji



and these transcend national boundaries in terms of settlement, ethnic and kinship relationships (Kefale 2009). The strategic geopolitical and economic importance of the border between Kenya and Ethiopia made it a contested space among many actors, including the Oromia regional state and the Somali regional state in Ethiopia. Periodic conflicts between the communities along the Ethiopia-Kenya border have existed for centuries.^{XLII}

Over the years, cases of conflict have been reported between Borana-Garreh, Gabra-Borana, Garreh-Gabra and recently between Burji and Gabra. Reports on conflict amongst the community started as early as the 1990s and most of this spilled over to each of the sides of the border. In December 2011, fighting broke out in rural areas on the Kenya side that are close to the international border with the media reporting that more than 7,000 people fled into Ethiopia (IRIN, Kenya 2012). In August 2013, immediately after general elections, more houses were burnt down and some 24 people died (*All Africa*, Kenya 2013). The Moyale conflict of 2013, which was felt on both sides of the border, led to 200 deaths, 53,968 displacements and 100 burnt houses (UNDP 2015). It was alleged in this conflict that Governor Ukur's administration encouraged his kin from Ethiopia to settle on the Borana settlements permanently, which the Borana saw as a wider scheme to change demographic patterns in favour of Gabra in future elections. Thus, many have attributed this to the curse of devolution.

In July 2012, armed militia attacked two villages near Moyale on the Ethiopian side. Houses were burned, more than 19 people died, and the Red Cross reported that 20,000 people fled into Kenya (BBC, Ethiopia 2013). In May and June 2015, conflict erupted between the Gabra and Garreh over land claims arising from the Somalis establishment of a new village under the Libaan zone that crossed into the Borana territory used by the Gabra for grazing. Even though there was no historical indication showing Garreh's territorial ownership of and settlement in the contested village, the group, backed by the then federal government in Addis Ababa, has been continuously been expanding into Borana land (Ibid.). Conflicts on the Ethiopian side of the border between communities have claimed many lives with various people displaced and properties on both sides of the border destroyed.

Conflict within the county and spillovers from Ethiopia continues and this has escalated in magnitude, intensity and frequency. The worsening of relationships and increasing commercialisation of raids, as well as the spread and use of devastating automatic weapons, have intensified the conflict as noted in the way the attacks affect combatants, women and



children (Ibid.). Most of the incidents occurring since 2013 relate to the political developments in Kenya, in particular, the devolved system. There is a general view, which asserts that devolution has been a curse to the pastoral community. Competition over voters and future voting blocks and resources accompanying it have fuelled the conflict. The persistence of conflicts has reduced cooperative and social relationships that had existed over a long period. The recurrent ethnic conflict will have a profound impact and greatly delay the region's socio-economic development, economic growth and derail the achievement of the objectives of devolution.

4.2 Resource-distribution

Scholars and researchers have continuously pointed out that access to and the distribution of resources are the most common causes of conflict in Africa.^{XLIII} The unequal distribution of resources, inequalities and the human passion for greed is one of the root causes of conflicts over time and across countries. This reality is apparent in the Marsabit County, where cyclical conflicts are often triggered by access to resources such as water and pasture. As discussed previously in the problem statement, communities in Marsabit have been marginalised under successive Kenyan regimes. Therefore, it was hoped that devolution would address these historical injustices. Hence, devolution was received with high expectations and enthusiasm. As previously discussed, both *ReGaBu* and *KAYO* roll out services and government reach to all corners of Marsabit County. However, county governments' employment and issuing of government tenders was reportedly marked by imbalances (Czuba 2018). For instance, during the reign of *ReGaBu*, it was alleged that Governor Ukur distributed resources and key government positions to his clan, particularly the *Gabra-Gar*. It was also alleged that employment and other opportunities is given to patronage among political supporters, with a largely tokenistic inclusion of the other ethnicity. For that reason, Under *Regabu* devolution process that explicitly promised inclusion has locked out the majority of people. (Czuba 2018). In this instance, devolution reinforced ethnic divisions by concentrating power around one dominant community. This perception created rifts between rival communities. Hence, there is little optimism for devolution changing the situation without addressing allegations of ethnic favouritism and ensuring transparency and equitability in the distribution of resources.



Devolution, if implemented transparently and equitably, offers opportunities for greater peace in the county. In reality, ethno-political struggles for the control of resources, including land and government positions, pose the potential for massive destabilisation and create the potential for recurrent eruptions of violence (Scott-Villiers 2017). There are high expectations from the public around the issue of resource distribution, land reform and service delivery and yet disappointment over the slow pace of development initiatives is growing. These issues need to be addressed by the current and future county governments. The unequal distribution of resources will derail the objectives of devolution and eventually infringe the rights provided for in the Kenyan constitution.^{XLIV}

4.3 Socio-economic development

The Kenyan 2010 constitution's article 174(b) stipulate that the key objectives of devolution are to promote social and economic development and the provision of easily accessible services to the residents. One of the abiding assumptions of devolution in Kenya is the notion that devolution carries an 'economic dividend'. The economic dividend is in the potential benefit of opportunities for communities to design and deliver policies that are attuned to their own needs. As discussed previously, the Marsabit County is gradually flourishing and the economy is improving. Therefore, devolution in Marsabit presents vast opportunities to improve the lives of the citizens, as well as to bring services closer to the people.

Devolution has resulted in the growth of the county's economy as evidenced in the increases in the local revenues since adaptation of devolved system. The revenue collection increased from Ksh 40 million in the financial year (FY) 2013/14 to Ksh116.48 in the FY 2016/2017.^{XLV} The country also collected Ksh 137.4 Million in the FY 2018/19.^{XLVI} During the year FY 2018/19 Marsabit county has Ksh 7,812 Millions. The main sources of revenue are; - allocation from National Government, Donors Fund, Conditional Allocation e.g. Road maintenance, Levy Fund, Free Maternal and Compensation and also from county own revenue collection.^{XLVII} Using this funds, county government has an opportunity to develop socio-economic development, strengthen projects in Agriculture and livestock, and expand youth's skills and development, Women empowerment and expand citizen business opportunities.



The mountain area provides a suitable location for investment and economic development in the county. The recent completion of the Isiolo-Marsabit highway decreased the travel-time from Isiolo to Marsabit and also contributes to economic growth in the county (Kochore 2016). However, factors such as droughts, perennial conflicts, unequal distribution of resources and poverty, resulting slow socio-economic development, cripple participation in decision-making processes, obstruct the movement of persons.

4.4 Inclusivity, transparency and accountability

The objectives of devolution in Kenya include the promotion of the democratic and accountable exercise of power (Constitution of Kenya, 2010 Article 174 (a)). Democratic governance emphasises that decision-making is based on participatory approaches (Ibid. Article 174 (c)), all level of government, governors and leaders should maintain inclusivity, accountability and constructive engagement with the various stakeholders. In addition, key national principles of governance, as articulated in Article 175, stipulate that county governments be based on democratic principles and the separation of powers. These principles are further echoed in Article 10, which highlights national values to include human dignity, equity, equality, inclusiveness, social justice, human rights, non-discrimination and protection of the marginalised, as well as good governance, integrity, transparency and accountability.

Section 35(1) of the County Government Act provides that the governor shall ensure that the composition of the executive committee reflects the community and cultural diversity of the county and take into account the principles of affirmative action as provided for in the constitution. Furthermore, the county assembly is directed not to approve nominations for appointment to the committee if they do not take into account the representation of minorities and marginalised communities, as well as community and cultural diversity within the county. Kenya's 2010 constitution also mandates parliament to legislate so that membership in both county assembly and county executives reflects the 'cultural diversity of a country' and that minorities within countries are protected (Article 197 (2)).

Transparent, accountable and democratic governance is, therefore, an imperative if economic integration is to be realised and conflict reduction addressed effectively. However, the existence of conflict and underdevelopment in Marsabit undermines the objectives of



devolution. Lack of accountability, transparency and inclusivity fans conflicts and instability, where conflicts leads to death and the destruction of property. There is growing consensus on good-governance-development-peace linkages, which remain vital for any form of transformation to occur in the Marsabit County. There is also an urgent need to put proactive strategic policy measures in place that will effectively promote peace, conflict resolution and improve the well-being of the people.

Structures and systems, as in the first county government, which permit a few people to have inordinate riches while the majority of the citizens remain disadvantaged, must be substituted by arrangements that nurture the generation of wealth in a way that promotes justice and good living standards. The opinions and lived experiences of the people of Marsabit – including the poorest – must be heard. The challenge is to make conflicts, wars and chaos come to an end and strive towards a new county of peace, stability, economic-growth, development and a sustainable pattern of livelihood.

5. Concluding remarks

The adaptation of a devolved system in Kenya is gradually transforming the counties as socio-economic development has been enhanced, and the participation of minorities and women in the government programmes developed. The county government in Marsabit is enhancing economic development and expanding the activities that fall within the ambit of county government, such as health, education and cultural activities. Critical challenges remain and these include, ethnic conflicts, the scarcity of resources, insecurities and the unequal distribution of resources by the county government. The study recommends that the county government should settle ethnic conflicts, enhance cultural diversity and foster peace and economic development in order for the objectives of devolution to be realised. The county government should also establish an independent commission consisting national and local experts to offer solutions on the contentious issues at the core of inter-clan frictions, such as boarder lands, wells, and access to grazing land, and just restorations for the losses. Finally, the county government should also cultivate accountability, transparency, inclusivity and the equitable distribution of county resources.

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ⁱⁱ According to Gertzel, the Provincial Administration during the colonial period was a sophisticated, centralised machine through which governor administrator by direct rule.

ⁱⁱⁱ Bulle & Ombui (2016) state that ‘Most districts of Northern Kenya were marginalized as the sessional paper ten (10) of 1967 could not give them opportunity as they are regarded as /Northern frontier district which does not add any value to the country (Kenya) the sessional paper sought to invest heavily in agricultural production area identified by colonial government, with the hope that it would include d the rest of the country which was not effectively achieved’.

^{iv} The United Nations Special Rapporteur stated that the dispute over the results of the 2007-2008 general elections were intensified by issues of land and ethnicity with the ensuing violence leading to more than 1500 people killed, thousands injured, widespread looting and land grabbing. See United Nations, 2011 ‘Report of the Special Rapporteur on the Human Rights of Internally displaced Persons, Chaloka Beyani’, Human Rights Council, Nineteenth Session, and Agenda Item3. United Nations General Assembly, New York.

^v See schedule of the Kenya Constitution 2010, for the functional areas of county government.

^{vi} The article uses desktop study to appraise how these functions have been rolled out in the Marsabit County.

^{vii} For a comprehensive background and explanation of the objectives behind devolution in Kenya, see Ghai 2015.

^{viii} The new constitution, under Articles 6 and 176, establishes a system of devolved government consisting of national and county governments.

^{ix} The two houses of parliament are the National Parliament and Senate.

^x Article 248 of the 2010 Constitution establishes nine commissions and independent offices, including the Kenya National Human Rights and Equality Commission, the Independent Electoral and Boundaries Commission, the Commission for Revenue Allocation, the Parliamentary Service Commission, the Judicial Service Commission, and the Public Service Commission. These commissions differ from the commissions based on the 1969 Constitution because they have an express provision outlining their independence from other arms of government and are administratively and financially delinked from the executive.

^{xi} Article 56 of the Kenya Constitution, 2010, stipulates that ‘The State shall put in place affirmative action programmes designed to ensure that minorities and marginalised groups— (a) participate and are represented in governance and other spheres of life; (b) are provided special opportunities in educational and economic fields; (c) are provided special opportunities for access to employment; (d) develop their cultural values, languages and practices; and (e) have reasonable access to water, health services and infrastructure’. Article 102(2) (b) deals with some in-depth inclusion of minority and marginalised groups to ensure greater certainty of the application of bills of rights to marginalised groups. Specific obligations are imposed on the state (which also include the counties) with regard to minority and marginalised groups and persons with disabilities (Arts 52, 54 and 56). A specific object of the devolution of government is then to protect and promote the interests and rights of minorities and marginalised communities (Art 174).

^{xii} The objectives of devolution in Kenya, as provided for in the article 174(a)-(h) include, - promotion of the democratic and accountable exercised of power, to foster national unity by recognising diversity, to give powers of self-governance to the people and enhance the participation of people in the exercise of the powers of the state and in making decisions affecting/, and to protect and promote the interest and rights of minorities and marginalised communities.

^{xiii} Kenya National Bureau of Statistics (KNBS), n.d. *Kenya Population and Housing Census, August 2009–Population Distribution by Sex, Number of Households, Area, Density, and County*, Kenya National Bureau of Statistics (KNBS), Nairobi. See also Kenya National Bureau of Statistics (KNBS) (2019) *Kenya Population and Housing Census, August 2009–Population Distribution by Sex, Number of Households, Area, Density, and County*, Kenya National Bureau of Statistics (KNBS), Nairobi.

^{xiv} Ibid.

^{xv} The county has 20 Ward Assemblies. The county electoral wards are; - Saku, 3, Laisamis 5, North Horr, 5 and Moyale 7. See County government of Marsabit (2019) The second county, integrated development Plan (CIDP).

^{xvi} The Waso Borana are mostly Muslims.

^{xvii} The budget allocation for Marsabit County increased from Kenya Shilling (KSHS) 3.906 Billion in the Financial Year (FY) 2013/14 to 7 Billion KSHS in the FY 2019/20. Government of Kenya (GOK), Commission on Revenue Allocation Budge 2013-2014, See Also County Government of Marsabit, County Fiscal Strategy paper (CFSP) 2018.

^{xviii} Kayo- is derived from the Borana/Oromo words meaning peace or success

^{xix} Inaugural speech, presented at the Marsabit Stadium.

^{xx} The research is a desktop appraisal offering an analysis of county activities that take places in many forums



with outcomes entering public domain through means such as government statements, newspaper editorials, nongovernmental briefings and academic articles.

XXI The Modern level 4 Hospital with complete theatre and x-ray wing was built at the cost of 450 million Kenya shillings, the facility he said to accommodate more patients than it was before. See Mugo, J' 2016 'North Horr get a Ksh 450 Million level four Hospital' Citizen News, available at <https://citizentv.co.ke/news/north-horr-get-a-ksh-450m-level-four-hospital-136182/>. Accessed 4th September 2019.

XXII Chari, A , 2019 ' Governor Ali launches modern facilities at Marsabit Referral Hospital' Star News , 6th May 2019' available at <https://www.the-star.co.ke/counties/north-eastern/2019-05-06-governor-launches-modern-facilities-at-marsabit-referral-hospital/> accessed 4th September 19.

XXIII County Government of Marsabit, County Fiscal Strategy Paper (CFSP) -2018.

XXIV The ECD enrolment is estimated to be 19, 239 with a total number of 413 teachers. The primary population is estimated to be 46,178 pupils, while Secondary schools stand at 6028 and 568 students enrolled in Vocational training colleges. Marsabit County (2019) Second County Integrated Development Plan 2018-2022. For national statistics see, Ministry of Education, Science & Technology (2014) *Basic Education Statistical Booklet*, Nairobi.

XXV Marsabit county has 253 public ECDC and 64 Private, 231 Primary school (181 public, 50 Private), 43 Secondary Schools, 4 Youth Polytechnic and 8 Vocational Training Centres. Marsabit County (2019) Second County Integrated Development Plan 2018-2022.

XXVI In the Financial Year 2018/19 more than 500 Million KSHS were allocated to the Youth polytechnic and skills development by KAYO government.

XXVII The Constitution 2010, Article 1(2), Article 10(2) a,b and c, Article 27, 33, 35, article 174c,d ; article 184(1), article 232(1) (d) Fourth Schedule Part 2(14) and The Public Finance and Management Act 207.

XXVIII See reference to public participation see also; County Government Act, Section 91-96, section 100 and 101.

XXIX REGABU passed – Marsabit County Civic Education and Public Participation Bill, 2015. Whilst, KAYO passed the Marsabit County Citizen Charter: Civic Education and Public Participation policy. [Cursor look]? at the content shows both policies are aimed at involving the public in the activities and programs of the county government.

XXX For recent public participation see public participation schedules to the public draft finance bill 2019, available at <http://marsabit.go.ke/public-participation-schedule-on-marsabit-county-finance-bill-2019/> see also <http://marsabit.go.ke/invitation-to-attend-annual-development-plan-adp-2020-21-public-participation-forums/>. See also At the launch of the Marsabit County Citizen Charter- Deputy governor Hon Riwe argues that county planning and administration is anchored on consultative process between informed citizen and responsive government. See <https://www.standardmedia.co.ke/article/2001285919/marsabit-launch-citizens-charter>.

XXXI However, in recent years, livestock raiding has become more frequent, violent and destructive. Cattle rustling has been common practice among pastoral communities in eastern Africa since the pre-colonial period (Gray et al. 2003).

XXXII Cattle raiding is to some extent, a response to disasters such as drought and an attempt to increase the yields of livestock by increasing numbers in a good season as an insurance against bad seasons.

XXXIII Marsabit County's proximity to the borders with Ethiopia, Sudan and Somalia and the porosity of the country's borders and bordering communities give access to small arms and ammunitions, which are used by ethnic groups fighting with rival communities.

XXXIV For comprehensive reports on Marsabit conflicts, please see SRIC 2014 'Report on Marsabit Pastoralists' Tension, The Influence of Unsealed National Boundaries and Developing Political Outfit on Pastoralists' Conflict in Marsabit'. See also Scott-Villiers 2017.

XXXV Ibid.

XXXVI On 12 July 2005, about 1,000 heavily armed bandits made a series of raids in the Didagalgalu area, some 130 kilometres from Marsabit Town. At least 53 people, including children, were killed (Witsenburg 2012).

XXXVII In a revenge attack, 10 people were killed in the Bubisa Trading Centre, 80 km from Turbi.

XXXVIII Komu, N & Walter, J (2019) Kenya: Police officers among 10 Killed in Marsabit Bandit Attack, (All-Africa News, November 19). Available at <https://allafrica.com/stories/201911060634.html>.

XXXIX Borana herders have conflicted with pastoral Rendille and Samburu along the district boundaries from southern Marsabit to Isiolo, east of the long Isiolo–Marsabit–Moyale highway (Fratkin and Roth 2005).

XL Marsabit County shares an international border with Ethiopia, stretching over 500 km from Moyale to the east and all the way to Illeret at the top of Lake Turkana to the west.

XLI Moyale is basically two towns in one: the smaller section on the Kenyan side and the bigger one on the



Ethiopian side with the border running between them. The Kenyan Moyale is made of seven (7) County Assembly Wards, namely: Butiye, Sololo, Heillu, Golbo, Moyale Township, Urain and Obbu.

^{XLII} During the Derg (Provisional Military Administration Council) between 1974 and 1991, Moyale was under Borana Awraja (Province). Local communities include the Borana, Garreh and Gabara communities, who lived in peace and harmony for years. During this period, Borana held uncontested control of the traditional wells. With the demise of Derg, the Borana province was split into two regional states and became two competing Woredas (districts), Oromia-Moyale and Somali-Moyale, without any clear demarcation. See Tache & Oba 2009.

^{XLIII} See also Markakis 1997; Maxwell and Reuveny 2000.

^{XLIV} Art 174(g) of the Kenya 2010 constitution provides that the objectives of devolution is to ensure the equitable sharing of national and local resources and to promote the interest of minorities and marginalised. Communities.

^{XLV} County Government of Marsabit (2019).

^{XLVI} Ibid.

^{XLVII} County collection revenues from business permits, livestock licenses, land and transportations charges and hospital bills. Ipsos MORI 2016).

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Fiscal Federalism Policy in Somalia: Emerging Challenges and Agenda for Reform

by

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Abstract

This paper examines the development of fiscal federalism in Somalia to reveal the challenges this unique country is facing and, based on the findings, propose and agenda for reform. Interviews, direct observation, and case studies were the key tools utilized in this study. The study interviewed 12 different fiscal experts (mid-level decision-makers and technical-level experts) involved in fiscal federalism issues in Somalia, and two practitioner experts experienced in various Sub-Saharan states' fiscal policies with respect to federalism. The study also analyzed the observed situation regarding fiscal-federalism issues among the federal government and member states. Two case studies of federalism are examined, showing how Nigeria and Ethiopia fared in the process of their fiscal decentralization, functions and expenditure assignments, tax-raising power, transfer policy, natural-resources management, and revenue-sharing mechanisms.

Key-words

Challenges, fiscal, federalism, Somalia



1. Introduction

Federalism is a constitutional mechanism for governance characterized by the division of power between levels of government; therefore, every level can take defined responsibilities over specific functions (Elazar 1987). There are two main levels of government: federal (national or central) in the top level; and state (provincial or regional) in the lower level. Also, some countries, e.g. South Africa and Germany, have a third level called local government (Bulmer 2017).

The effectiveness of decentralization is linked to the extent to which responsibilities are divided in a proper manner and principles are adhered to. The political, governance, and economic responsibilities are based on sharing, rather than the completely centralized decision-making of the unitary system.

In fiscal federalism each level of government has certain powers to make economic decisions within its jurisdiction. This power comes as a result of the agreed functions assignment for decisions related to resource distribution, raising revenue, grants, subsidies, transfers, borrowing, money printing, spending on public goods and services, running public corporations, and other regulatory decisions that are essential to framing the fiscal side of the federalism. All public finance functions are carried out the tier assigned to perform that particular activity. The most important consideration is how the decisions regarding economic activities are divided among the various levels of the government (Boadway & Shah 2009). In summary, a proper allocation of roles and responsibilities at different levels of government is key to policy stabilization and the establishment of proper revenue sharing (Shah 2008).

Countries in transition, Somalia for instance, face several challenges on the road to adopting a robust model of fiscal federalism, and the implementation of the above-mentioned key elements of public finance might be achieved as easily as in countries with a long federal history.

In Somalia, the term '*federal*' was relatively unheard of a few decades ago; it first officially appeared in the 2004 Transitional Federal Charter of the Transitional Federal Government (TFG) and later in the Provisional Constitution adopted in August 2012, following significant support from the international community and other stakeholders. This came about after



years of conflicts, inter-community mistrust, severe political instability, and a prior history of a unitary system. Despite the formation of federal member states, however, there is no comprehensive framework for power sharing between the levels of the government. The Provisional Constitution outlines some federal responsibilities such as defense, foreign affairs, immigration, and naturalization, as well as currency, while this implies that sanitation, sewage, and road building are assigned to the municipalities. In between the two, there remains a huge gap, and the levels of the government should cooperate and discuss the role of each of them (World Bank 2015).

In general, the Provisional Constitution defines the country as 'Federal,' but the problem is that it does not define some important issues regarding different aspects of federalism, specifically fiscal federalization. It defines only currency, which is an absolute responsibility of the federal government. Currently, some states are struggling to deliver services within their jurisdiction in the face of limited capacity, while the federal government is striving to ensure security, with most other activities limited to Mogadishu (World Bank 2015). Somalia has, therefore, shifted to the federal system. Politically, several good elements have been implemented and certain functions of the government have been decentralized, while the constitutionally centralized activities are run at the federal level. Additionally, several positive measures have been agreed regarding public finance issues. However, discussions and agreements on intergovernmental relations regarding the economic and fiscal aspects of federalism have not progressed as quickly as those regarding other elements of federalism. Thus, currently, fiscal responsibilities are unclear due to several reasons. First, there are no agreed tax/expenditure assignments between levels of government. States collect all accessible taxes and fees from their jurisdictions and spend them through their budget. Their collections include business taxation and port customs, while the federal government collects revenues only from Mogadishu city, Benadir region. Second, there are no formula-based transfers to the states. The current transfers, which are mostly grants from donors, are *ad hoc* distributions. Although these are external grants, they are not derivation-based, however, as they are not based on social indicators such as size of population, level of development, poverty, etc. Rather, they are based on a discretionary decision by the federal government. These practices, if continued in the broader range of revenue sharing, including natural resources, may violate the principles of fiscal imbalances, thus creating conflicts among the levels of government. To date, resource-sharing mechanisms have been agreed only for



petroleum and fishery resources by the federal government, all states, and Benadir region, excluding Somaliland. Various principles of decentralization have been implemented in recent years, but fully-fledged decentralization has yet to be implemented as the country is still in a transitional period. However, there are current efforts to amend the unitary-based laws enacted prior to the adoption of federalism. The amendments are required following a call from the ministry of constitutional affairs for all policies, laws, and regulations to conform, in consultation with stakeholders, to the federal system. This paper aims to study recent developments regarding fiscal federalism in Somalia, detailing pressing challenges and recommending possible solutions.

2. Literature and Theoretical Framework of Fiscal Federalism

2.1. Definition of Fiscal Federalism

Fiscal federalism is the scope and structure in which different government tiers define and share their responsibilities, functions, and the allocation of resources among them relative to functions (Ewetan 2012). It is the mechanism by which government functions and resources are distributed among national and sub-national governments through agreement on revenue assignment, expenditure responsibility, and fiscal equalization.

Fiscal federalism is defined as a way to divide fiscal decision-making power across multi-leveled governments (Tanzi 1996). Many countries have adopted fiscal federalism as a means to improving public-sector efficiency. It is mostly related to fiscal policy, including the distribution of functions and powers between the federal government and sub-national governments (Moges 2003).

2.2. Theoretical Framework

Theories are important elements in studying this field as they provide explanations and predictions for specific cases or phenomena. How similarly or differently the principles and pillars of fiscal federalism are practiced in Somalia is highlighted using the following two theories of fiscal federalism.



2.2.1. First Generation Theory (FGT) of Fiscal Federalism

The first-generation theory (FGT) of fiscal federalism, also known as the traditional theory of fiscal federalism, was developed by two economists named Musgrave and Oates (Musgrave & Peacock 1958; Oates 1972). This theory focuses on the assignment of fiscal responsibilities among different levels of a federal government and public-sector functions (Oates 1998). Oates (1998) emphasized that the basic theory of fiscal federalism lays down the framework for assigning functions for various government levels. It concerns understanding what functions and instruments are best centralized and decentralized, while highlighting revenue and expenditure assignments in order to improve communities' well-being, based on the three core government functions of resource allocation, income distribution, and macroeconomic stabilization (Musgrave & Peacock 1958).

General services and goods should be provided by the central government, while local goods should be provided by the lower-level governments. In fact, distribution and stabilization functions should be conducted and coordinated by the federal government. This theory is applicable to most countries, even if the country is not federal. However, this theory has been criticized for several reasons, including providing limited opportunities for checks and balances among the layers of government, and ignoring the preferences of local citizens (Musgrave & Musgrave 1984).

This theory may or may not work in Somalia, depending on how the federal government of Somalia tries to adopt it. However, some scholars have attempted to modify the traditional or FGT of fiscal federalism. They have developed a theory that incorporates checks and balances within the concept of fiscal responsibility in federal countries, while giving core local functions to the lower-level authorities. Checks and balances support emerging federal countries in learning and making corrections as they gradually implement principles in an iterative manner.

2.2.2. Second Generation Theory (SGT) of Fiscal Federalism

Significant modernization efforts have been undertaken to improve the FGT, or the traditional theory of fiscal federalism, encompassing both the core benefits and motivations of fiscal federalism. These modifications have been made both by economists and political scientists to ultimately develop the SGT of fiscal federalism. It combines two respected recent theories (Oates 2005). First, Hayek (1945) proposed that local governments have more



knowledge about their societies' preferences, so they are in a better position to provide and deliver the public goods and services, respectively, and should therefore take on the responsibility of providing them. Second, citizens, through local elections, put pressure on local governments to better respond to local needs and desires (Tiebout 1956).

This theory encourages local authorities to be empowered to efficiently deliver local services, while the central governments have a more limited role, including macroeconomic management, market regulation, and developing national policies (Feng et al. 2013). Oates (2005) noted that the SGT's key contribution is that it focuses on more recent theories regarding contemporary political economy and intergovernmental arrangements.

This prioritizes sub-national governments and encourages the national-level authorities to delegate the delivery of public services and goods to sub-national governments, which are closer to the communities they serve. It also emphasizes the gains in efficiency that can be made by adopting this approach. This conforms with article 50 of Somalia's constitution, which states that 'Power is given to the level of government where it is likely to be most effectively exercised.' Functionalizing this theory may allow for the possibility having constitutionally enacted principles with a theoretically framed decentralization of Somalia's public finances.

2.3. Prior Studies

Federal countries vary in the magnitude of the provision of public goods and services across levels of the government, and this is reflected in the extent of their spending power. These differences in expenditure across the levels of government reflect the allocation of responsibilities: government levels to which the most responsibilities are allocated will have a larger share of the expenditures for the delivery of goods and services. Usually, financing the public services of fiscal affairs, external affairs, national defense, and social protection lies at the federal level, while states, since they have the knowledge of local demands and preferences, provide local services, including education, safety, protection, housing, and transport. The above has been verified by Virkola (2014) in his study of fiscal federalism in Canada, Germany, Switzerland, and the US.

There are different approaches to assigning revenues to sub-national governments, and these approaches vary in the degree of fiscal autonomy granted. The four main aspects to



consider in revenue assignment are: tax base; tax rates; who collects the taxes; and revenue administration (Martinez-Vazquez et al. 2006).

One approach, when sub-national governments have more fiscal autonomy, involves sub-national governments having the power to define the tax base and set rates, impose taxes, and administer the revenue under their jurisdiction. This, however, can lead to inconsistency, duplication of work, administrative complexity, economic biases, and tax competition among the provinces, owing to different jurisdictions imposing different taxes and rates and following different administrative methods. This approach is used by many countries, including Canada, Switzerland, and the US. In Somalia, individual states (sub-national governments) have full autonomy in setting the tax base and rates, as well as administration. There is, however, a tax harmonization bill currently being considered in parliament and awaiting legitimization, meaning that all revenues would be uniform.

A second approach is known as sub-national surcharges. Here, the federal government defines the tax base and collects its own tax, including surcharges set by sub-national governments. It prevents regions from defining the tax base in contradictory ways, setting different tax rates, and hindering business mobility across the regions. Thus, it maintains uniformity and avoids duplication of work.

A third approach, the tax-sharing approach, is perhaps not as attractive as the first two approaches. It involves sub-national governments receiving fixed fractions of specific federal-government revenues. The shared rates are mostly equal across the individual states. Therefore, this approach limits the fiscal autonomy of the regions, creating an imbalance between revenues and expenditure burden (Martinez-Vazquez et al. 2006).

According to Chandra (2012), expenditure determines revenue. As a result, the above theoretical frameworks give the federal government the ultimate authority in economic stabilization, income redistribution, and delivery of the national demand for goods and services. Similarly, Musgrave & Musgrave (1984) suggested that the federal government collect taxes related to policies for stabilization, redistribution, or taxes on mobile goods, while other taxes can be collected by regional governments.

Notably, fiscal imbalances can come about for various reasons. First, federal governments have more taxing power and relatively fewer expenditure responsibilities, while sub-national governments have less taxing power and more spending functions. This leads to sub-national governments being unable to finance their own responsibilities from their



own revenue sources (Winer & Hettich 2010; Shah & Anwar 1991). Second, according to Chandra (2012) and Shah (1991), fiscal imbalance may also arise from horizontal fiscal imbalance (HFI), which occurs when some sub-national governments have more natural resources or tax revenue than others. Third, fiscal imbalances may arise from expenditure needs. Some states may have unusual spending needs due to having a greater proportion of poverty, their geographical characteristics, and/or their population density, thus resulting in a gap between the fiscal capacity and fiscal need.

Obviously, fiscal imbalance in its various guises is a challenge for most federal governments. Under these circumstances, when the federal government preserves key tax bases and sources, leaving inadequate fiscal means to sub-national governments to cover their expenditure needs, a fiscal gap can occur (Shah 1991). Intergovernmental transfers and revenue sharing are the two most important components of fiscal federalism where the central government uses as balancing instrument to cover deficits, either horizontal or vertical (Chandra 2012).

Furthermore, based on the study of Chandra (2012), intergovernmental transfers and revenue sharing are also two important components of fiscal federalism. In most countries, the federal government preserves the key tax bases and sources, leaving inadequate fiscal means for sub-national governments to cover their expenditure needs, potentially resulting in fiscal imbalance. The federal government can use such transfers to restore fiscal balance. Fiscal-federalism and public-finance experts have broadly grouped these transfers into the following two groups: specific-purpose transfers (conditional transfers); and general-purpose transfers (unconditional transfers). In specific-purpose transfers, the federal government identifies the purpose for which the beneficiary state requires funding. Such grants are usually spent on specific issues that are a priority for the federal government. In general-purpose transfers, meanwhile, the recipient states do not have any specific limitations or conditions over their spending. The main purpose of such grants is to ensure the minimum provision of public services and equalization between federal members states (Chandra 2012).

2.4. Fiscal Federalism in the Context of Somalia

As reflected in the Provisional Constitution, Somalia shifted from a unitary system of government to a federal state after the collapse of Siyad Barre's dictatorship and years of



political, as well as social, struggle. The constitution clearly defines the legality of the federal system and the existence of different layers of government:

Article 48:

1. In the Federal Republic of Somalia, the state is composed of two levels of government:

- (a) The Federal Government Level;
- (b) The Federal Member States Level, which is comprised of the Federal Member State government, and the local governments.

In the above statement, we understand that local governments operate under the member states. The constitution also describes that service delivery and revenue collection is given to the most appropriate level of government and that federalism is built upon several principles, including ‘a fair distribution.’ Nonetheless, regarding monetary policy regulations, the Central Bank of Somalia independently enjoys the power to fulfill its national duties of formulating and implementing financial and monetary policies, including currency printing, inflation control, stabilization of exchange rates, and the establishment of a banking system. In short, the Central Bank of Somalia is the national reserve of the whole country, constitutionally speaking.

Although the country has adopted the federal system, power is yet to be fully divided among states and the federal government, owing to the constitution being incomplete. Thus, as the constitution suggests, discussions and negotiations among the different levels of government, elites, and other politicians are required. Governmental revenue collection is one of the powers that remains undivided, including taxes, natural resources, and customs. Additionally, the revenue-harmonization and public-financial-management bills, which have yet to be approved by the parliament, suggest that revenue-raising power and the collection of natural resources should be under the control of the federal government of Somalia. After negotiations, other agreements have been made, including the revenue-sharing mechanism for petroleum resources and the signing of the memorandum of understanding (MoU) regarding the management of fishery resources and licensing (Isak 2018; Mohamud & Isak 2019).

All things considered, establishing a comprehensive fiscal federalism is the only way in which the public sector can actively perform its duties. This requires different levels of



government to agree on responsibilities, revenue and expenditure assignment, revenue sharing, intergovernmental transfer, and fiscal equalization. Currently, the principles and instruments of intergovernmental fiscal arrangements are properly harmonized, and things are working as planned by default, with each level of government collecting accessible revenues under its jurisdiction.

Areas that still require much more discussion and negotiation by the different levels of government are:

- *Public goods-and-services delivery and expenditure responsibilities relative to the functions assignments.* Although there is a preliminary agreement among the ministries of finance at the national and sub-national levels, a consensus among all government authorities regarding spending guidelines is still required.
- *Revenue-raising and tax-collection powers of each level of government.* This is, however, provided for in the revenue-harmonization bill that is currently before the parliament, although significant further discussion is required.
- *Revenue-sharing mechanism for business taxes and customs.* The fishery, petroleum, and mineral-resources revenue-sharing mechanisms have been agreed in different meetings by the respective authorities.
- *A sound formula-based transfer policy.* This will address what style of intergovernmental fiscal transfer Somalia will practice and how it is implemented. Some good elements have been agreed at the ministerial level but the policy-related medium- to long-term factors are still absent.

Bauer et al. (2018) proposed, for several reasons, that the federal government should manage natural resources and other revenues. First, revenue and natural-resources management by states can hinder a coherent, countrywide fiscal-regime design and economic policy. Second, it can lead to inequalities between states, i.e. some are resource-rich states while others have less resources. For instance, some states in Brazil, like Rio de Janeiro, Espirito, and Sao Paolo, generate a lot of revenues compared to the other states in the country, leading to fiscal capacity differences among states. Ultimately, the federal government of Brazil had to intervene to resolve the issue. Such issues might not happen if the federal government effectively manages fiscal affairs (Bauer et al. 2018).



Bauer et al. (2016) conducted a study of resource governance and revenue-sharing mechanisms that examined more than 30 countries. Although countries use different approaches to managing and sharing resources, the federal government usually collects all revenues from different resources before transferring back to sub-national governments. This is called a derivation-based approach and is used by many countries, e.g. Angola, Bolivia, Brazil, Cameroon, Canada (some states), Chad, China, Colombia, the Democratic Republic of the Congo (DRC), Ecuador, Ethiopia, Ghana, Guinea, India, Indonesia, Iraq, Italy, Kyrgyzstan, Madagascar, Malaysia, Mexico, Mongolia, Niger, Nigeria, Papua New Guinea, Peru, the Philippines, South Sudan, the US (some states), and Venezuela.

Several other countries, however, use indicator-based transfer, in which revenue is shared based on indicators, such as population, revenue generation, poverty level, and geographical characteristics (e.g. remoteness), regardless of which region the revenues originate from. Ecuador, Mongolia, and Mexico use this approach.

Uniquely, the US and Canada give substantial rights to provinces to collect taxes from extraction operations, which constitute a major proportion of local budgets. In this case, these states do not require being given transfers, since they are directly collecting their share as a tax (Bauer et al. 2016).

Moreover, countries like Nigeria, Uganda, and Mongolia use a mixture of indicator-based and derivation-based approaches, where a percentage of oil and gas revenue is allocated based on the place of origin, while the rest is distributed according to social indicators of such as population, revenue generation, poverty level, and geographical characteristics.

Finally, Kazakhstan uses *ad hoc* transfers in two regions rich in natural resources: Atyrau; and Mangistau. These transfers are built upon political agreements made each year rather than a law that clearly defines the share of every government of the natural-resource revenues.

In summary, formula-based allocations (derivation- and indicator-based) are more stable and predictable than *ad hoc* transfers.

2.5. The Case of Benadir Regional Administration

Benadir is the region that contains Mogadishu, the capital city of Somalia. Its status in the federal system is yet to be defined by the parliament, to which the constitution has given absolute authority in this matter. However, there are some on-going efforts to define the



status of the region according to Benadir's wishes. The decision regarding the capital city either being federally administered or having the rights of member statehood is yet to be agreed. Presently, Benadir is directly administered by the federal government. All kinds of revenues are managed by the federal government; specifically, the ministry of finance. These revenues are income tax, sales tax, customs, stamp duties or registration taxes, and other fees on public goods and services. With the exception of certain taxes, the Mogadishu municipality collects property tax, and different kinds of permits and license fees, as well as very low-level collections with regard to small markets and hygienic issues. As a result, the federal government gives 15% of the customs revenue to the Benadir regional administration, which can be defined as unconditional transfers. It is a derivation-based revenue-sharing approach by which Mogadishu is compensated as being the source of that revenue. Also, Benadir is among the recipients of conditional transfers given by the federal government of Somalia. These funds are mostly from the World Bank, the European Union, and other donors' budgetary supports to Somalia. The conditions for these funds come from either the federal government or the donor, although grants are given in their entirety to the federal government of Somalia to keep the country's systems running and to pay the salaries of civil servants, teachers, and army forces. The fact that the case of Benadir is separately presented highlights that it's political status differs than that of other fully-fledged states, being more under the full control of the federal government than other states; therefore, the public-finance aspects of this regional administration are unique in Somalia.

2.6. Other States

There are five federal member states in Somalia: Jubbaland; South West; Hirshabelle; Galmudug; and Puntland. Ongoing discussion since decentralization has led to these states agreeing some politically related factors with the federal government but, regarding tax, there are no legally defined or agreed methods of tax collection, tax base, or administration between the federal government and member states. By default, every state collects what it is able to collect within its territory. Legally, every municipal government is allowed to collect some revenue, the same as Mogadishu's local government, but currently the states are taking full control of this role, and there is no collection authority lower than a state. Not only revenue collections, but also other instruments are not yet clear, and sub-national governments tend to provide public services to as limited a degree as possible to municipal



governments from the budget of their own revenue sources; some of the fiscal gap is covered by intergovernmental transfers and grants from the federal government and donors. There is an agreement on expenditure assignment guidelines, but the responsibilities are not fully divided among levels of government.

Federal member states, like Benadir, receive transfers from the federal government of Somalia. They are made up of unconditional as well as conditional grants. Most of these grants are used for the salaries of civil servants, police forces, and other governance needs.

3. Methodology

This study's methodology for data collection is mixed and made up of three instruments, namely: interviews; observations; and case studies.

For the interviews, the study questioned 12 experts working for the ministries of finance of the federal government of Somalia and of federal member states, and the finance department of Benadir's Regional Administration. Why these representatives were chosen is based on the fact that their government agencies are directly involved in the fiscal issues of federalism, and they are members of intergovernmental fiscal forum committees entitled to continue negotiations regarding fiscal federalism until alternative measures are fully agreed by all. This study sought the views of technical mid-management and decision-makers for two reasons. First, the authors were not able to reach the policy makers – the ministers – due to limited accessibility to their offices. The second and most important reason is that technical and administrative views always have higher probability of realism than politicians' views; technocrats tend to identify the real problems and facts.

Direct observation is another research instrument that the study used, since the researchers have good knowledge of the fiscal-federalism process. They witnessed, and had an opportunity to be involved in, the fiscal responsibilities of the federal ministry of finance.

Finally, the study has utilized two case studies, from Ethiopia and Nigeria, to draw conclusions from the analysis on these countries' fiscal federalism, specifically regarding their principles, division of assignments, and existing challenges.



3.1. Case studies

The study used case-study countries whose federalism establishment can be good example to Somalia: Nigeria; and Ethiopia.

3.1.1. *The Case of Nigeria*

Historically, Nigeria's fiscal federalism dates back to 1940s, and many legal definitions have been used to describe and modify the intergovernmental fiscal relations among the governments. These legal documents have been issued by commissions, legislatures, decrees, and the Supreme Court (Egwaikhide et al. 2009).

The federal government exclusively looks after some high-level responsibilities: defense; foreign affairs; police and security; higher-level elections; passports and citizenship; telecommunications regulation; railways; currency and banks; taxation of income, profits, and capital gains; mines and minerals; copyright; aviation; and trade and commerce. States and federal governments share some responsibilities for health, social welfare, post-secondary education, culture, electricity, statistics, industry, research, and technology, while sewage disposal, sanitation, road maintenance, primary education, and market stalls are solely under the control of the sub-national governments (Bin 2011; Nigeria National Assembly 1999).

In Nigeria, it is clearly agreed and enacted that major sources of revenues (such as petroleum and mining revenue, royalties, corporate profit tax, customs duties, excise duties, and income taxes) lie under federal jurisdiction management, while others lie under the sub-national governments, including local government (Orji 2008).

Nigeria's revenue flows go to a federation account, which serves as a central treasury to the three levels of the government, which are federal, state, and local. These revenues are allocated and distributed to the different tiers of the government in two ways: vertical allocation; and horizontal allocation. Vertical allocation sets the percentage of revenues to be allocated to each different government tier, i.e. one federal government, 36 states, and 774 local governments. It covers and applies to all revenues in the federation account over a given period of time (Orji 2008). Horizontal allocation is a set of formulae for intra-tier sharing among the states and local governments. It can be broken down into two allocative instruments: derivation-based; and formula-based. The derivation method is based on giving a certain portion of the revenue back to the place of origin, while formula-based sharing



considers certain socioeconomic indicators, such as population, poverty, landmass, access to water, health, educations, etc. (National Bureau of Statistics [Nigeria] 2017).

3.1.2. *The Case of Ethiopia*

Historically, Ethiopia's system of government has been centralized and most fiscal power and related decision-making has been concentrated at the center (Moges 2003). The 1995 constitution declared Ethiopia a federal republic. Several larger communities were selected to ethnically establish their federal regions, and this paved the way for other smaller communities to be utilized to alleviate potential problems regarding misunderstanding with their other ethnic counterparts. However, the government at this time had to enforce this kind of federalism on the communities chosen (Bezabih 2016).

In Ethiopia, the functions assignment is constitutionally defined. The federal government exclusively runs foreign affairs, defense, federal police, public security, overall economic and social policies and food security, fiscal and monetary policies, foreign-direct-investment policies, industry and commerce, natural resource management, air and water, transport, national health standards, education, science and technology, interstate roads, railways and highways, collecting federal taxes, and nationality and immigration responsibilities. States work on ensuring democratic order based on the rule of law, socioeconomic-development policies at the state level, maintaining rural roads, managing state-level taxes, land conservation, and implementing federal policies, laws, and policies, while local governments maintain water, sewerage, and fire protection (Negussie 2016).

Regarding tax assignment, there are three levels: federal; state; and shared. The federal level collects custom duties, personal income tax on federal and international organizations' employees, profit tax, sales, taxes on the income of air, rail, and sea transport services, tax on rental of houses and properties owned by the federal government, federal stamp duties and tax on monopolies, and collecting fees and charges related to licenses issued and services rendered by the federal government. States collect personal income tax collected from state employees and private enterprises, rural land-use fees and tax on income of private farmers and cooperative associations, profit and sales tax on individual traders, tax on income from inland water transportation, taxes on income derived from rent of houses and other properties in the state owned by state or others, income, profit, sales, and excise taxes on enterprises owned by the states, and royalties for the use of forest resources.



Although collections are made at the federal level, the following taxes are shared: profit, sales, excise, and income taxes levied on enterprises jointly established by the federal and state governments; profit, sales, and excise taxes on companies; tax on dividends due to shareholders; and profit tax and royalties on large-scale mining and all petroleum and gas operations (Negussie 2016).

4. Results

Interviews, direct observation, and case studies were key tools utilized in this study. The study interviewed 12 different fiscal experts who are mid-level decision-makers and technical-level experts involved in fiscal federalism issues in Somalia, encompassing the federal government of Somalia and all federal member states (Galmudug, South West, Jubbaland, Hirshabelle, Puntland) and Benadir Regional Administration. The Somaliland's ministry of finance was not reachable due to political reasons. The study interviewed two practitioner experts who have experience on various sub-Saharan states' fiscal policies with respect to federalism. The study also analyzed the observed situation regarding fiscal-federalism issues among the federal government and member states.

The research results are based on current ongoing efforts and meeting minutes of previous intergovernmental fiscal federalism forums. Finally, two case studies of federalism were examined in the study. The objective the case studies was to show how Nigeria and Ethiopia fared in the process their fiscal decentralization, functions and expenditure assignments, tax-raising power, transfer policy, natural-resources management, and revenue-sharing mechanisms.

4.1. Current Status

The interviews, observations, and case-study results highlighted the issues in Somalia described in the following sub-sections.

4.1.1. *The Levels of Government*

The constitution states that the country will have three levels of government: federal; state; and local government or municipality. However, based on the interview results and the case-study analysis, current practices and facts indicate that the roles of local governments



are in fact taken over by states, which act as the sole authority from state level to the district level. The existing competition for power is only between the federal government and member states. There is no state-versus-municipality delegation or negotiation of power, and this has led to fundamental federalism features being ignored, and hence the absence of fiscal checks and balances in the lower level. There are state–municipal disputes over functions and responsibilities in some emerging countries, but it is different in Somalia, where municipalities are in the pre-existence phase, except for Mogadishu, which is the only active local government fully working.

4.1.2. Functions and Expenditure Assignment

There are some preliminarily agreed guidelines on functions and expenditure assignments, in addition to four constitutionally defined areas that are the exclusive responsibility of the federal government: national defense; citizenship and immigration; foreign affairs; and monetary policy. All other functions of governance are subject to discussion among levels of the government, as described by the Provisional Constitution. Currently, member states and Benadir region provide services under their own jurisdiction and finance them through the accessible revenues collected in their territory. The lack of assignment description was not a barrier for them in providing capable services. Recent examples include Benadir Regional Administration and Puntland State, whose provision of government services to their citizens has been successful. The ministers of finance of the federal government and member states agreed expenditure guidelines in their Addis Ababa meeting in September 2019. This will pave the way for future acceleration in resolving fiscal federalism issues in all their aspects.

4.1.3. Revenue Collection and Policy

Somalia has not yet established a framework for revenue collection, administration, or setting the policy for taxation; it remains a work in progress. The federal government agreed with member states some instruments, including harmonization of sin tax rates covering various products imported to Somalia. The harmonization of sin taxes included increasing tax rates for tobacco and Khat, aimed at restricting the demand from young people for drug consumption rather than increasing revenue. Going forward, there are planned customs reforms that will be expanded to Kismayo (Jubbaland State) and Bosaso (Puntland State),



which is the one of the foundations for unifying nation-wide customs control. Despite these agreements, the remaining works are much harder; some critical assignments on taxation have yet to be discussed. Questions still remain to be answered regarding: who collects what; whether there will be one revenue administration channel (Revenue Authority) or whether every government level will collect taxes in its own way; and whether revenue sharing (of business taxations) will be based on the tax type's collection for each government or whether funds will be deposited to a National Reserve (constitutionally defined) and then distributed and transferred to governments. In conclusion, tax regimes are not sufficiently harmonized.

4.1.4. Intergovernmental Transfers

Current federal government transfers to sub-national governments are made on an *ad hoc* basis and are very small in number compared to actual needs. Currently, there are three kinds of transfers. The first is a conditional grant given equally to all states and Benadir region. These grants are only spent on certain areas agreed by the government, such as health, education, and civil-service staff salaries. The second is general transfers, which do not have any conditions regarding what they are to be spent on. The first two transfers are grants that the country receives from donors and are given, on *ad hoc* basis, equally to all sub-national governments, including Benadir region (the capital city). The third kind of intergovernmental transfer is different from the previous two because the source of revenue is domestic. It is a portion of domestic tax revenues that the federal government transfers back to the originating city, which is Mogadishu. The federal ministry of finance gives 15% of customs revenue back to the Benadir Regional Administration.

4.1.5. Natural-resources Revenue Sharing and Management

The revenue-sharing mechanism is another important fiscal instrument of federalism. The federal and state governments have agreed on petroleum- and fishery-revenue sharing after concluding a MoU. The MoU explains that the management of these resources and collection of revenue is performed by the federal authorities, and sharing is based on this agreement. However, these agreements cannot be regarded as the final legal reference for natural resources, but rather only as a preliminary proposal for anticipated constitutional changes. Despite these improvements, several key questions still need to be addressed. For example, to date, no discussions have been held regarding the sharing of revenues from taxes



and customs, or higher-level licensing fees, including telecommunications, overflight fees, etc.

4.2. Challenges

Based on the results from above analysis, these following challenges emerge.

4.2.1. *Political and Security Instability*

These two factors are common in Somalia. This fragility has cost Somalia much more than most other countries in the world, based on: insecurity and political instability in the country following the former government's collapse in 1991; the existence of active armed groups fighting against the government; prolonged fighting among different societies/communities; and fighting over resources among clans. The federal government controls only the capital city and its environs, while most of the states are similar in this respect (controlling their regional capitals and other limited areas), except for Puntland, which has control of most of its area of jurisdiction, and Somaliland, which is under special treatment currently. Isak (2018) revealed that these two factors challenge sources of revenue collections for the country.

4.2.2. *Low Understanding Related to Federalism*

Society at large, as well as many politicians, do not yet have a good understanding of federalism. Federalism has different features compared to a unitary system, most of which have not yet been fully understood. Many laws still remain unchanged from their unitary perspective, political representations are still based on a clan basis, and various social connections are still considered as having a higher value than state building. This lack of understanding regarding federalism is a hugely challenging factor (Ali et al. 2019).

4.2.3. *Constitution-related Challenges*

The constitution set out only four national-level functions, which are responsibilities of the foreign ministry, Immigration and Naturalization Directorate, the central bank, and the national army. Notably (and unfortunately), this leaves all other functions subject to negotiation. Further, some pre-federalism constitutions for regional administration violate the current provisional constitution. For example, the Puntland state constitution enables



the head of state to conclude agreements with foreign countries and print currency notes; this has been in practice in recent times. This tends to create economic balkanization when member states negotiate concessions and infrastructure contracts individually, without national-level involvement. Somalia is also a case that is very different to other countries, with issues still to be resolved regarding Somaliland, Mogadishu's status (the capital city), and the fact that the constitution is provisional and has not yet been subject to a public referendum. All these factors highlight the existence of constitutionally related challenges.

4.2.4. Attempting to solve all the issues at once

Since the federal government of Somalia is leading the efforts for fiscal decentralization, there are some signs indicating that the government wants to resolve all outstanding issues at the same time. Currently, each government agency does not have a viable infrastructure to solve related issues with counterpart sub-national agencies because of technical deficiencies, weak institutional capacity, insecurity, and lack of funding. In addition, trying to solve at one point in time and agree on all instruments (such as tax assignment among the ministries of finance, functions and expenditure responsibilities among all government agencies, revenue sharing and transfer policy) will likely lead to these individual issues not being properly resolved. Bundling them all together at once does not make things easier; a more gradual, step-by-step approach may be more successful.

4.2.5. Tensions and Mistrust among Levels of Government

There are political misunderstandings and mistrust between federal and member states. This has interrupted the ongoing efforts to decentralize some important instruments of federalism. Some fiscal forum negotiations have been postponed, several high-level meetings have been disrupted, and one state refused to be part of the initiative for unified national secondary examination by the federal ministry of education. It has also led to several heads of state meeting with international communities and blaming the federal government. In summary, this tension, misunderstanding, and mistrust has hindered the ongoing process of building the pillars of federalism.



4.2.6. *Weak Institutional Capacity*

The national government institutions, as well as sub-national institutions, have been established in the last seven years, following prolonged civil unrest in the country. In addition to this, government personnel in both levels have not been equipped with the required skills to speed up state building in general and federalism in particular. These weaknesses, together with the scarcity of resources, make performing the necessary duties to fiscally build the nation extremely difficult.

5. Conclusion

In general, Somalia has been making economic progress, including GDP, economic policy reforms, advanced farming, reconnection with international organizations such as the World Bank and International Monetary Fund (IMF), and reconstruction of infrastructure. For instance, as of August 2019, there is an ongoing highway reconstruction that links Mogadishu to the neighboring regions of Lower and Middle Shabelle. On top of that, there are untapped and newly discovered offshore resources in Somalia including tuna, oil, and gas. Therefore, the country requires far-sighted leaders, inclusive governance, and effective (as well as a mutual) agreement between all stakeholders.

Meanwhile, most Somalis (in their different groups) do pay attention to the revenue-sharing ratio. This has undeniably led to mistrust between clan elders, the federal government, and some federal member states. In an effort to counteract this, there was a MoU signed by presidents of all levels of the government in Baydhabo, June 2018. This MoU explains the revenue-sharing ratio, but it is yet to be accepted by some federal member states, e.g. Puntland state.

In short, the decentralization of the federal system to the lowest level – the creation of independent local governments – is vital and inescapable. Until this is achieved, there will be a significant challenge to continued prosperity. Also, the MoU requires approval by the parliament in order to become a policy. In summary, Somalia requires a comprehensive and legitimate solution to the existing fiscal problems for the whole country if genuine and long-lasting progress is to be made.



5.1. Recommendations

Based on the previous discussions and findings, the present study recommends:

- Fostering discussions between the federal government and federal member states, as encouraged by the constitution. This will lay down the foundations of fiscal-federalism principles and instruments. Also, it is highly recommended to strengthen the capacity of sub-national governments (both institutionally and in terms of personnel) to enable them to fully exercise the responsibilities within their jurisdiction.
- A clear assignment of functions, revenue sharing, and expenditure responsibilities among the national and sub-national governments. This should be based on the likelihood of effectively performing these duties and on which assigned level of government is most closely related to the affected section of society.
- In setting policies related to the division of work, expenditure powers, tax assignment, resources management, and revenue sharing, it is highly recommended that legally sound and analytically analyzed policies are set out that are built upon expertise and take lessons from the failures and successes of federalism in other countries.
- The agreed principles are recommended to be set down in a high-level legal source such as the constitution. Somalia has been experiencing many disputes regarding previously agreed principles that were set out either in intergovernmental agreements or MoUs. Putting these principles into a low-level framework would make it vulnerable to repeated disputes. Ethiopia and Nigeria are examples of setting out the division of powers and functions of the national government in the constitution.
- To maintain the principles of public financial management in general, and transparency and accountability in particular, the terms of agreement must also be fulfilled, as this will extend the possibility of sustaining agreed principles, while also encouraging the continued solving of issues in discussion forums.

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**The Iraqi Federation and the Kurdistan Regional
Government: the conflict between communal and oil
and gas policies**

by

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Abstract

The purpose of this paper is to analyse the role and place of oil and gas politics in the Iraqi Federation. This aspect is investigated in its relationship to ethnic conflict. These two features are considered in their interplay, which permeates the whole Iraqi constitutional experience. The 2005 Iraqi Constitution embodies specific but vague dispositions related to the ownership and the ‘management’ of oil and gas revenue sharing. In addition, other disputes are shaking the relationship between the Kurdistan Region and the central government, especially the status of Kirkuk, which is strictly connected to the ownership of natural resources. Therefore, the ‘imported’ Iraqi Constitution is critically examined, above all in those ambiguous and carefully drafted dispositions and where the Constitution has not been implemented. Two specific sections are devoted to federalism, decentralisation and oil and gas revenue sharing. An analytical framework of such dispositions is provided, as well as their cumulative reading within the federal structure. In the last sections, it is argued that the interplay between oil and gas disputes and ethnic conflict are shaping the asymmetric Iraqi Federation, especially between the Kurdistan and the Iraqi central government. This issue is highlighted by the unsolved status of Kirkuk and the impossibility to address the constitutional shortcomings through constitutional amendments’ rule. Therefore, the Constitution is caught in between the informal agreements and the undefined horizon of the Iraqi (un)constitutional politics.

Key-words

Iraq, federalism, ethnic conflict, constitutional asymmetry, Kurds, comparative federalism



1. Introduction

This paper seeks to examine the future of the Iraqi federation on a constitutional perspective, arguing the main sources of conflict affecting the country is grounded on ethnicity, and oil and gas revenue sharing. The analysis will be carried out without leaving aside the social and political dimension, such as the ISIS experience together with the ongoing protests in the whole country. The main topic of this paper is federalism, which was introduced and prompted by the US administration during the occupation. Recurrent shortcomings and ambiguities of the Iraqi constitutional framework are, as a matter of fact, often connected to the deficient Constitution-making process, which was driven by the US. This deficiency consisted specifically in a short constitution-drafting period and limited participation; a fact, which also affected constitutional dispositions on the core value of federalism in terms of ‘self-rules and shared-rules’. Unfortunately, the constitutional ambiguities of the ‘transplanted’ Constitution, even though on the one side provided actors with a bargaining range, on the other side these ambiguities have worsened the relationship between the three main religious-ethnic groups: Shia’s, Sunnis and Kurds. In this light, and together with this historical background, one should be able to understand that the rise of ISIS in Iraq is strictly connected to the Sunnis’ insurgency during the occupation. Recent developments, such as the faltering Kurdish referendum, have definitively shown the fragility of the Iraqi federal institutions facing a difficult integration among different ethnic groups. Thus, is clear that, in practice, the Iraqi constitutional Text is not likely to represent the so called *idem sentire*, grounded on shared values and aspirations (sec. 4). In this logic, a carefully analysis of the constitution-making process is required in order to understand the current constitutional and political reality (sec. 3). On the ground of constitutional dispositions, above all, the absence of the upper Chamber shall be highlighted. Constitutional ambiguities and shortcomings are the main features of the disposition related to the structure of the Federation and decentralisation. The first shows the existence of one ethnic based region (the Kurdistan), alongside with 15 Governorates. The Iraqi decentralisation represents a unique model in the world, taking into consideration the legislative power of the federal government, regions and governorates, and the deference to regional laws in case of ‘contradiction’ among the federal and regional government (par. 5). Besides that, the



constitutional dispositions on oil and gas exploitation and revenue sharing, which is likely to represent the main field of conflicts and source of instability for the country, shall be taken into account. The recent disputed 2018 Federal Budget, alongside the failed 2007 hydrocarbon law, is the best example thereof (sec. 6). The conclusion and hypothesis on the future of the Iraqi federalism are strictly connected to a serious commitment to shared path in matter of oil and gas issue. The agreement in this field could be conducive to a broader arrangement between the three major groups on reducing US constitutional legacy. The inclusion of the Sunnis' group is strongly recommended and could lead to key constitutional amendments and implementations. Broadly speaking, a shared and inclusive constitutional reform is recommended in the light of fixing the shortcomings in an 'autochthonous way'. It goes without saying that, the influences of external actors, such as the US, Iran and Turkey, are fully considered in this paper, even though not explicitly addressed.

2. Historical background

After the invasion led by the United States army and the consequent fall of Saddam Hussein's regime, a foggy and never ending transitional period began in Iraq. Federalism has been introduced in Iraq in the aftermath of Saddam Hussein's regime. The reason for its application has been, mainly, its flexibility which makes it still today the sole way to accommodate ethnic diversity in Iraq, whose society is deeply divided between the three major ethno - religious groups: Shias, Sunnis and Kurds^I. These divisions are grounded in the country's turbulent political and institutional history since the 1980's Iran-Iraq war (1980 – 1988), during which Saddam Hussein's Sunnis regime systematically intensified to the repression of the Kurd population in the North. After the First Gulf War (1991) persecutions took place in the South, due to the failure of the Shia's rebellion. As a consequence of that, in the new Iraq^{II}, the feeling of being discriminated has spread among the Sunnis^{III}, mainly due to the de-Ba'athification and their economic marginalization, becoming what has been considered as the main reason of ISIS successful insurgency in the early summer 2014^{IV}.

Indeed, preliminarily it shall be noted that the Federal Constitution was promoted by foreign forces (United States above all), and largely boycotted by the Sunni minority, to which belonged Saddam Hussein's family and the majority of the former Iraqi political elite (par. 2). Furthermore, the Iraq Kurdistan was *de facto*, under the no fly zone umbrella since 1991,



being a semi-independent territory under the direct administration of the Kurdistan Regional Government (KRG), which was *de facto* divided in two separated government (Kurdistan Democratic Party in Arbil and Duhok and Patriotic Union Party in Sulaimaniya)^V.

Between the three major ethno-religious groups, only the Shi'a (60% of the population) firmly supported the new federal institutional framework, due to the limited role they were assigned during the previous regime. In fact, under Saddam Hussein's despotic rule, Shias were highly underrepresented in the major institutions and they were subject to systematic repression which included mass executions, especially after 1988 (Anderson and Stansfield 2004: 117 and ff.).

The federal model adopted in Iraq raised severe confrontation between Shias and Kurds^{VI}. Two were the federal models discussed in Iraq: the territorial or majoritarian and the ethnic or multinational federal model^{VII}. The first was supported by Shias while the second by Kurds. The first model tends to a major centralization of the State. As explained above, the Shias promoted a territorial federalism, which is likely to assign them the majority in the federal institutions. The Kurds have generally favoured the second model of federalism, consisting in weak federal institutions and in a Kurdistan Region. The country's current constitutional arrangements have basically entrenched the second model of federalism. This means that, after the fall of Saddam Hussein's regime, the Sunnis, skeptical about federalism, were excluded from the political debate. Moreover, the only feasible way to address the question is the substantial reintegration of the Sunni minority through inclusive policies (Al-Qarawee 2014: 33-41; Romano 2014a: 547-566, especially 548-551). To sum up, the Iraqi constitutional engineering is arguably defined as asymmetric ethnic federation due to the presence of the Iraqi Kurdistan Region. There are several factors which satisfy this definition, whose terminological declinations have been manifold: ethnic, multinational, plurinational and more recently hegemonic autonomy (Kössler 2018: 400). First and foremost, the Kurdistan represents the homeland of the Kurdish people, where they can exercise their autonomy. Secondly, the Kurdish identity in Iraq is strictly connected to their territory. Finally, the Kurdish are territorially concentrated and this makes the territorial accommodation the only viable option^{VIII}.



3. The ‘imported’ Iraqi Constitution

The Iraqi Constitution is a typical example of the transplants of the liberal constitutional model set by external actors (on constitutional transfers see Frankenberg 2018: 111 and ff.). These actors, alongside the majority of scholarship, have focused on features such as the degree of ‘democracy’ and ‘stability’ in post authoritarian countries, instead of fostering efforts on widening socioeconomic gaps, immigration policies and democratic deficit (especially in Afghanistan and Iraq). Therefore, the exportability of ‘key Western constitutional concepts and ideals to troubled and often idiosyncratic settings’ has been carelessly accepted. Thus, the so-called ‘Global South’ (Sub-Saharan Africa, Central America, Middle East and Eurasia) constitutional experiences, which should be furtherly investigated, have been largely ignored. Indeed, the constitutional experiences of the regions mentioned above remain nowadays a *terra incognita*, which deserves still even more attention^{IX}. Last but not least, and this is the case of Iraq, constitutional experiences in the Global South tend to be considered only in terms of the failure of the rule of law^X.

The Iraqi case deserves attention for the abovementioned reasons. The dawn of the new Iraqi constitutional framework began when the United Nations, enacting the UN Security Council Resolution (UN SCR) n. 1483, recognised to US and UK the status of occupation forces according to the Hague Convention 1907 and Geneva Convention 1949^{XI}. The Resolution n. 1483 formally authorised US and UK to exercise the legal power, on behalf of the Coalition Provisional Authority (hereinafter CPA)^{XII}. The CPA Regulation n. 1, 13 May 2003, assigned to the CPA itself the faculty to ‘exercise powers of government temporarily in order to provide for the effective administration of Iraq during the period of transitional administration, to restore ...’ (Section 1, 1) and that ‘the CPA is vested with all executive, legislative and judicial authority necessary to achieve its objectives, to be exercised under relevant U.N. Security Council resolutions, including Resolution 1483 (2003), and the laws and usages of war. This authority shall be exercised by the CPA Administrator’ (sec. 1, 2)^{XIII}. The following UN SCR 1511 pointed out the temporary nature of the CPA, recognised the Iraqi Governing Council (IGC) appointed by the CPA on 13 July 2003, and ‘called on the Coalition Provisional Authority in Iraq to return governing authority to the people of that country ‘as soon as practicable’’. Furthermore the UN SCR 1511/2003 invited the IGC to provide, no later than 15 December 2003, to the UN SC a ‘timetable and a programme for



the drafting of a new constitution for Iraq and for the holding of democratic elections under that constitution^{xiv}.

Consequently, on 15 November 2003, the CPA and the ICG contracted an agreement^{xv}, which tasked CPA and ICG to write a Transitional Administrative Law (TAL), which was signed on 8 March 2004. The document drew up by the CPA and the ICG was basically a provisional constitution which, alongside the Iraqi Interim Government (IIG), came into effect on 28 June 2004, two days before the scheduled CPA's dissolution, as set out by the UN SCR 1546/2004 (Marr 2012: 279; Allawi 2007: 214-218). The 15 November Agreement and the TAL still represent the cornerstone of the current Iraqi constitution.

In fact, the Agreement firstly introduced key constitutional features of the following TAL such as federalism, bill of rights, separation of powers and also regional caucuses aimed at providing the selection of members of the transitional assembly. Secondly, as mentioned above, although the TAL was the interim constitution drafted by CPA and its appointed body (IGC), this document *de facto* was 'a full-fledged constitution that commits Iraqis to many important decisions'^{xvi}. The TAL embodied many provisions concerning federalism (art. 4)^{xvii} and the Kurdistan Region status. The federal structure was set out in article 52 which promoted the consociation model of federalism (supported by McGarry and O'Leary 2007: 670-698). The goal of this federal structure, for the US, was 'to prevent the concentration of power in the federal government and to encourage the exercise of local authority' (Lugar, Biden and Hyde 2004: 8). Moreover, art. 53 letter a) recognised the Kurdistan Regional Government (KRG) as the official government of the Kurdistan Region and (letter b) eighteen governorates with their right to form regions from amongst themselves (not more than three). The following art. 54 letter b) assigned legislative autonomy to the Kurdish National Assembly including the power to amend 'the application of any such law within the Kurdistan region, but only to the extent that this relates to matters that are not within the provisions of articles 25 and 43(D) of this Law and that fall within the exclusive competence of the federal government'. On matter of sources of law, Islam was recognised source of legislation and official religion of the State (art. 7) alongside fundamental rights (Chapter 2, articles 11 – 23). This was another basic TAL provision, which became a key point of the Iraqi Constitution. In fact, article 3 stated also that 'no law that contradicts the universally agreed tenets of Islam, the principles of democracy, or the rights cited in Chapter Two of this Law may be enacted during the transitional period' (see



par. 3). Ultimately, it's clear that the TAL has been basically the framework of the permanent constitution^{xviii}.

In addition, the TAL set the agenda for the Constitution drafting process, calling for the election of the National Assembly by 31 January 2005 (art. 2, let. b) (Binda *et al.* 2005: 6-13)^{xix}. Later, the elected National Assembly assumed the office as a transitional parliament and a constituent assembly, with the main task of writing the draft of the permanent constitution by 15 August 2005 (art. 61 let. a). The last step was the popular referendum on the draft constitution (art. 61 let. b), held on 15 October 2005, which gave way to the adoption of the current Iraqi Constitution^{xx}.

The result of the TAL engineering was highly favourable to the Kurds. The significant Kurdish victory during the constitution drafting process remains the main feature of the Iraqi federalism. Both the TAL and the permanent Constitution provided for a highly decentralised system, because the KRG was granted, in the areas under its control, the right to stay in charge over the security forces and raise taxes. The Kurdish rule has led experts to strongly highlight the tentative to ignore the Arab identity of Iraq overwhelmed by western liberal constitutionalism and its 'Kurdo-centrism'^{xxi}.

The lack of legitimacy of the constitution making process came from the absence of the participatory nature due to, together with the external influence^{xxii}, the absence of an inclusive national dialogue and consensus. Moreover, the US did not deal with the whole Iraqi ethno-religious communities, having marginalised Sunnis^{xxiii}, constrained Shias issues^{xxiv} and boosted Kurds. As a consequence, the relation between the Constitution and the sovereignty principle remains highly problematic (Brown 2005: 931-932; Benomar 2004: 95; Arato 2009: 88-97)^{xxv}.

4. Basic principles and key features of the Iraqi Constitution

Understanding the Iraqi Federation means taking into consideration the relevance of the Preamble, which summarises the main challenges of the Iraqi future. Generally, preambles, among Arab countries, are longer than those in western constitutions. Such preambles contain several common features, first of all the frequent evocation of God (Allah)^{xxvi}. Besides that, what makes the Iraqi preamble a distinctive example is the first sentence: 'We the people of Mesopotamia ... the cradle of civilization ... home of numeration' (cf. Hischl



2014: 275; Voermans, Stremler and Cliteur 2017: 49, 53-54, 60). The description of the glorious past might be understood as an attempt to state that Iraq can reborn from the ashes of the war. The second paragraph clearly points out an additional and relevant indication: remembering the past, being aware of the present violence, sectarianism and division, seemed to be, for the drafters, the right tool in order to rebuild the statehood. Furthermore, religious and ethnic groups, Shias and Sunnis, Arabs, Kurds, Turkmen etc, are underlined and mentioned.

Only after such “clarifications” the classic US based formula, ‘we, the people of Iraq’, is set out. In addition, in the same paragraph, the Preamble lays down the regime of the new Iraq: republican, federal, democratic and pluralistic (par. 4). Federalism, in its narrow meaning of ‘unity in diversity’, is widely promoted in the last paragraph, where it’s stated ‘we the people of Iraq, of all components and across the spectrum ... The adherence to this Constitution preserves for Iraq its free union of people, of land, and of sovereignty’. Moreover, another basic feature is the management of resources, plainly recalled in the Preamble – ‘just distribution of resources’ (par. 3), which has become the main struggle within the country. The reason of the Preamble’s consistency, recalling the past, being aware of the present and hoping for a better future, is grounded on the specific commitment to rebuild the new statehood. Finally, as Tushnet has argued, the length of the Preamble is likely to reflect ‘the kinds of negotiated compromises that pervade constitutional details’^{xxvii}.

The basic principles enshrined in the Preambles are recalled in the first Section of the Constitution (art. 1-13). The first article ‘the Republic of Iraq is a single federal ... state in which the system of government is republican, representative, parliamentary, and democratic and this Constitution is a guarantor of the unity of Iraq’ is strictly connected to article 13 sec. 1^{xxviii} where it’s stated that ‘this Constitution is the preeminent and supreme law in Iraq and shall be binding in all parts of Iraq without exception’. The meaning of ‘without exception’ might be referred to secessionist aspirations of the Kurds. Hence, the combination between the first and last article of the first section aims to enforce the supremacy of the Constitution as supreme law of the Federation (Zedalis 2009: 32).

Not unlike the Preamble, art. 3 sets out that Iraq is a country of multiple nationalities, religions and sects (art. 3) (Castellino and Cavanaugh 2013: 224 and ff.). Additionally, more significant is art. 4, which defines some central issues closely related to the legal status of the Iraqi minorities. In the first section, Arabic and Kurdish languages are labelled as official



languages of Iraq (Bammarny 2016: 487). Moreover, the Constitution lays down the right to educate children in their mother tongue such as Turkmen, Syriac, and Armenian in government educational institutions. Turkmen and Syriac languages are guaranteed by par. 4. The Constitution points them out as official languages in the administrative units ‘in which they constitute density of population’. Similarly, in order to safeguard the other minorities, the last section confers to all administrative units the possibility to choose an additional official language through referendum.

Moreover art. 45 par. 1 of the Constitution, stressing that ‘the State shall seek to strengthen the role of civil society institutions, and to support, develop and preserve their independence’, outlines a further key feature, the political socialization function of the Constitution, which means, as Burgess has argued, the promotion of the federal political culture. Ethnicities, tribes and religious groups are recognised at the lowest level. According to art. 45 par. 2, ‘the State shall seek the advancement of the Iraqi clans and tribes [...] their noble human values in a way that contributes to the development of society’. The mention of tribal traditions, consistent with religion and the law, meets the prohibition respecting of the human rights protection. Finally, art. 125 underlines and promotes the other minorities or ‘nationalities’, such as Turkomen, Chaldeans, Assyrians, and all other constituents (Burgess 2013: 312).

5. Decentralization: Governorates and the status of the Iraqi Kurdistan Region

Before providing a more in-depth analysis on some particular federal arrangements of the Iraqi Constitution, as well as the distribution of the legislative competencies between the central government and the Kurdistan Region and governorates, the main features of the Iraqi parliamentary system shall be outlined^{XXIX}. To begin with, Section four of the Constitution concerns the federal institutions. Currently, the Iraqi Parliament is composed of the Lower Chamber only (328 members), the Council of Representatives, which ‘shall consist of a number of members, at a ratio of one seat per 100,000 Iraqi persons representing the entire Iraqi people’ (art. 49).

However, the upper chamber, named the Federation Council, has not been established yet and it would entail a huge constitutional reform, with the purpose to shape legislative



power, legislative process and the internal rules of both the chambers^{xxx}. To date, in spite of art. 49, the legislative power is wielded by the Council of Representatives only^{xxxi}. The constitutional provision of art. 65 lays down that the Federation Council shall represent the regions and governorates not organised in regions. Besides that, the Federation Council may come into force only after the enactment of a law by a two-thirds majority of the members of the Council of Representatives. One viable explanation of the failure of such enactment is grounded on the different interpretation of Iraqi federalism by the Shias and Kurds. In federal systems the upper chamber promotes regional or states member interests and, in the Iraqi context, it would work as an anti-majoritarian agent in decision-making process, especially in constitutional amendment procedure. Moreover, a direct representation to governorates can be granted and it might also have the effect of reducing the influence from the above.

Consequently, it has been emphasised that the Federation Council will constitute a basic tool of the Federation in matter of negotiation policies affecting regional or local interests, having considered that no other place for negotiations between the federal government and the federal units has been foreseen. Moreover, the upper house could play a key role in the appointments of judges of the FSC (McGarry and O'Leary 2008: 46). Without the establishment of the upper house, asserting that the Iraqi federal system is incomplete is the crude reality. The Iraqi Federation is affected by a chronic imbalance, given by the existence of only the Kurdistan Region alongside the 15 governorates. The current federal engineering makes nearly impossible any intraregional cooperation in order to check the federal government (Romano 2014b: 199-200)^{xxxii}.

The hallmark of federal systems is the division of legislative power between federal institutions and regional entities. Section 4 and 5 of the Iraqi Constitution deal with the powers of the Federal Government (Sec. 4, artt. 109 - 115), Region(s) and Governorates (Sec. 5, artt. 116 - 125). Currently, the Iraqi Federation is composed of 19 Governorates including four contained in the Kurdistan Region – Arbil, Sulaymaniyah, Dohuk and Halabja^{xxxiii}.

Article 109, which is strictly connected to article 1 and article 13, fosters and promotes the unity and integrity of the Iraqi Federation (Zedalis 2009: 34). The following article spells out the list of federal (exclusive) competencies: foreign policy; national security policy; fiscal and customs policy; standards, weights, and measures regulation; citizenship; frequencies;



budget bill; planning policies related to water sources from outside Iraq and its just distribution inside Iraq; general population statistics and census. To oil and gas management are properly devoted many articles in Sections four and five. Firstly, article 111 is a general provision, which states that oil and gas are owned by the Iraqi people in regions and governorates. The constitutional provision spells out that the Iraqi people are the owners of the oil and gas without specifying who holds authority over that resources. Consequently, the role of the federal government is not enlightened, notwithstanding art. 111 is within Section 4, related to powers of the Federal Government (Zedalis 2012: 59-60).

The authority over oil and gas is not even clarified in article 112, which has little if any technical rationale together with an ambiguous hierarchy between the level of governments (Al-Ali 2019: 109-110). The language of the first paragraph, ‘the federal government, with the producing governorates and regional governments, shall undertake the management of oil and gas extracted from present fields ...’ together with the Second, ‘the federal government, with the producing regional and governorate governments, shall together formulate the necessary strategic policies’, epitomises another serious source of ambiguity (Blanchard 2010: 7). To what extent are sub-national units involved in the management of oil and gas policies? Basically, in both paragraphs the role of regions and governorates shall be taken into account but, despite that, the two constitutional provisions are slightly different. Regarding the First paragraph, it may be argued that the Federal Government is supposed to drive the policy making, whereas the sub-unit authorities are likely to play a secondary role. The collaborative spirit is recommended and strengthened in the Second paragraph, where the word ‘together’ suggests a more inclusive and decisive role of regions and governorates in the formulation of the strategic policies. Moreover, the scheme of the Four Section of the Constitution shall be acknowledged. Article 114, see below, spells out shared competencies; hence, article 112 is something different by the content of article 114. Substantially, art. 112 might be understood as a generic provision which encourages, under the guide of the Federal Government, the principle of mutual collaborations between the Federal Governments and its sub-units (Zedalis 2012: 61-64). Similarly, art. 113 points out the principle of cooperation between the Federal Government and Federal Units, concerning ‘antiquities, archeological sites, cultural buildings, manuscript and coins’, but it’s explicitly expressed that cultural goods are ‘under the jurisdiction of the federal authorities’ and ‘shall be regulated by law’.



Section 114 lays down shared competencies between federal and regional authorities^{XXXIV}, while article 115 outlines one of the most critical provisions of the Constitution. Article 115, read together with the provisions of article 110, represents, as Romano points out, a ‘very strong devolution of power—making the Iraqi federation one of the most decentralised (at least on paper) in the world’ (Romano 2014b: 195). In fact, this provision states that ‘all powers not stipulated in the exclusive powers of the federal government belong to the authorities of the regions and governorates’. The key role of article 115 in shaping the federal nature of Iraq is emphasised where it states that ‘with regard to other powers shared [...] priority shall be given to the law of the regions and governorates not organised in a region in case of dispute’. This article is indirectly referred to the Kurdistan Region: based on this provision, Kurdistan Region’s laws should take precedence over federal laws in matters included in the shared competencies list (Bammarny 2016: 489). Furthermore, pairing the first and second sentences, the sub national units are granted powers not assigned to federal government. Zedalis points out that Article 115 is similar ‘to what might be denominated a retained or reserved powers provision’ (Zedalis 2012: 56).

Section 5 recognises the Kurdistan Region as a federal region ‘along with its existing authorities’ (art. 117) (Shakir 2017: 131 and ff.). Articles 118 and 119 lay down the two procedures about the formation of new regions, while articles 120 and 121 grant them the right to adopt constitutions and regulate their autonomy (Deeks and Burton 2007: 77 and ff.). It shall be noted that, alongside the abovementioned article 115, article 121 par. 2 points out that ‘in case of contradiction between regional and national legislation in respect to a matter outside the exclusive authorities of the federal government, the regional power shall have the right to amend the application of the national legislation within that region’ (Deeks and Burton 2007: 65-68, 72-74; Zedalis 2012: 52). Finally, articles 122 and 123 are related to governorates not incorporated into a region. The latter enshrines by some means the principle of subsidiarity, where outlines that ‘powers exercised by the federal government can be delegated to the governorates or *vice versa*, with the consent of both governments, and this shall be regulated by law’ (Romano 2014b: 197). The federal and regional powers alongside the role of governorates not organised into a region, are highlighting the high level of decentralization set out by the Iraqi Constitution. Related to governorates, the autonomy is only on paper because, especially related to governorates, autonomy has been severely reduced by Law n. 21/2008 ‘Governorates not organised into a region’, which gave way only



to a pure administrative decentralisation. First and foremost, relevant ministries refused to transfer their powers, such as the Minister of Finance, Health and Education. This has created huge consequences due to the dependency of governorates from fiscal transfers from Baghdad and for the suspension of decentralisation in key sectors as health and education. Furthermore, recently the Iraqi Parliament dissolved all provincial councils. Thus, the trend is towards a centralisation and the annihilation of the provincial representative institutions, whose elections have been postponed indefinitely^{xxxv}.

The current relationship between the KRG and the Federal Government is undermined by article 140 par. 2, which points out one of the core problem of the Iraqi Federation: Kirkuk and other disputed areas^{xxxvi}. Moreover, it shall be acknowledged that, the controversy outlined by Article 140 is interrelated not only to the ethnic management, but also to oil and gas management and revenue sharing^{xxxvii}.

According to this provision, a referendum should have taken place on such an issue by December 31, 2007; however, to date, article 140 par. 2 has never been implemented by the federal government. On the other hand, the Kurds heavily insist for the implementation of article 140 (Kane 2011: 11-15). The result of this political conflict between the Kurds and the Federal Government is a stalemate in seeking accommodation on future constitutional amendments, according to article 142. The Kurds have been blocked the Constitutional Reform Commission and, as a consequence, any other Constitutional amendment are not likely to come into force, because the referendum outlined in article 142 par. 4 requests: a) the majority of the voters and b) if not rejected by two-thirds of the voters in three or more governorates. The Kurds hold the absolute majority in the four governorates within the Kurdistan Region: Arbil, Sulaymaniyah, Dohuk and Halabja (Bammarny 2016: 490; Khan and Kirmanj 2015: 374). Finally, the non-implementation of article 142 has blocked also article 126, dealing with the constitutional amendment procedure, which states, in its par. 5, that 'article 126 of the Constitution shall be suspended, and shall return into force after the amendments stipulated in this article have been decided upon'^{xxxviii}.

Related to art. 140 issue, 'an unexpected *de facto* resolution' seemed to be occurred after the successful Peshmerga's offensive, which recaptured around the 90% of the disputed territories, including Kirkuk (Danilovich 2017: 58). Nevertheless, diverging from this expectation, in mid-October 2017, the Iraqi Government launched a successfully military operation regaining the military control over Kirkuk and other disputed areas (Loveday



2017). The resolution of this issue remains unpredictable and, currently, the situation on the ground could be seen as a direct result of the missed implementation of the Iraqi Constitution, above all Article 140. Therefore, the situation has worsened because the offensive has displaced again thousands of Kurds^{xxxix}.

6. Oil and gas ‘management’: the turning point of a State

The renewed Kirkuk crises between Iraqi Army, sustained by several Shias militias, and Peshmerga is the mirror of the total mismanagement of the oil and gas issue given by a) the shortcomings and deficiencies of the Iraqi Constitution and b) the ambiguous text of the constitutional disposition concerning oil and gas (Al-Ali 2013)^{xl}. The ambiguity is heavily outlined in the aforementioned article 112, where is stated that the federal government, ‘with the producing governorates and regional governments, shall undertake the management of oil and gas extracted from present fields’. Zedalis pointedly has argued that art. 112, due to its language, has a ‘limited reach’, especially in the first paragraph. These limits are mainly represented by the terms ‘management’, ‘extracted’ and ‘present fields’^{xli}.

About the first issue it’s hard to achieve accuracy, insofar as the term ‘management’ has no juridical meaning. The Federal government ‘shall undertake the management ...’, but what kind of political and juridical actions fall within the possible interpretation of ‘management’? What are the boundaries between the management activity and else? The lack of clarity on what could be included in the management of oil and gas affects, thus, the role of the Federal government and its competencies. The Second problematic issue derives from the word ‘extracted’ referred to oil and gas. This word is likely to be connected to resources already been extracted, excluding oil and gas fields discovered but not entered yet in production. Hence, oil and gas extracted are subject to federal government’s control and doesn’t matter where oil fields are placed or when the extraction has begun^{xlii}.

The most remarkable limit is outlined by the involvement of the only ‘present fields’ in the federal oil and gas management. No other words are said on future fields and the federal authority is legitimate to carry out its power solely on oil and gas fields discovered at the time of the Constitution’s enactment. The meaning of ‘present fields’ is strictly connected to other two words, the aforementioned ‘producing’ and ‘extracted’. Together with ‘present fields’, the reference is to present oil and gas fields currently in production. The result is that merely



the producing 'present fields' fell into article 112, leaving aside those not under production, no matter whether discovered or not. This constitutional disposition shall be read taking into account the large amounts of proven crude oil reserves (148.766 billion barrels as of 2017)^{XLIII}, considering that oil fields are not all under production. In such way, the silence of the Iraqi Constitution is harmful. Furthermore, another issue shall not be forgotten, because in both paragraphs of article 112 the producing governorates and regional governments are mentioned. The interpretation of article 112 might signify the exclusion, from the management of oil and gas (art. 112.1) and from the formulation of the necessary strategic policy (art. 112.2), of the non-producing sub-central units (Zedalis 2009: 46-51; Kane 2010: 11; Al-Moumin 2012: 424; Zedalis 2012: 69-70).

Furthermore, article 112 sets out the basic principles or, better to say 'guidelines', concerning the redistribution of revenues. Alongside the neutral and fair 'proportion to the population distribution in all parts of the country', is outlined the 'allotment for a specified period for the damaged regions' deprived by the former regime (Saddam's dictatorship). Moreover, it's specified that the same allotment is owed also to regions, which is likely to mean those 'areas of Iraq', 'damaged afterwards'. The oil and gas management shall be regulated by law but, due to several disagreements mainly between Shias and Kurds, the *Hydrocarbon Law* has never been enacted yet^{XLIV}.

The interpretation of the words 'damaged afterwards' is likely to represent a key point of the Iraqi future. The Sunni's governorates (Nineveh, Saladin and Al-Anbar), have suffered broad damages due to ISIS conquest followed by the ongoing joint counter offensive of the Federal Government and Peshmerga (*de facto* the Kurdistan Army^{XLV}). Related to the governorates aforementioned, considering the large amount of damages and refugees, will be necessary allocate special funds due to several damages of a large number of cities and towns, above all Mosul. This constitutional provision might constitute a sufficient legal basis for a proportional allotment of resources to this area of Iraq. Shall be acknowledged that, being Sunnis the majority of the population within the recalled governorates, is recommended that, the Shias' based Federal Government promotes inclusive policies narrowly directed to accommodate Sunnis' vindications. Besides that, it might help to fill the gap in terms of inclusion feeling of Sunnis minority in the political arena, fostering state-building and avoiding future religious and ethnic conflict (O'Driscoll 2016: 61-73).



Hence, article 112 shall be understood linked to article 121 par. 3, which lays down the allocation to regions and governorates of an ‘equitable share of the national revenues sufficient to discharge their responsibilities and duties, but having regard to their resources, needs, and the percentage of their population’. This provision, enshrines the equalization principle, having considered the different incomes across governorates and regions, especially in matter of oil and gas. Furthermore, article 121 par. 3 is recalling article 111, which states that oil and gas belong to Iraqi people ‘in all the regions and governorates’ (IDEA 2014: 64, 72).

Articles 111 and 112 shall also be combined with the aforementioned articles 114 and 115. Particularly, the second, third and fourth paragraphs of article 114 (shared competencies), shall be analysed related to oil and gas management. The second and third paragraphs, being related to the regulation of ‘the main sources of electric energy and its distribution’ and the formulation of ‘environmental policy to ensure the protection of the environment from pollution’, are strongly connected to oil and gas industry. Even though paragraphs two and three on one hand deal with the generation of electricity and its distribution and the environmental protection, on the other hand they are implicitly linked to oil and gas, due to their environmental implications and being them the primary source of electricity in Iraq. Moreover, paragraph four lays down the shared competence ‘to formulate development and general planning policies’, passing on activities or policies. It’s likely to assert that the formulation of oil and gas policies may fall into general policies, having considered that a) oil and gas ‘management’ represents undoubtedly the main issue in Iraq and b) this disposition is placed among shared competencies and not within article 110. Another question arises, without any answer as of today: might this paragraph be referred to art. 111 and 112? (Zedalis 2012: 78-81).

To make more intricate the interpretation must be recalled articles 115 and 121 which, as stating that in case of conflicts on the ground of shared competencies, between the law of sub-units and the Federal Governments, priority shall be given to sub-units’ law. These articles allow, as noted above, significant autonomy to KRG and governorates’ authorities. Hence, sub-units could strongly claim the legitimacy of their request of control over oil and gas fields^{XLVI}. The ambiguity detected with reference to oil and gas revenue sharing, is worsened by the absence of any Supreme Court’s decisions on matters of constitutional interpretation dealing with oil and gas issues. Once again, the constitutional ambiguities and



deficiencies shall be considered as a consequence in the light of the Constitution-making process. The price of a quick Constitution adoption has been a poorly drafted constitutional text, which leaves unsolved the hallmark of the Iraqi Federal system, the oil and gas management and revenue sharing (Kane 2010: 12; Zedalis 2012: 88).

Currently, without any chance to enact the Hydrocarbon Law, the revenue sharing is outlined in the annual Federal Budget, which represents an additional field of conflict. For the first time since 2005, the 2018 Federal Budget Law, then confirmed in the 2019 Federal Budget Law, has broken the agreement between the Federal Government and the Kurds, because it has reduced the Kurdistan Region's share from 17% to 12.67%, due to the fact that KRG signed contracts and exported oil without taking into account the central government. As a consequence, an additional institutional conflict has risen: on March 13, 2018, President Fuad Masum, leader of the Patriotic Union of Kurdistan (PUK), refused to sign the bill due to 31 constitutional violations. Nevertheless, on April 3, 2018, the Federal Budget has become law without any amendments, confirming the 12.67% to Kurds^{XLVII}. The 12.67% share has been confirmed in the Iraq's 2019 Budget, although some encouraging steps towards the reconciliation have been done. Despite that, the KRG has been weakened and economic crisis continued to deteriorate the Region^{XLVIII}.

7. After ISIS and the Kurdistan referendum: which perspectives for the Iraqi federation?

The defeat of ISIS in West Iraq, at least on physich chart, sets out again the issue of the Iraqi statehood. Undoubtedly, the rise and fall of ISIS have revealed the weakness of the Iraqi institutions^{XLIX}. On the other hand, ISIS defeat might represent a new chance for the Iraqi statehood, strictly connected to ethno-religious rivalries. Besides that, the proliferation of Shias militias is a threat to national reconciliation and statehood as well as the influence of Iran. Shias militias, alongside Peshmerga and KRG, made the best effort in ISIS defeat and could be hard leaving them aside in the future (Strategic Comments 2017; Rosen 2017). Hence, ISIS defeat might be the best chance to build trustworthy representative institutions and implementing the constitution, in order to shape State authority, weakened by the complete mismanagement of the public administration and the high level of corruption (Mansour 2017; 2-4, 14-17, 26-28; Abrams *et al.* 2017).



But this is only a part of the story. The main issue remains the evaluation of the very heart of federalism, self-rule and shared rule: the relationship between the Federal Government with its sub-units and among sub-units themselves. Federalism has been invoked and then quickly applied in Iraq as a solution for one among those of the world's most intractable conflicts^I. Not surprisingly the Iraqi main issue, oil and gas revenue sharing, has also been defined 'intractable' (Kane 2010: 5; Anderson 2012: 2).

An appraisal of the Iraqi federal arrangements involves, above all, the Kurdish, their autonomy and their possible secession. The non-binding independence referendum, held on 25 September 2017, it's only the last manifestation of this desire^{LI}. Even though the Kurdish referendum is legally groundless and out of the constitutional order, having examined above articles 1 and 13^{LII}, the legal status of Kirkuk and the other disputed territories (including the Nineveh governorate) shall be taken into account. In fact, other scholarship has argued that the legitimacy of the referendum is given by the failure of the Federal Government to set into its agenda the will of the people of Kirkuk and disputed areas, scheduled by art. 140. Such a major issue is based on the constitutional provision, which recognizes the illegitimacy of internal boundaries. The referendum is rooted in the Arabization of former regime together with the negligence of the current Federal Government. In addition, referendum was held also in the light of undermine the economic crisis in the Region, as well as for empowering the KRG in the negotiation with the federal government^{LIII}. The independence is unlikely to become reality in the future, given the opposition of regional and international actors and the hostility of the Iraqi Government, which launched the offensive on such areas on October 16, 2017, fully restoring its control on Kirkuk and the majority of disputed areas (Abebe 2017; Riegl *et al.* 2017: 153-165). The future is unpredictable and, to this regard, a confederal option between Erbil and Baghdad has been proposed. For instance, a Confederation between KRG and Baghdad could give the Kurds the opportunity to manage their own oil and gas and, moreover, to solve Kirkuk's issue (Natali 2011: 3; Knights 2016; Salih 2017). Instead, others have recently recommended a different structure for the Iraqi Federation: three regions, (Kurdish, Shiite and Sunni), redrawn along ethno ethnic-religious line, leading Iraq to a typical ethno-federation. This solution is justified by the Sunnis' decreased opposition to federalism, due to the centralising actions pursued by Shias' governments^{LIV}. On the other hand, this proposal, in practice, would face the hard task of



drawing internal boundaries and it is likely to create a big Shia's region, driving the Federation into a more problematic 'federal imbalance'.

Basically, the first step is the resolution of the issue embodied in art. 140 and the implementation of the abovementioned constitutional dispositions. Concerning the former, the FSC has recently stated that art. 140 is valid 'until achieving its requirements and the objective of its legislation according to the steps stipulated in article (58)' of the TAL, which seeks to address the previous Arabization and, in the paragraph C, states that 'the permanent resolution of disputed territories, including Kirkuk, shall be deferred until after these measures are completed'^{1.V}. Without any doubt, this is a landmark judgement, which can be hardly reversed in the future. If we consider the Constitution-making process, this judgement reminds us to connect the TAL to the Final Constitution fourteen years later. It may be argued that the clear message of the Court can be conducive to a comprehensive constitutional bargain, which can lead to the resolution of the thorny issue embedded in art. 140.

Nevertheless, as of today, the debate is still about constitutional shortcomings and ambiguities and whether or not they can favour the consensus-building and incremental constitutional development^{1.VI}. Among these ambiguities the primacy is given here to the debate over oil and gas revenue sharing, alongside a fair mechanism of dispute resolution on this matter. The likelihood that the Court could act as arbiter is remote, due to divisive nature of that issue. To this regard, are these ambiguities and omissions part of a strategic flexibility? Are open ended frameworks, constitutional deferrals and postponements used strategically in Iraq? Indeed, constitutional ambiguities and open ended frameworks request to set their meaning through interpretation or practice. Instead, where ambiguities are postponements, the risk is that they consist in agreements on contentious issues which are interpreted and understood differently by different parties 'and it is acceptable on this basis'^{1.VII}. Moreover, what matters is the specific nature of postponement and deferral: 'what is deferred, how much, to whom and by whose authority' (Arato 2014: 810). That is the case of Iraq where ruling parties and political elites refused to apply the Constitution (for instance art. 140), refused to implement it where is requested to (the upper chamber) and even they have taken advantages from those crucial ambiguities, especially in matter of oil and gas revenue sharing. In this specific case, which constitutes the gist of the Iraqi federal system, the abovementioned ambiguities have been deliberately interpreted by main political actors only



on the basis of self-interest, discharging the Constitution and federalism (Al-Ali 2019: 115-118). On the other side, formal constitutional amendments request a large bargain between the Kurds and the national government (art. 142, then art. 126), which is unreliable without a firm constitutional commitment to the solution of Kirkuk and other disputed areas issues. Hence, it can be argued that the Iraqi federation is in a double-faced limbo, the former shaped by informal agreements often broken and rearranged, the latter based on the indefinite waiting for empowering constitutional dispositions. The latter plays the game of the former but almost fifteen years after the adoption of the Constitution the positive effects of such ambiguities and postponements have not been seen. Formal changes and ordinary politics overcome constitutional law and formal amendment rules: *Verfassungswandel* tends to replace *Verfassungsaenderung*. This risk is huge putting the learning after the adoption of the final constitution, especially when the most important issues are not properly settled. Postponements may have their part in the growth of a given constitution, but only when the backbone of the constitution has been set up (Arato 2014: 812-816). Perhaps, the Iraqi constitutional life may be shackled only through a truly constitutional effort, not only promoted by the FSC. In order to overcome this sort of *sine die* constitutional ambiguity, a mutual constitutional commitment between the different ethnic groups may begin from the resolution of art. 140 and oil and gas revenue sharing. In this sense, informal intergovernmental relations may represent an additional and viable (informal) option in order to learn the basic requirement of a constitutional living: echoing the South African experience the Iraqi communities still have to talk about talks seriously.

Indeed, this is a long-term process, during which Iraqis will seek to reach their constitutional identity. On the other hand, the influence of external actors during and after the constitution-making process, requires an assessment of the degree or the scale of heteronomy. To this regard, Albert has recently pointed out that ‘along this scale of heteronomy, many constitutions that we might not otherwise consider imposed reveal tinges if not full colours of imposition’ (Albert 2019: 104). Furthermore, alongside measuring the degree of heteronomy, we shall consider also the autochthony of the Constitution and the degree of autochthony, consisting in how much ‘a constitution is, legally speaking, ‘home grown’ or rooted in native soil’ (Oliver 2016). Bearing in mind that the Iraqi Constitution needs to be implemented, it is likely to increase the degree of autochthony at the expense of



heteronomy. In this sense, the resolution of such constitutional issues and disputes may produce a new and more authentic federal product of the Global South^{LVIII}.

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^I The Iraqi population is composed of two major ethnic groups (Arab 75%-80%, Kurd 15%-20%) and many others (Turkmen, Assyrian, Shabak, Yazidi 5%). Islam is the first religion (Shias 60% mostly Arabs, 40% Sunnis, Arabs and Kurds) beside other minorities (Christianity 1%). Source: CIA World Factbook, retrieved July 2017. For a comprehensive account of sectarianism in Iraq see Haddad (2011).

^{II} There is one more feature to take into account. The political mobilisation along sectarian lines, which is well defined in the Kurds and Shias traditions and weak among the Sunnis. The strong sense of ethno-nationalism is the *qawmiyya* for the Kurds. The Shias are driven by the *muthloomiyya*, a sense of oppression which permeates the cultural background of the Shias. Unlike the Shias and Kurds, the Sunnis are fractured among themselves and crossed by intra-Sunni conflicts. See Mansour (2016).

^{III} The Sunnis, in particular, ruled in Iraq since 1921. See Diamond (2005: 295); Dawisha Adeed (2013: 243-244).

^{IV} On the Sunnis' marginalization the Report by the International Crisis Group (27 February 2006, 12 and ff.).

^V UNSC Resolution 688 of 5 April 1991 condemned the repression of the Iraqi regime against the Iraqi population, especially the Kurds. The Resolution pursued humanitarian operations and did not establish the no-fly zone. It was unilaterally declared by USA, France and UK. *Ex multis*, on the development of the Kurdish statehood after the First Gulf War: Voller (2014); Ihsan (2017); Rifaat (2018). On the division of the KRG in two separated governments see: Ahmed (2012: 29 and ff.).

^{VI} For a preliminary quick snapshot on the Iraqi contradictions and tensions see Benomar (2004: 81-95, 91).

^{VII} This distinction owes much to Horowitz's theories. See Horowitz (1985: 563-652) Others (John McGarry and Brendan O'Leary) distinguish the two types of federalism in 'integrationist' and 'consociational' model, clearly based on Lijphart's insights. Lijphart (1977). See also O'Leary (2005: 3-43). For a discussion over the different forms of federalism within the Iraqi context see: McGarry and O'Leary (2007: 670-698), O'Leary (2005: 47-91). These authors describe the Iraqi constitutional conflict as between 'integrationists' and 'consociationalists'.

^{VIII} Academic literature on ethnic or multinational federalism is broad and, generally, the word 'multinational' is referred to European and Western federal experiences, while the word 'ethnic' is related to federal experiences elsewhere, especially in Africa and Asia. They have in common that the territorial structure of a given federal State is shaped and based on cultural diversity of different groups. The main question is whether or not ethnic based (or multinational) federalism exacerbate or accommodate diverse groups. Nevertheless, it is also true that constructing sub-national levels of government for accommodating a specific group leads to a mere reproduction of the nation-State logic. In this sense a specific homeland of a given ethnic groups tends to discriminate its internal minorities and the like. Concerning the word ethnic/ethnicism is strongly recommended the reading of Ghai. In particular, Ghai stresses that ethnicism is a social and political construct and this happens when mere cultural distinctions (language, religion) became the basis of the political identity. The most interesting examples are Ethiopia and Bosnia and Herzegovina, whose territory is constitutionally modelled on the distribution of ethnic groups. See *ex multis* and for different contexts: Kymlicka (2001: 91 and ff.); Ghai (2000: 4-39); Ghai (2019: 53-69); Anderson (2013); Burgess (2012: 23 - 44); Kössler (2015: 245-272); Kössler (2018: 399 - 418, especially 400 - 410); Gagnon (2013).

^{IX} Ran Hirschl highlights the gap of constitutional law literature between the so called 'Global North' and the 'Global South'. See Hirschl (2014: 3-4, 174, 209-216).

^X See critically: Maldonado (2013: 1-37). Dann, for example, has argued that 'the need to temper and overcome the parochialism of Western constitutional thinking is obvious and urgent'. See Dann (2017).

^{XI} Even if UNSC never authorised the military intervention, after the fall of Saddam's regime, it recognised USA and UK occupation forces. UNSC Resolution 1483, 22 May 2003, *The situation between Iraq and Kuwait*, preamble. Hague Convention, 18 October 1907, art. 42 and Geneva Convention 12 August 1949, art. 2.2. On such a basis the 1483 Res. recognised 'the specific authorities, responsibilities, and obligations under applicable international law of [the United States and United Kingdom] as occupying powers under unified command (the "Authority")'.

^{XII} About CPA see Dobbins James et al. 2009, *Occupying Iraq a history of the coalition provisional authority*, RAND



Corporation, New York.

^{xiii} Undoubtedly, ‘recognizing the CPA was merely the recognition of a fact, the fact of belligerent occupation, which before the CPA was administered by the U.S. military, according to international law’. The head of the CPA was Paul Bremer (named US Presidential Envoy and Administrator) and the constitutional advisor the academic Larry Diamond. See Arato (2009: 20).

^{xiv} UN SC *Resolution 1511*, 16 October 2003, parr. 1,4 and 6. This Resolution was heavily criticised because it accepted the IGC as a representative body of the Iraqi people, leading the Constitution-making process, although it was an unelected body. See Arato (2009: 20-21); Roberts (2005: 54, 27-48, 32). He argues that ‘this UN resolution did not create the occupation: it simply recognised that it already existed’. See also: Ismael Tareq and Ismael Jacqueline (2015: 31-32). According to the Authors, the IGC was ‘an effort to gloss an acceptable Iraqi cover for the occupation’.

^{xv} *The November 15 Agreement: Timeline to a Sovereign, Democratic and Secure Iraq*.

^{xvi} See Benomar (2004: 92-93). Benomar argued that often interim constitutions provisions have found their way in final constitutions.

^{xvii} Art. 4: ‘The system of government in Iraq shall be republican, federal, democratic, and pluralistic, and powers shall be shared between the federal government and the regional governments, governorates, municipalities, and local administrations. The federal system shall be based upon geographic and historical realities and the separation of powers, and not upon origin, race, ethnicity, nationality, or confession’.

^{xviii} Clearly Allawi stressed ‘It (the Constitution) talked about pluralism, gender rights, separation of powers and civilian control over the armed forces – none of which were even remotely familiar terms in Iraq. The TAL embodied western, specifically American notions, and was carefully supervised by the CPA. Each significant point had been pre-cleared with the NSC in Washington. Neither the CPA nor its drafters envisaged it as anything less than the basic model for Iraq’s permanent constitution’. Allawi (2007: 222); Bremer (2006: 271).

^{xix} The political significance of the quickly adoption of the TAL, alongside the agenda of the first elections in Iraq, was the upcoming US Presidential election of November 2, 2004, which vested G.W. Bush President of the United States for the second mandate. See Arato (2009: 129).

^{xx} Over the 77% of the registered voters participated to the elections. The Shia’s coalition, United Iraqi Alliance (UIA), gained 128 of 275 seats, while Kurdish Alliances 53 seats, the main Sunni party (Concord Front) 44 seats and others 50 seats. See: Dawisha and Diamond (2006: 89-103); Dawisha (2013: 248-259). The voter turnout was at 63%, while 79% voted for the constitution. The Kurdish and Shia’s Governorates voted in favour and the Constitution was rejected by the population of the three Sunni Governorates. Rules and procedures of referendum were outlined in articles 60 and 61 of the TAL. See: *Strategic Comments* (2005); Arato (2009: 188-189, 242); Shakir (2017: 102).

^{xxi} See International Crisis Group (18 July 2006); Deeks and Burton (2007: 1-89, 65); Allawi (2007: 224); Molloy, Zulueta and Welikala (2017: 19).

^{xxii} Substantially, the foreign intervention, made by the US, may be summarised as follows: a) the occupation authorities selected the makeup of the TAL drafting committee; b) they determined the procedural framework and c) influenced the procedure of the Iraqi Constitutional Committee; d) finally, personnel of the US embassy were deeply involved during the negotiations. See: Dann and Al-Ali Zaid (2006: 440-442); Dann 2013: 248-250, 260); Al-Ali (2013); Ismael Tareq and Ismael Jacqueline (2015: 68).

^{xxiii} The Sunnis exclusion from the political process and the constitution making-process has been one of the main problems to statehood. See: Anderson and Stansfield (2004: 150-153); Arato (2009: 211-218); Hamoudi (2016: 849-852).

^{xxiv} After the occupation the insurgency begun in the whole Iraq, except for the Kurdistan Region, not only in the ‘Sunni triangle’, but also in the South (headed by the Sadrist movement). The rebellion sprang out after Bremer’s refuse to take account of the Grand Ayatollah Ali Al Sistani’s (leading *marji*’ for Shias and Najaf *Hawza*) proposal, based on the direct election of the constituent assembly. On the TAL, the office of Al-Sistani stated that ‘Grand Ayatollah Sistani has already clarified [...] that any law prepared for the transitional period will not gain legitimacy except after it is endorsed by an elected national assembly. Additionally, this law places obstacles in the path of reaching a permanent constitution for the country that maintains its unity and the rights of its sons of all ethnicities and sects’, 8 March, 2004. This statement was grounded on Sistani’s *fatwa* of 25 June 2003, which underlined that ‘[...] first of all, there must be a general election so that every Iraqi citizen - who is eligible to vote - can choose someone to represent him in a foundational Constitution preparation assembly. Then the drafted Constitution can be put to a referendum’. The political meaning of this *fatwa* was the legitimation of the Shias into the new constitutional framework. For that reason, Sistani’s *fatwa* was described as ‘an epochal event in the annals of the interaction between Islam and democracy’. The contrast between Al-Sistani and Bremer was solved by the UN mediation led by Lakhdar Brahimi: Sistani capitulated on early



elections, while Bremer on the caucus issue. See Feldman (2005: 6-9); Feldman (2004: 36-43).

^{XXV} Three main factors undermined the TAL and the permanent Constitution: the absence of consensus, the unfulfilled democratic culture among Iraqi population and politicians; the role of the US. See Shakir Farah, *The Iraqi Federation...*, at 96. In particular, others argue that the absence of participation was also connected to 'damaging deadlines'. See Brandt Michele et al., *Constitution-making and Reform...* above at 25, pp. 46, 76, 324, 337-339.

^{XXVI} Islamic law is explicitly recognised as a foundation source of legislation (art. 2 par. 1). This typology of relationship between constitutionalism and religion has been conceptualised by Ran Hirschl as 'constitutional theocracy'. Cfr. Hirschl (2010: 2-4, 35-36). See also: Rabb (2008: 540-541); Ahmed and Ginsburg (2013: 615-695, 680-693).

^{XXVII} Related to the Iraqi case he points out: 'The Iraqi preamble, for example, carefully includes as many of the peoples of Iraq as possible, so as to avoid the implication that one group has constitutional priority'. See Tushnet (2014: 26).

^{XXVIII} Sec. 2: 'No law that contradicts this Constitution shall be enacted. Any text in any regional constitutions or any other legal text that contradicts this Constitution shall be considered void'.

^{XXIX} The main features of the Iraqi parliamentary system are: the election of the President of the Republic by the Council of Representatives (CoR) (art. 70); the appointment by the President of the Prime Minister and the Council of Ministers (art. 76 co. 1); the Prime Minister with its Cabinet shall gain the confidence vote upon the approval by an absolute majority of the Council of Representatives (art. 76 co. 4). See Shakir (2017: 141-149).

^{XXX} Eminent scholarship has recently argued that second chambers tend to be ineffective. Instead, intergovernmental or bilateral decision making are favoured by subnational entities in order to seek participation rather than representation. This can also explain the lack of attitude of Iraqi institutions to set up a comprehensive constitutional reform, with the exception of the Federal Supreme Court. See Palermo (2018). The Supreme Court issued a decision on January 17, 2018 calling for the establishment of the FC. See Lasky (2018).

^{XXXI} Art. 48: 'The federal legislative power shall consist of the Council of Representatives and the Federation Council'.

^{XXXII} Without the upper chamber, the federal 'scheme' and the relationship between the levels of government is incomplete. See, Danilovich (2014: 54); Danilovich (2017: 47).

^{XXXIII} This arrangement makes the Constitution asymmetric. See Bammarny (2019: 255-286).

^{XXXIV} According to article 114, the shared competencies are: to manage customs; to regulate the main sources of electric energy and its distribution; to formulate environmental policy; to formulate development and general planning policies; to formulate public health policy; to formulate the public educational and instructional policy, in consultation with the regions and governorates that are not organised in a region; to formulate and regulate the internal water resources policy.

^{XXXV} Despite that, the path of the intergovernmental relations may be a viable tool for undertaking the dialogue between the national, provincial and regional (KRG) level as well. To this regard, Law 21/2008 set up a forum which seeks to manage the relationship between the provincial and the national level, the High Commission for Coordination among Provinces (HCCP). See Al-Mawlawi (2019); Fleet (2019: 10 and ff.).

^{XXXVI} Liam Anderson stresses that the case of Kirkuk represents an example of gerrymandering of subunit boundary lines in order to divide an ethnic group. Moreover, the presence of several oil and gas fields in the area shall be taken into account. During Saddam's regime the Kurds were systematically expelled and replaced by Arabs. Besides the 'Arabization', the boundaries of Kirkuk's Province were altered and redrawn. See: Anderson (2013: 113-115); Rafaat (2008: 251-266).

^{XXXVII} In Kirkuk district is placed a 'super giant oil field', estimating 5 billion oil reserves. See Mazeel (2010: 7-8, 51).

^{XXXVIII} Art. 126 lays down two procedures: Sections one and two 'may not be amended except after two successive electoral terms with the approval of two-thirds of the members of the Council of Representatives, the approval of the people in a general referendum' (par. 2), while other sections may be amended with two thirds of the members of the Council of Representatives followed by the approval through referendum (par. 3). Finally, shall be pointed out an additional safeguarding clause regarding regions (par. 4): 'articles of the Constitution may not be amended if such amendment takes away from the powers of the regions that are not within the exclusive powers of the federal authorities, except by the approval of the legislative authority of the concerned region and the approval of the majority of its citizens in a general referendum'.

^{XXXIX} A possible solution, alike the Northern Ireland and Brčko (Bosnia and Herzegovina), is outlined by O'Driscoll, who argues that only the assignment of a special status to Kirkuk could solve the controversy, establishing shared cross-border institutions. See O'Driscoll (2017b).



^{XI} The ambiguous ownership provisions have inflamed the ethnic and religious conflict in both horizontal and vertical level. See IDEA (2014: 23).

^{XLI} Art. 112 and the aforementioned art. 111 are the two constitutional provision representing the primary reference to oil and gas. See Zedalis (2012: 58 and ff. 67); IDEA (2014: 23).

^{XLII} *Ibid.*, at 68. The reference, in the Iraqi Constitution, to the management in oil and gas, without being specified management activities, represents a rarity. In comparative perspective, constitutions assigning the management authority to different levels of government are generally referred to specific activities, while where the word ‘management’ is assigned to a single level of government, it is replaced by another all-embracing term. See IDEA (2014: 34-35, 42-43). For instance, taking into account the federal constitutions examined in George Anderson edited book, *‘Oil and Gas in Federal System’*, Oxford University Press, Oxford, 2012, where a prominent role in their economy is represented by oil and gas resources, the word ‘management’ is not referred to oil and gas activities, except for the Constitution of Venezuela (art. 156). Anderson (2012).

^{XLIII} Source of crude oil reserves: OPEC, *Annual Statistical Bulletin*, 2019.

^{XLIV} Facing the inability and negligence of the Iraqi Government, the Kurdistan Regional Government adopted the Regional oil and gas Law, No. 22/2007. The KRG Law diversifies ‘Current Field’, being this ‘a Petroleum Field that has been in Commercial Production prior to 15 August 2005’ from ‘Future Field’, instead ‘a Petroleum Field that was not in Commercial Production prior to 15 August 2005, and any other Petroleum Field that may have been, or may be, discovered as a result of subsequent exploration’ (art. 1). Related to current fields, art. 18 lays down the cooperation and the ‘joint management’ with the Federal Government. On the other hand, KRG stressed its authority over future fields through the Kurdistan Exploration and Production Company (KEPCO) and Kurdistan National Oil Company (KNOC), articles 10-11. See: Zedalis (2009: 79-90).

^{XLV} The legitimacy of the Peshmerga, basically the army of the Iraqi Kurdistan, is not clarified by the constitutional framework. Art. 9 points out that ‘the formation of military militia outside the framework of the armed forces is prohibited’, while accordingly to art. 121 ‘the regional government shall be responsible for ... the establishment and organization of the internal security forces for the region such as police, security forces, and guards of the region’. See Danilovich (2014: 65-85).

^{XLVI} KRG has stated that articles 115 and 121 are limiting the federal authority, meanwhile enhancing the regional government in oil and gas industry management. To this regard, the KRG received an expert’s legal opinion (signed by Professor James Crawford) allowing Kurdish claims over its own oil and gas resources. See: Clifford (2016); Alkadiri (2016: 7).

^{XLVII} The annual Federal Budget is composed of 84% from oil and gas revenues and 16% from non-oil-incomes. Moreover, shall be also noted that approximately 20% of Iraqi oil and gas are placed in Kurdistan Region, Kirkuk and disputed areas. The abovementioned 31 constitutional violations have not been published. On 2018 Federal Budget see: Iraqi Presidency, *The Presidency of the Republic Sends Back the Federal Budget Law to the House of Representatives*, 2018/03/13.

^{XLVIII} The central government will pay the salaries of Peshmerga and the breakdown of spending for the three KRG provinces has been removed. Despite that, the KRG continue to not deliver the agreed 250.000 barrels of oil per day expected by the national government. See Al-Mawlawi (2019); Nawzad (2019); Bammarny (2019: 272-274).

^{XLIX} As pointedly stressed by David Romano, shortly after the ISIS rise. See Romano (2014: 10).

^L See Hueglin (2012: 27). In fragile States, Steytler and De Visser argue, ‘the fragile federation was perhaps the best, if not the only, way out of fragility’. See Steytler and De Visser (2015: 79 and ff.).

^{LI} Al Ali rightly underlines how the Kurds have stressed that Iraq is a voluntary union where Kurdistan has ‘retained its sovereign status’ in a [Report](#) just a day before the referendum. KRG Cabinet, Report: The Constitutional Case for Kurdistan’s Independence, 24 September 2017. See Al-Ali (2019: 114).

^{LII} The Iraqi Federal Supreme Court stated that ‘the referendum occurred on 9.25.2017 in Kurdistan territory and the regions outside it [...] has no substantiation in the constitution and violates its provisions’. Republic of Iraq Federal Supreme Court, Ref. 89 & 91 & 92 & 93/federal/2017 on 2017-11-20.

^{LIII} Referendum turnout: 72%; voters for independence: 90%. Gökhan argued also that the referendum has been undermined by its unilateral proclamation. See: Gökhan (2017). *Contra* Shehabi has stated that the constitutional order allowed the right to carry out the consultative referendum. The referendum is based on its consultative nature, which involves a recognised minority. Moreover, Kurdish people has a ‘constitutionally recognised claim’ related to Kirkuk and other disputed areas: Shehabi (2017). See also the insightful comment of Bâli (2017).

^{LIV} The Author stresses the implementation of art. 140 together with the creation of the Sunni and Shia region. Only ethnic federalism could prevent the Iraqi disintegration. The Shias Government, especially during Maliki’s ministry, having denied the autonomy, has provoked the search for autonomy by the Sunnis. See O’Driscoll



(2017a: 315-332).

^{LV} Republic of Iraq, Federal Supreme Court, Ref. 71/federal/2019, 28/07/2019.

^{LVI} In support of the Iraqi Constitution is Hamoudi, who sees a positive outcome from ambiguities and postponements of the Iraqi Constitution. These features can lead to a positive path and a progressive convergence between the three Iraqi ethnic groups by the incremental development of the Constitution. Hamoudi (2013); *contra* Al-Ali (2014).

^{LVII} According to Saunders among postponement techniques shall be emphasized those involving deliberate ambiguity in drafting potentially disputed provisions and a decision which does not aim to resolve a controversial issue leaving a place-holder in the constitution. See Saunders (2019: 348).

^{LVIII} The wording 'Global South' was firstly used by Oglesky in 1969 and, in comparative constitutional studies, is different from 'Third World'. Among comparative constitutional scholars, Global South is widely used for emphasizing several features which leads to rethink the methodology of comparative constitutional law. Firstly, for understanding dynamics and patterns of constitutional law, the academy is tasked to investigate more than ever overlooked constitutions and constitutional experiences. The call is to study constitutional law beyond the 'usual suspects' (in the words of Ran Hirschl) of western constitutional experiences. Secondly, the Global South critique is not only closely linked to those constitutional experiences of States once under the colonial domination. The Global South critique aims at underlining the more sensitive approach towards marginalisation, group rights and exclusions. To this regard, the best book is that edited by Bonilla Maldonado, where the judicial activism of three Constitutional Courts (India, South Africa and Colombia) is underlined. Undoubtedly, the Global South critique poses two major challenges: a) methodological due the almost exclusive enlightenment of Global North experiences and b) the prioritisation of concepts like separation of powers, liberal democracy, instead focusing more on development, marginalisation and groups' rights. Hirschl has stressed that the Global South critique has challenges from the within as well. The broad and diverse constitutional experiences of the Global South make hard to group all together these constitutional jurisdictions. Moreover, it is not clear what is meant for Global South and the relevance of constitutional courts of India and South Africa is more studied than others in the 'North'. Nonetheless, the Global South critique sheds lights on diverse challenges and realities. In this sense, we can learn from something 'different' from our standards and from constitutional enrichment and variations of the Global South. See Oglesby (1969); Hirschl (2014: 205-223); Dann (2017); Maldonado (2013); Kumar (2017); Fowkes (2017).

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**The Directive on the Fight against Fraud to the
Union's Financial Interests and its Transposition into
the Spanish Law**

by

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Abstract

This paper aims at analysing the content of the PIF Directive and assessing its transposition into the Spanish Law. To achieve these objectives, this paper starts with a detailed study of the criminal law obligations enshrined in the PIF Directive. Then, these obligations are compared with the content of the Spanish criminal code, which has been modified in the last years (2010, 2015 and 2019) with the purpose, among others, of adapting the Spanish law to the EU requirements as regards the protection of the Union's financial interests. The paper concludes, on the one side, that the PIF Directive leaves an extensive leeway to Member States in the definition of the crimes, sanctions and limitation period, which may hinder any desired harmonisation of national legislations. On the other side, it concludes that the Spanish criminal law fulfils, generally speaking, the mandate of the PIF Directive.

Key-words

PIF Crimes, PIF Directive, Spanish Criminal Code, Unions' Financial Interests



1. Introduction

The EU budget suffers enormous losses every year as a consequence of the conducts of fraud. These conducts are usually interlinked with other criminal behaviours such as corruption of public officials and misappropriation of public funds. In addition, money laundering typically appears intertwined with economic crimes such as those mentioned, damaging not only the EU financial interests but also the EU economy in general. Due to their devastating effects, the fight against these conducts has been a continuous concern in the agenda of the European Union. More specifically, since the nineties, the EU agenda on the protection of the financial interests has focused on the use of criminal law measures to combat behaviours that may affect them due to the deterrent effect of the criminal sanction. In 1995, the PIF Convention came to light, being the first legal instrument requiring Member States the criminalisation of conducts of fraud that might affect the financial interests of the former European Community. At the present, the PIF Directive, passed in 2017, emphasises the necessity of making use of criminal law resources to curb this kind of behaviours.

The PIF Directive is aimed at harmonising national criminal laws with the purpose of reaching a more effective fight against the offences that may put the Union's financial interests at risk. The deadline to transpose the obligations of the PIF Directive expired in July, 6th 2019. Therefore, some Member States, among them, Spain, have tried to adopt their national legislations to the mandate of the PIF Directive.

The objectives of this paper are, firstly, to analyse the content of the PIF Directive, and secondly, to assess its transposition into the Spanish Law. To achieve these objectives, this paper starts with a detailed study of the criminal law obligations enshrined in the PIF Directive. Then, these obligations are compared with the content of the Spanish criminal code, which has been modified in the last years (2010, 2015 and 2019) with the purpose, among others, of adapting the Spanish law to the EU requirements as regards the protection of the Union's financial interests. The paper concludes, on the one side, that the PIF Directive leaves an extensive leeway to Member States in the definition of the crimes, sanctions and limitation period, which may hinder the desired harmonisation of national legislations. On the other side, it concludes that the Spanish criminal law fulfils, generally speaking, the mandate of the PIF Directive.



2. Legislative background on the protection of the Union's financial interests through criminal law

The protection of the financial interests of the European Union has been a concern since the 1970s, when for the first time own resources were allocated to the former European Economic Community (Di Francesco Maesa, 2018). The protection of the financial interests through mechanisms of criminal law emerged in the 1990s, with the adoption of the so-called PIF Convention (Convention on the protection of the European Communities' financial interests¹⁾ and its Protocols within the third pillar, on the basis provided by Article K.3 of the Treaty of Maastricht.

The PIF Convention was the first legal instrument, which imposed criminal law obligations on Member States for the protection of the European Communities budget. Specifically, the Convention required Member States to take measures to punish conducts of fraud through criminal law sanctions. The PIF Convention, however, did not mention other practices, which could be very harmful for the financial interests of the European Communities, namely, the practices of corruption of public officials managing Communities' funds. To solve this problem, a Protocol was added to the PIF Convention (Protocol to the Convention on the protection of the European Communities' financial interests, of 27 September 1996, hereinafter, First Protocol¹¹⁾). The First Protocol, being aware that 'the financial interests of the European Communities may be damaged or threatened by other criminal offences, particularly acts of corruption by or against national and Community officials, responsible for the collection, management or disbursement of Community funds under their control' (Preamble) required Member States to consider corruption of any national official as a criminal offence, including any official of another Member State, and Community officials if the conduct damaged or was likely to damage the European Communities' financial interests. That was a true step forward in the fight against corruption since until that date, corruption was considered a merely national problem. Neither the PIF Convention nor the First Protocol dealt with some crucial issues in the fight against fraud and corruption affecting the financial interests of the European Communities, namely, money laundering, liability of legal persons and assets recovery. Therefore, a Second Protocol tackling these issues was added to the PIF Convention in 1997 (Second Protocol to the



Convention on the protection of the European Communities' financial interests, of 19 June 1997, hereinafter, Second Protocol^{III}).

Despite the fact of having three new legal binding instruments to combat fraud and corruption affecting the EU budget through criminal law measures, the problem remained in subsequent years. Member States were reluctant to ratify the PIF Convention and its accompanying Protocols (Arnone & Borlini, 2014; Di Francesco Maesa, 2018;; Szarek-Mson, 2010), which took many years to enter into force. Even when the PIF Convention and the Protocols entered into force, Member States provided an uneven level of enforcement and implementation of the obligations concerning the protection of the Union's financial interests through criminal law (European Commission, 2012; Kuhl, 2012; Mancano 2019; Vervaele 2014). Therefore, it was necessary to give a new impulse to the fight against practices damaging the Union's financial interests. The Commission prepared a first pillar proposal for a directive on this topic (European Parliament & Council, 2001), but the Council rejected it because it considered inappropriate the use of the Article 280 of the Treaty establishing the European Community as legal basis (Di Francesco Maesa, 2018).

With the entry into force of the Lisbon Treaty in December 2009, the Commission issued a new proposal on the fight against fraud to the Union's financial interests by means of criminal law in 2012 (European Parliament & Council, 2012). After five years of negotiations, the PIF Directive – Directive (EU) 2017/1371 on the fight against fraud to the Union's financial interests by means of criminal law – (European Parliament & Council, 2017) was finally passed under the basis provided by Article 325 of the Treaty of Functioning of the European Union^{IV}. The PIF Directive replaces the PIF Convention and the Protocols thereto. Built upon the *acquis* of these legal instruments, the PIF Directive seeks to strengthen the protection of the Union's financial interests through stricter obligations for Member States. It imposes the obligation of sanctioning by means of criminal law a number of offences, which may put the EU budget at risk. Additionally, it foresees other measures regarding criminal law, like harmonisation of penalties and limitation periods. The following section analyses the content of the PIF Directive.



3. Content of the PIF Directive

3.1. Offences to be criminalised by Member States

According to Articles 3 and 4 of the PIF Directive, Member States have the obligation to consider some conducts that may put the Union's financial interests at risk as a criminal offence. The offences referred by the PIF Directive are fraud, corruption of public officials, misappropriation of funds, and money laundering.

3.1.1. *Fraud*

Ever since the former European Economic Community (EEC) was provided with 'own resources' in 1970 (European Council, 1970), the conduct of fraud has been a major concern because attacks on the budget are attacks on the very existence of the Union (Manacorda, 1999). Every year, fraud causes millions of Euros to be lost from the EU budget. Although quantifying fraud against the EU's financial interests is a complex task, the Commission estimated it at EUR 467 million in 2017 (European Commission, 2018). Typical fraudulent activity includes: evading payments of customs duties and taxes, and obtaining benefits to which they are not entitled (Csúri, 2016). Former EU legal instruments tried to prevent such conduct but with limited success. In 1995, the PIF Convention required Member States for the first time the criminalisation of fraud that damaged or was likely to damage the financial interests of the European Communities. Nevertheless, as said before, the criminal law measures of the PIF Convention did not sufficiently contribute to curb fraud losses. The new PIF Directive emphasises the idea of making use of criminal law resources to fight against practices of fraud due to the deterrent effect of the criminal sanction on the potential perpetrators' decision (European Commission, 2012). Moreover, the Directive offers an updated definition of fraud, which clarifies the language on VAT fraud (Juszczak & Sason, 2017). Like the PIF Convention, the PIF Directive differentiates between fraud affecting expenditure and fraud affecting revenue. Regarding expenditure, the definition has been formulated, making a distinction in Article 3 (2) of the Directive between non-procurement-related expenditure (e.g. grants) and procurement-related expenditure. The first follows the definition provided by the PIF Convention, according to which the offence of fraud includes



...any act or omission relating to: (i) the use or presentation of false, incorrect or incomplete statements or documents, which has as its effect the misappropriation or wrongful retention of funds or assets from the Union budget or budgets managed by the Union, or on its behalf; (ii) non-disclosure of information in violation of a specific obligation, with the same effect; or (iii) the misapplication of such funds or assets for purposes other than those for which they were originally granted.

The definition of fraud concerning procurement-related expenditure contains a further requirement, according to which, the person must act ‘in order to make an unlawful gain for the perpetrator or another person by causing a loss to the Union’s financial interests’ (Article 1 (2) (b)). It should be noted, however, that in this case, damage must actually have been caused; it is not sufficient the risk of damage (Juszczak & Sason, 2017).

When it comes to revenue, during the negotiations the most debated point was the inclusion of the VAT fraud among types of conduct to be considered a criminal offence by Member States legislation. On the one hand, the Council wanted to exclude VAT fraud from the scope of application of the PIF Directive. The problem was the nature of the harm against the Union’s financial interests, which is only indirect in VAT fraud. Therefore Member States were reluctant to include VAT fraud among the PIF crimes. To avoid transferring to the EU more powers than needed in the field of criminal law where the competence is mostly national, Member States included high thresholds in the understanding that only beyond these thresholds the harm to the EU budget could be real. On the other hand, the Commission and the Parliament did want to include it among the PIF crimes. The Court of Justice of the European Union (CJEU) shed light in this matter in the *Taricco* case^V, confirming the Commission and Parliament’s opinion that VAT fraud falls under the scope of the definition of fraud *ex* Article 1 of the PIF Convention. Finally, negotiators reached a ‘compromise solution’ (Anghel Tudor, 2019: 141) whereby VAT fraud would be included in the PIF Directive (Article 3(2) (d)) while making its criminalisation conditioned upon two additional requirements: fraud should be cross-national (linked to two Member States at least) and its produce be at least EUR 10 million (Article 2 (2)).

Some scholars have criticised the provisions concerning the criminalisation of VAT fraud in the PIF Directive as too narrow, therefore appraising it as a step backward from its treatment under the PIF Convention (Di Francesco Maesa, 2018: 1462). Granted, VAT fraud was not expressly mentioned in the PIF Convention, but the Court of Justice



interpretation that VAT fraud was included in the PIF Convention, without additional requirements, had changed the situation. By contrast, the PIF Directive obliges Member States to consider only the most serious forms of VAT fraud a criminal offence, such as carousel fraud, Missing-Trader-Intra-Community (MTIC) fraud and fraud committed by a criminal organization (Juszczak & Sason, 2017). The problem here is the wide margin left to the Member States in defining serious cases of VAT fraud. Some Member States may opt for the limit of EUR 10 million, while others may reduce this limit considerably, hindering the desired attempt to harmonise the definition of such offences.

3.1.2. *Corruption*

Along with fraud, what may also seriously damage the Union's financial interests is the practice of corruption of public officials managing EU funds. Estimating the cost of corruption is highly difficult. The EU Anti-Corruption Report calculated the cost of corruption for the EU economy at EUR 120 billion per year, just a little less than the annual budget of the Union (European Commission, 2014). This figure only includes losses in tax revenue and investments, ignoring further indirect cost components. Other studies offer larger figures. The one carried out by van Ballegoij and Zandstra (2016) estimated that the cost of corruption at the EU level may oscillate between EUR 179 and 990 billion. As observed, the variation is very significant. The explanation is that the study calculates the loss to the EU economy in three different scenarios (the 'magnificent seven', the 'catch me if you can', and the 'goodfellas'). "The "magnificent seven" scenario calculates how much countries lose relatively in economic terms by not reaching the corruption level of the seven best performing Member States. The 'catch me if you can' scenario calculates how much countries lose relatively in economic terms by not reaching the EU average corruption level. The 'goodfellas' scenario divides Member States into four different groups with similar institutional characteristics and levels of corruption. The scenario analyses how much countries lose relatively in economic terms by not reaching the level of the best performer within the corresponding peer group' (Ballegoij and Zandstra, 2016: 6). The losses vary from one scenario to another: EUR 870 to 990 billion in the first, EUR 179 to 256 billion in the second, and EUR 218 to 282 billion in the third. The study considers the third scenario to be the most feasible because it takes into account the difference in corruption levels between Member States (Ballegoij and Zandstra, 2016).



In addition, there is another problem that may rise the global figure: the practices of corruption are frequently linked with fraud to the EU budget since public officials may be bribed to facilitate the diversion of the EU money (Csúri, 2016: 124). For these reasons, fighting corruption at the EU level has been traditionally linked to the fight against fraud, and several relevant legal acts have been adopted.

One of the biggest problems in a coordinated fight against corruption at the EU level is the lack of uniform definitions. A good example of this is the concept of ‘public official’. The First Protocol to the PIF Convention offered an own definition of ‘Community official’ but each national legislation would define and provide meaning to the concept of ‘national official’, giving rise to high disparity across Member States. As provided by Article 1 (c) of the First Protocol, the concept of ‘national official’ had to be understood ‘by reference to the definition of ‘official’ and ‘public officer’ in the national law of the Member State in which the person in question performs that function’. This provision was strongly criticised by scholars (Benito Sánchez, 2019; Kaiafa-Gbandi, 2010; Mitsilegas, 2013; Wolf, 2007) because the same conduct could be deemed an offence in one Member State and not in another, depending on the definition in each Member State, a situation that could clearly hinder cooperation between countries in the fight against such practices. In order to avoid this problem, it was obvious that a common definition of ‘public official’ was needed. Now, the PIF Directive offers an autonomous definition of ‘national official’ in Article 4 (4) (a) (ii):

[t]he term ‘national official’ shall include any person holding an executive, administrative or judicial office at national, regional or local level. Any person holding a legislative office at national, regional or local level shall be assimilated to a national official.

Moreover, the definition of ‘public official’ in the PIF Directive is completed in Article 4 (b) with a reference to a *functional* or *material* concept, according to which, ‘public official’ is also

any other person assigned and exercising a public service function involving the management of or decisions concerning the Union's financial interests in Member States or third countries.

The *functional* concept has as a direct consequence the enlargement of the scope of application of the criminal law in this matter. Indeed, the new definition has been designed



to cover all residual situations that could not be considered a criminal offence under the previous legal provisions (PIF Conventions and the Protocols).

The new concept of ‘public official’ contained in the PIF Directive is undoubtedly a step forwards, since it offers an autonomous concept of EU law, which once the Member States transpose into national legislation, will avoid problems derived from the existence of so many different and competing definitions.

The definition of ‘corruption’ as a crime follows what was stipulated in the First Protocol to the PIF Convention in 1996. According to this, Member State shall consider active and passive corruption of public officials a criminal offence when the conduct damages or is likely to damage the Union’s financial interests. We can distinguish between the notions of ‘passive corruption’ (the conduct of the public official who requests or receives a bribe) and ‘active corruption’ (the conduct of the person who promises, offers or gives a bribe to a public official). Due to space constraints, only the amendments to the definition of the crime is explored here.

Traditionally, criminal codes in Europe have distinguished two modalities of corruption offences depending on if the conduct of the public official violates or not official duties. The most serious case is that in which a public official acts ‘in breach of his duties’. The less serious case is that in which a public official acts ‘in accordance to his function’ but contrary to the general official duty of acting impartially. An example of this distinction can be observed in the criminal codes of Germany, Italy and Spain. The *Strafgesetzbuch* distinguishes between *Bestechlichkeit* (§ 332, breach of duty) and *Vorteilsannahme* (§ 331, not breach of duty). The *Codice penale* differentiates between *corruzione per un atto contrario ai doveri d’ufficio* (Article 319, breach of duty) and *corruzione per l’esercizio della funzione* (Article 318, not breach of duty). The *Código penal* does the same between *cohecho propio* (Article 419, breach of duty) and *cohecho impropio* (Article 420, breach of duty).

This distinction between conducts obviously affects the criminal penalty, which is heavier in those cases in which the public official acts ‘in breach of his duties’. In those cases, it had been traditionally understood that the damage on the legal interest (the fairness of the Public Administration) is more significant than in those cases in which the civil servant does not breach official duties.

This view started to change at the end of the 1990s. The Criminal Law Convention on Corruption, adopted by the Council of Europe in 1999, represents the beginning of this



change. The Convention does not make any distinction in its Articles 2 and 3, which define active corruption and passive corruption respectively, on the basis of an action or omission of the public official ‘in the exercise of his or her functions’. The Explanatory Report to the Convention considers that the legal interest can be ‘severely undermined’ in both cases, so that no distinction is needed (Council of Europe, 1999). Although the civil servant acts without violating official duties, the fairness of the Public Administration is anyway damaged, or at least put at risk, because he receives money (or another advantage) by a citizen or a company, something inadmissible in a democratic state, where public officials are remunerated by public budget, not by citizens or companies (Council of Europe, 1999). The United Nations Convention against Corruption adopted in 2003 follows the path of the Council of Europe Convention. It does not distinguish either between more or less serious corruption offences (Article 15).

In line with these two international legal documents on corruption, but contrary to what was stipulated by the First Protocol to the PIF Convention in 1996, the PIF Directive also does not make any distinction between corruption that violates or not official duties. The main consequence of this change of perspective is the enlargement of the conducts under the threat of the criminal law. From the PIF Directive on, any conduct related to a bribery is punishable although the public official does not act ‘in breach of official duties’ because the EU budget may also be put at risk by any such behaviour where a public official acts in accordance with his function but contrary to the general duty of acting impartially, for instance, by giving preferential treatment by speeding up the processing of a case.

3.1.3. *Misappropriation*

One of the main novelties of the PIF Directive is the requirement to consider the misappropriation of funds a criminal offence. This is a true improvement with respect to former legal documents on the protection of the EU budget since all of them had ignored these practices, despite the significant annual losses to the EU budget. The impact assessment for the proposal for the PIF Directive estimated such losses at EUR 15.1 million (European Commission, 2012).

The offence of misappropriation of public funds has been present in the criminal codes of some Member States for decades. Some examples are the *Codice Penale* of Italy (Articles 314 - 316ter) and the *Código Penal* of Spain (Articles 423 - 435bis). These criminal codes place



this offence among ‘offences against the public administration’. Other criminal codes in which this offence has existed for years are the French and the German. These latter include a regulation of misappropriation that does not distinguish between public or private assets (*Code pénal*, Articles 314-1 to 314-4; *Strafgesetzbuch*, § 266). Although the definition of this crime may vary from one set of legislation to another, the key element is the *diversion* of money. The PIF Directive defines the offence of misappropriation as ‘the action of a public official who is directly or indirectly entrusted with the management of funds or assets to commit or disburse funds or appropriate or use assets contrary to the purpose for which they were intended in any way which damages the Union's financial interests’ (Article 4 (3)). Where such conduct is committed intentionally, the Member States are now obliged to sanction it via criminal law.

One might assume that some forms of misappropriation are included in the definition of fraud provided in Article 3 of the PIF Directive, in relation to expenditures since it mentions ‘the misappropriation or wrongful retention of funds or assets from the Union budget’ and ‘the misapplication of such funds or assets for purposes other than those for which they were originally granted’. Article 4 (3), however, covers other types of conduct carried out by a public official, for instance, the use of a credit card linked to a bank account where EU funds are deposited to fund public projects for personal purchases (European Commission, 2012).

3.1.4. Money laundering

Money laundering is defined as ‘the process of concealing the origin, ownership or destination of illegally or dishonestly obtained money by hiding it within legitimate economic activities’ (Transparency International, 2009: 16). Practices of money laundering constitutes a grave risk to the EU economy since the objective of these practices is to legitimise, or make regular, the assets coming from criminal offences, which are then introduced into the formal economy by various mechanisms as if they had been obtained by legal means. The Union’s concern about the effects of money laundering on the EU economy began more than three decades ago with the first Anti-Money Laundering Directive was passed in 1991 (European Council, 1991). The need to protect the Union’s financial interests through the criminalisation of money laundering was firstly exposed by the Second Protocol to the PIF Convention in 1997. The PIF Directive (Article 4 (1)) imposes the same obligations,



requiring Member States to adopt the necessary measures to ensure that money laundering, involving property derived from the offences referred to by the Directive, constitutes a criminal offence. Actually, the only novelty here is the consideration of the crime of misappropriation of EU funds as a ‘predicate offence’, that is, an offence whose proceeds may become the subject of a money laundering offence. The Second Protocol to the PIF Convention already stipulated that fraud and corruption should be considered ‘predicate offences’.

As regards the definition of the offence of money laundering, the PIF Directive refers to the Fourth Anti-Money Laundering Directive (European Parliament & Council, 2015). The recently passed Fifth Anti-Money Laundering Directive (European Parliament & Council, 2018) does not change anything since, as pointed out by its Article 1 (2), the new Directive ‘does not apply to money laundering as regards property derived from criminal offences affecting the Union’s financial interests, which is subject to specific rules laid down in Directive (EU) 2017/1371’.

3.1.5. Participation forms and inchoate crimes

According to the criminal law theory, the category ‘participation’ includes any kind of contribution to the offence carried out by other persons than the perpetrator (Klip, 2012), such as the instigator or the accomplice. The category ‘incomplete’ or ‘inchoate’ offence refers to those conducts that shall be punished even before the undesirable harm materialises, the classical example being the attempted offence (Klip, 2012). None of these concepts has been defined by specific EU legal instruments, although many of them use this terminology^{VI}. Consequently, it seems to be that the Union law leaves the definitions to Member States (Keiler, 2011).

The PIF Directive employs the terms ‘incitement’, and ‘aiding and abetting’ to describe the forms of participation that must be placed under the remit of the criminal law by national legislations (Article 5). Likewise, the attempt to commit a PIF crime shall be considered punishable by the criminal law in Member States (Article 5). The reference to the attempted offence represents a progress in the protection of the EU financial interests since the former legal instruments did not impose obligations in this regard.

The problem is the lack of definitions concerning the terminology, just like the lack of instructions concerning the applicable criminal sanctions for these situations, which may lead



to differences in the implementation of the Directive (Di Francesco Maesa, 2018). In any case, it must be assumed that it is very complex to establish harmonised rules in this respect since the concepts of ‘participation forms’ and ‘inchoate crimes’ have a long tradition in the criminal law systems of the Member States, which in some cases comes from the nineteenth century. Therefore, it will not be easy to unify criteria. Member States would probably show great reluctance to alter these traditional notions.

3.2. Criminal law sanctions

The PIF Convention opened up a way of harmonising criminal sanctions for offences affecting the financial interests of the EU, by requiring Member States to adopt ‘effective, proportionate and dissuasive criminal penalties, including, at least in cases of serious fraud, penalties involving deprivation of liberty which can give rise to extradition’ (Article 5 (1)). This attempt at harmonisation was a flawed one, to the extent that it left to national authorities the task of adopting criteria to grade, in the light of their respective legal systems, the seriousness of criminal offences, resulting in an uneven ranking of penalties across Member States (Carrera Hernández, 2001). This idea may be illustrated well through comparative examination of the treatment of passive corruption in Germany, Italy and Spain. While all three criminal codes punish this offence with a penalty of imprisonment, striking variation is observed. The same offence would be punished with imprisonment between 6 months and 5 years in Germany (*Strafgesetzbuch* Code § 332), between 6 and 10 years in Italy (*Codice Penale*, Article 319), and between 3 and 6 years in Spain (*Código Penal*, Article 419). Thus, the criminal sanction for the perpetrator may vary between 6 months and 10 years for the same offence.

To avoid situations like the one described above, the PIF Directive can be seen as a step forward when it comes to the harmonisation of penalties since it provides Member States with more precise requirements. Like the PIF Convention, the PIF Directive has allowed securing uniformity across Member States in a key aspect: that the set of conducts described above are sanctioned with penalties of imprisonment (not only fines). The novelty here is that it foresees a maximum penalty of at least four years of imprisonment when the offence involves ‘considerable damage or advantage’ (Article 7 (3)). According to the same legal article, ‘considerable damage or advantage’ shall be understood as referring to cases involving more than €100,000. Nevertheless, this attempt at harmonising criminal sanctions continues



to be very limited since the PIF Directive does not offer rules concerning minimum penalties; and with respect to maximum penalties, Member States may foresee very broad-ranging limits. This situation may seriously hinder any desired harmonisation, the lack of uniform penalties continuing to be an opportunity for potential perpetrators. When they have to decide the territory on which the PIF crime will be committed (e.g. VAT fraud), they will be able to choose the Member State in which the crime is punished with lower penalties, just for the case they are caught by authorities.

3.3. The aggravating circumstance of ‘criminal organisation’

The European Union has been concerned about organised crime for many years, as evidenced by a number of legal initiatives adopted in this matter. In 1999, the conclusions of the European Council of Tampere on the creation of an area of freedom, security and justice in the European Union included the fight against organised crime as one of the priorities of the Union. Likewise, two programmes – the Hague Programme: Strengthening Freedom, Security and Justice in the European Union, and the Stockholm Programme: An Open and Secure Europe Serving and Protecting Citizens – underline the need to combat organised crime. In 2008, the Framework Decision 2008/841/JHA on the fight against organised crime (European Council, 2008) was adopted, requiring Member States to make a criminal offence any conduct related to participation in a criminal organisation.

The links between organised crime and the offences referred by the PIF Directive seem to be clear. In 2000, the United Nations Convention against Transnational Organized Crime^{VII} pointed out the relations between criminal networks and the offences of corruption and money laundering. Therefore, among the offences mentioned in the Convention due to the relation to organised criminality, we find corruption (Article 8) and money laundering (Article 7). The links between these criminal conducts are also a reality at the EU level. Indeed, the Preamble of the PIF Directive (recital 2) points out that attacks to the Union’s financial interests are often committed by organised criminal networks. Moreover, the European Parliament published a report on the relationship between organised crime and fraud to the EU budget (European Parliament, 2011). Other studies have investigated the links between organised crime and corruption (Gounev & Bezlov, 2010; Villoria Mendieta, 2012). In order to curb the damage caused to the EU’s financial interests by criminal gangs, the PIF Directive requires Member States to consider that the commission of the offence in the framework of a criminal



organisation represents an aggravating circumstance, referring to the 2008 Framework Decision to define ‘criminal organisation’ (Article 8).

The PIF Directive, however, does not specify any provision concerning the criminal penalty for those cases where there is an aggravating circumstance. In addition, the Directive does not explain either if the obligation contained in Article 8 concerning the aggravating circumstance can be fulfilled in that case in which the national criminal law considers the participation in a criminal organisation as a separate offence. The text of the PIF Directive does not say anything to this respect. The Preamble of Directive does point out this possibility but, as known, the Preamble is not a valid legal basis for this claim. Consequently, differences in the punishment of criminal behaviour among Member States may be very significant. The Directive could arguably have contained more concrete provisions to allow for the complete harmonisation of penalties, thus preventing that legislative divergences at the national level become a relevant factor when potential criminals decide in which Member State(s) the offence against the EU’s financial interests will be committed.

3.4. Liability of legal persons

When it comes to persons responsible for a criminal offence, traditionally the criminal law theory in the continental Europe – contrary to Common Law system – has been only focused on natural persons (individuals) since they are the only ones that can be motivated by the law. Consequently, the legal systems of these countries have rejected the idea of considering the legal persons (companies) criminal liable, following the Roman aphorism *societas delinquere non potest*. However, the development of economic criminality has brought about a change because economic crimes are essentially committed in the framework provided by a legal person. For instance, it is almost impossible to imagine a case of VAT fraud without the support of a company. For these reasons, some Member States have been including criminal liability of legal persons into their legislations for the last years (Vermeulen et al, 2012). This is the case, for instance, of, France, The Netherlands, Portugal and Spain, whose criminal codes include provisions on the responsibility of legal entities^{VIII}. Other States, such as Germany and Italy do not recognise criminal liability for legal persons, but this does not mean that companies remain unpunished where involved in economic crimes. In these cases, companies can be sanctioned with non-criminal sanctions. In the case of Germany, the responsibility of legal entities is regulated in the *Gesetz über Ordnungswidrigkeiten* (§ 30) (Act on regulatory offences). The liability



may derive from an offence of criminal or administrative nature (Martínez-Buján Pérez, 2016). In the case of Italy, the liability of legal persons is regulated by the Decreto Legislativo 231/2001^{IX}. Formally, the responsibility of legal entities in Italy is administrative. However, this type of liability has been described as quasi-criminal since it derives from a *criminal* offence and the trial is ruled by *criminal law* guaranties (Fiorella, 2006; Selvaggi, 2006; Valenzano, 2015).

The EU law takes into account the diversity of legal models concerning the responsibility of the legal persons. Thus EU legal instruments on criminal matters do not impose the obligation of considering legal persons responsible from the point of view of the criminal law. However, when a Member State does not implement criminal liability for companies, it must implement other measures, having equivalent effect (Klip, 2012). This idea is reflected in the PIF Directive. In line with the Second Protocol to the PIF Convention, Article 6 of the PIF Directive obliges Member States to take measures to ensure the liability of legal entities involved in the perpetration of offences covered by it (fraud, corruption, misappropriation and money laundering). The sanctions can be criminal or non-criminal; but in any case, they must be effective, proportionate and dissuasive (Article 9), which shall include fines, and may include others. As example of other sanctions, the PIF Directive mentioned those contained in the Second Protocol to the PIF Convention: (a) exclusion from entitlement to public benefits or aid; (c) disqualification from the practice of commercial activities; (d) placing under judicial supervision; (e) judicial winding-up,) while adding two new: (b) exclusion from public tender procedures, and (f) closure of establishments which have been used for committing the criminal offence.

The problem with this regulation concerning the responsibility of legal persons is the broad margin left to Member States. They can choose, firstly, between criminal and non-criminal sanctions. Secondly, only the penalty of fine is a compulsory sanction according to the PIF Directive, while the other sanctions are optional for Member States. In this situation, harmonisation seems to be very distant in this matter.

3.5. Limitation period

Discovering cases of financial crimes such as those mentioned in the PIF Directive is a very complex task. Contrary to traditional crimes (theft, injuries...), crimes like corruption, fraud or money laundering are 'victimless crimes', in criminological terminology. Packer (1968: 151) defined the 'victimless crimes' as 'offenses that do not result in anyone's feeling



that he has been injured so as to impel him to bring the offense to the attention of the authorities'. For this reason, this type of offences remain hidden to authorities for years since citizens may not even be aware of the commission of one of those crimes. Consequently, it may take years to discover the perpetration of the crime and to identify the perpetrator.

Lengthy investigations may become problematic when a short limitation period is attached to the offence in the criminal legislation. Once that period has expired, no legal proceedings can be carried out against the alleged offenders, which has as a consequence the impunity of the person(s) involved in the perpetration of the criminal offence. To solve this problem, the PIF Directive pays special attention to the limitation period for the offences it covers. The former legal instruments on the protection of the Union's financial interests did not set any rule concerning prescription periods, which led to a notable lack of legal equivalence in this matter (European Commission, 2012). However, according to Article 12 of the PIF Directive, Member States shall ensure a 'sufficient period' after the offence has been committed, and in the case of offences punishable by a maximum sanction of at least four years of imprisonment, the limitation period shall be at least five years.

The new PIF provisions are an attempt at harmonising (along with criminal sanctions), the limitation periods in the national law of the Member States. However, the rules concerning harmonisation in this point are very vague. Firstly, because the expression 'sufficient period' may be understood by Member States in a very different sense. Secondly, because the PIF Directive does not establish any period of prescription for those offences in which there is not a 'considerable damage or advantage'. Thirdly, even for those cases in which the PIF Directive advocates for a limitation period of 5 years, this is only a minimum threshold, so Member States can foresee very different rules for prescription of offences. Consequently, the current disparity among national legislations may persist in the future.

4. The transposition of the PIF directive into the Spanish law

The Spanish Criminal Code was amended at the beginning of 2019 through the Law 1/2019^X (hereinafter, Law 1/2019) with the aim of transposing a number of EU Directives into the Spanish legislation, among them, the PIF Directive, as said in the Preamble of the Law (para. 3). In this section, it will be analysed the way in which the Spanish Legislature has implemented the obligations of the PIF Directive and the degree of compliance with these



obligations. The analysis follows the structure used in the previous section: definition of the crimes, sanctions, aggravating circumstance, liability of legal persons and limitation period.

4.1. Definitions of the crimes and criminal sanctions

4.1.1. *Fraud*

Fraud offences are punished by Articles 305 to 310bis of the Spanish Criminal Code (hereinafter, SCC), within the Title XIV ('Offences against the Exchequer and the Social Security'). The adoption of the SCC in 1995 coincided with the adoption of the PIF Convention. Therefore, the PIF Convention had a significant influence in the description of the fraud crimes. As a result, the SCC incorporated a number of offences against the then Community's financial interests, along with the offences against the Spanish Exchequer (national, regional and local Exchequer) (Martínez-Buján Pérez, 2015; Nieto Martín, 1996).

Like the PIF Convention and the PIF Directive, the SCC also distinguishes between fraud concerning revenues and fraud concerning expenditures. On the one hand, the conduct of fraud affecting the Union's revenues constitutes an offence as provided by Article 305.3 of the SCC (fraud affecting the Spanish Exchequer is in Article 305.1). On the other hand, the conduct of fraud affecting the Union's expenditures, basically, grant fraud, constitutes an offence as provided by Article 308.1 SCC (it also includes fraud affecting the Spanish Exchequer concerning grant fraud).

In the following paragraphs, those provisions are studied, firstly, the offences regarding revenues, and secondly, the offences regarding expenditures.

Revenues. Since the adoption of the Spanish criminal code in 1995, the EU budget has been protected with more intensity than the Spanish budget, going even beyond the principle of assimilation derived from the judgement in the Greek Maize case^{XI}. According to the Spanish legislation prior to the entry into force of the Law 1/2019, the conduct of fraud as concern revenues affecting the EU budget was a criminal offence when the amount of money was higher than 4000€. The conduct of fraud to the Spanish Exchequer was a criminal offence, however, when the amount of money was higher than 120000€. Frauds below these sums were *mere* administrative law offences.

This enormous difference in the treatment of these behaviours has changed by effect of the aforementioned Law 1/2019, although even so, the protection of the Union's financial



interests continues to be bigger. Now, fraud concerning revenues at the EU level constitutes a criminal offence if the amount of money is higher than 10000€. When the conduct is related to the Spanish Exchequer, the limit continues to be 120000€.

The most striking consequence of the Law 1/2019 as regards monetary limits is the decrease of the protection of the Union's financial interests because until the entry into force of the Law, the criminal offence of fraud started in 4000€. After the entry into force of the Law, the criminal offence of fraud starts in 10000€. That is, the Law 1/2019 has decriminalised frauds to the Union's financial interests between 4000€ and 10000€. Although the new monetary limit fulfils the limit mentioned in the PIF Directive (Articles 2 and 7), the decriminalisation of some conducts of fraud by the Spanish legislative seems to go against the purpose of the PIF Directive, which is to strengthen the use of the criminal law to protect the EU budget due to the deterrent effect of the criminal sanction (European Parliament & Council, 2017; European Parliament & Council, 2012; Mancano, 2019). Moreover, before the adoption of the Law 1/2019, the criminal sanction foreseen in Article 305.3 of the SCC was aggravated if the amount of money was higher than 50000€. Now, the aggravation begins in 100000€.

To sum up, the monetary limit of the SCC after the entry into force of the Law 1/2019 fulfils the requirements of the PIF Directive, but there is not a rational justification for the decriminalisation of some cases of fraud concerning revenues. Likewise, there is no justification for the lower protection for frauds between 50000€ and 100000€.

Another difference in the treatment of fraud to the EU budget and fraud to the Spanish budget is related to the 'tax regularization'. As provided by Article 305.1 *in fine*, as regards fraud to the Spanish Exchequer, the fraudster will be exempt of criminal responsibility if his tax situation is brought into compliance^{xii}. This option is not possible in the case of a fraud to the EU budget. Again, one can observe here a stronger protection of the Union's budget.

The asymmetric treatment between fraud at the EU level and fraud at the Spanish level may have serious consequences in the incrimination of VAT fraud. The VAT is a national tax subject to some standard EU rules. Nevertheless, VAT fraud does not only affect the national Exchequer. It may indirectly affect the Union's financial interests because Member States contributions to the EU budget are calculated on the basis of their VAT intake (European Commission, 2012). The key question here is where to include VAT fraud indirectly affecting the EU financial interests. Since VAT is essentially a national tax, VAT



fraud should be included in Article 305.1 (national fraud). However, as VAT fraud may affect the Union's financial interests, this conduct may also be included in Article 305.3 (EU fraud). The Spanish case law has traditionally considered that these conducts fall under the scope of Article 305.1 (national fraud). In line with this interpretation, the criminal offence of VAT fraud starts in 120000, and not in 10000, even when it affects the Union's financial interests. Only fraud concerning traditional own resources (TOR) (e.g. customs duties and sugar levies) fall under the scope of application of Article 305.3 (Díaz Morgado, 2016; De la Mata et al, 2018).

Expenditures. Fraud concerning expenditures, e.g. grant fraud, constitutes an offence provided by Article 308 of the SCC. After the entry into force of the Law 1/2019, this Article includes both fraud to the Union's financial interests, and fraud to the Spanish Exchequer. Previously, fraud concerning expenditures affecting the EU budget was in Article 306, while Article 308 only contained fraud concerning expenditures affecting the Spanish budget. Similarly to the case of a fraud concerning revenues, the treatment of a fraud concerning expenditures was different, giving more protection to the EU budget than to the Spanish budget^{xiii}. The Law 1/2019 has unified the protection, so now, the monetary limits to consider a conduct of fraud as a criminal offence are the same, irrespective of the fact that the budget affected belongs to the EU or to Spain. According to Article 308, the conduct of fraud will be considered as a criminal offence when the amount of money is higher than 10000€. In addition, the offence will be aggravated when the amount is higher than 100000€. This decision of the Spanish Legislature is a powerful one because there is no reason to treat differently these conducts of fraud. Nevertheless, the negative critic to the Spanish legislation is, again, that some conducts of fraud have been decriminalised, namely, those between 4000€ and 10000€. The new monetary limits meet the terms of the Directive, but it is difficult to understand the decision of the Spanish legislative – by the way, very punitive in the last reforms of the criminal code – of decriminalising some conducts of fraud concerning expenditures.

Furthermore, a new problem arises in this point, and it is related to the 'tax regularization'. Before the Law 1/2019, tax regularization was only possible with respect to the offence of fraud affecting the Spanish Exchequer since tax regularization was mentioned in Article 308, but not in Article 306. Now, as both forms of fraud (EU and Spain) are in Article 308, the tax regularization, and consequently, the possibility of the exemption of



penalty, refers to both of them. The consequence is clear. For instance, a case of grant fraud to the EU budget (even, enormous amounts of money) may finish with the exemption of penalty if the fraudster brings his tax situation into compliance with the law. There will not be a criminal offence in cases like this. This clearly breaks the mandate of the PIF Directive, which does not mention any possibility to this respect. Indeed, just the contrary, the PIF Directive insists on strengthening the use of the criminal law.

To complete this chaos, the Spanish Legislature, through the Law 1/2019, forgot to remove Article 306 from the criminal code, where fraud concerning expenditures affecting the EU budget was located. As a result, these cases may be included both in Article 306 and 308; an absolute nonsense that might have as a consequence important problems related to the concurrence of two provisions being applicable at the same time (Rodríguez-Ramos Ladaria, 2019). The more logic solution is to understand that Article 306 has been *de facto* abolish by the Law 1/2019.

When it comes to criminal law sanctions for fraud, the PIF Directive requires firstly that Member States foresee ‘effective, proportionate and dissuasive criminal sanctions’ (Article 7 (1)) for the offences referred, and secondly, it obliges to foresee penalties of imprisonment (Article 7 (2)). The Spanish Criminal Code, in Articles 305.3 and 308, does foresee penalties of imprisonment, so it complies with the requirements of the PIF Directive. In both provisions, the imprisonment oscillates between 1 and 5 years. Additionally, the perpetrator will receive a fine up to 6 times the amount of money defrauded. Nevertheless, both Articles include a mitigated penalty for less serious cases; those in which the amount of money defrauded oscillates between 10000€ and 100000€. In these cases, the SCC offers two alternative penalties: imprisonment (from 3 months to 1 year) and fine (up to three times the amount defrauded). Therefore, it might be concluded that the SCC infringes the mandate of the PIF Directive, which expressly demands penalties of imprisonment. In any case, the option for the penalty of imprisonment does exist. In addition, the two alternative penalties are an option employed by the Spanish Legislature in other places of the criminal code to respect the principle of proportionality of penalties, which obliges to foresee less serious penalties for less serious offences.

Thirdly, the PIF Directive (Article 7 (3)) requires higher penalties in cases of ‘considerable damage or advantage’, specifically, a maximum penalty of at least 4 years of imprisonment. The SCC complies with this requirement because for those serious cases the



penalty of imprisonment oscillates between 1 and 5 years, both in Article 305.3 and 308. Moreover, the SCC foresees additional penalties: a) a fine of up to six times the amount of money of the damage or advantage, b) the ban of receiving public grants or aids, and c) the deprivation of the right to enjoy fiscal benefits or incentive for a period between 3 and 6 years.

Fourthly, the same Article 7 (3) of the PIF Directive recognises that Member States ‘may also provide for a maximum sanction of at least four years of imprisonment in other serious circumstances defined in their national law’. The SCC does foresee other situations in which the penalty must be aggravated (from 2 to 6 years of imprisonment). These situations are related only to the conduct described in Article 305, not in Article 308 (grant fraud). These are a) the amount defrauded exceeded 600000€, b) the fraud was committed within a criminal organisation, and c) the perpetrator used natural or legal persons or other entities as proxies, or tax heavens, to hinder the prosecution of the crime.

4.1.2. Corruption

The offences of corruption (*cohecho*) are placed in Articles 419 to 427bis of the SCC, within the Chapter V of Title XIX (‘Felonies against the Public Administration’). The Spanish legislation meets the requirements of the PIF Directive as regards the criminalisation of corruption thanks to the reforms of the criminal code carried out in 2010^{XIV}, 2015^{XV}, and the aforesaid reform of the Law 1/2019. The two first reforms were aimed at adapting the Spanish legislation to international commitments on this matter (Benito Sánchez, 2015), particularly, the Convention on the fight against corruption involving officials of the European Communities or officials of Member States of the European Union^{XVI} (hereinafter, EU Convention on corruption), the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions^{XVII} (hereinafter, OECD Convention), and the United Nations Convention on Corruption^{XVIII} (hereinafter, UNCAC). The amendment of 2019 only modified the offences of corruption with respect to the concept of ‘public official’, in order to adapt it to the mandate of the PIF Directive.

As provided by the PIF Directive, the Spanish criminal code penalises both passive and active corruption of public officials. The definition of these crimes does not make any reference to the Union’s financial interests since any conduct of corruption involving EU public officials or officials of Member States will be a criminal offence.



The incriminatory elements, both concerning the *actus reus* and the *mens rea*, as described by Article 4 (2) of the PIF Directive are present in Articles 419 and subsequent of the SCC. Even the aforementioned novelty of the PIF Directive as regards the conduct of the public official ('acting in accordance with the duties') is already included in the definitions of the crimes of the SCC. This is so because the SCC has traditionally distinguished between the offence of corruption when the public official acts in breach of his duties (*cobeccho proprio*, Article 419), and the offence of corruption when the public official acts in accordance with his duties (*cobeccho improprio*, Article 420). Additionally, the SCC punishes as passive corruption two more conducts: the so-called 'subsequent bribery' (Article 421), that is, cases in which the corrupt agreement takes place after the action or omission of the public official; and the bribery offered to the public official just in view of his office or duty (Article 422), that is, the public official will not act or refrain from acting. On the other hand, active corruption is a criminal offence as provided by Article 424 of the SCC. The incriminatory elements are the same than those foreseen to passive corruption.

The concept of public official is the only element of the definition of the crime that has been modified by the Law 1/2019 to transpose the PIF Directive. Nevertheless, the concept of the Spanish criminal code was already compatible with the concept of the PIF Directive thanks to former reforms of the SCC. Article 427 of the SCC, within the aforementioned Chapter V of Title XIX of the SCC was modified in 2010 to extend the application of the offences of corruption to those cases in which EU public officials or officials of Member States were involved, to comply with the aforesaid EU Convention on corruption. Then, in 2015, the SCC was again modified. This reform also affected the concept of public official, which was enlarged to include officials of any third country (not only EU Member States) and officials of any international organisation (not only the EU), as demanded by the UNCAC. So, the concept of public official as provided by Article 427 as modified in 2015 includes:

- a) any person holding a legislative, administrative or judicial office of any country of the European Union or other foreign country, whether appointed or elected.
- b) any other person exercising a public function for a country of the European Union or other foreign country, including for a public agency or public enterprise of the European Union or of other public international organization
- c) any other official or agent of the European Union or of a public international organisation.



Finally, the Law 1/2019 has just added the letter d) to the Article 427 to include what prescribed by Article 4 (4) (b) of the PIF Directive.

d) any other person assigned and exercising a public service function involving the management of or decisions concerning the Union's financial interests in Member States or third countries.

This modification does not seem to be necessary because the persons mentioned in the new letter d) of Article 427 could be include in letter b) of the same Article (García Arroyo, 2019). In any case, now there is no doubt that the concept of the SCC completely fulfils the requirements of the PIF Directive.

As regards criminal sanctions for corruption offences, the SCC complies with the mandate of the PIF Directive. On the one hand, the crimes of passive and active corruption in which the public official acts in breach of his duties are punishable with a penalty of imprisonment between 3 and 6 years, plus a fine between 12 and 24 months^{XIX}. The public official will receive, in addition, the penalty of barring from public employment and office for a period between 9 and 12 years, and the penalty of deprivation of the right to passive suffrage for the same period.

On the other hand, the offences of passive and active corruption in which the public official acts in accordance with his duties are punishable with a lower penalty of imprisonment (from 2 to 4 years) and the same fine. The additional penalties of barring from public employment and office, and of deprivation of the right to passive suffrage will have a duration between 5 and 9 years.

As observed, the limits of the penalty of imprisonment comply with the obligations of the PIF Directive since the maximum limit is 6 years in most serious cases of corruption, and 4 years in the remaining ones.

4.1.3. Misappropriation

The Spanish criminal code criminalises the conducts of misappropriation of public funds in Articles 432 to 435bis, within Chapter VII of Title XIX ('Felonies against the Public Administration'). The Spanish legislation meets the requirements of the definition of the crime as stipulated by Article 4 (3) of the PIF Directive. The same as with respect to the



definition of the offences of corruption, the SCC does not include in the definition of the crime of misappropriation any reference to the Union's financial interests because any conduct of misappropriation committed by a public officer will be punishable.

The aforesaid Law 1/2019 amended this Chapter VII to include a new provision concerning the definition of public official in relation to misappropriation offences. Until the entry into force of the Law, misappropriation of public funds was an offence exclusively related to the Spanish Public Administration^{xx}. As mentioned before, the Law 1/2019 has expanded the concept of public official to officials of the EU and other public international organisations, and officials of Member States and other foreign countries since the aforementioned Article 427, in which the definition of public official is placed, is also applicable to misappropriation offences as provided by the new Article 435bis.

When it comes to criminal law sanctions for the offence of misappropriation, the Spanish legislation fulfils the requirements of the PIF Directive. A misappropriation offence, as provided by Article 433 of the SCC, is punishable with a penalty of imprisonment between 2 and 6 years, a fine between 12 and 24 months, and the barring from public employment and office for a period between 1 and 10 years.

The SCC even foresees specific aggravating circumstances in relation to the crime of misappropriation, which raise the penalty of imprisonment for a period between 4 and 8 years, and the barring from public employment and office for a period between 10 and 20 years. The aggravating circumstances are: a) serious damage or hindrance caused to the public service; and b) damage or advantage higher than 50000€. When the damage or advantage exceeds 250000€, the penalty of imprisonment may be raised to 12 years, and the barring from public employment and office to 30 years.

4.1.4. Money laundering

Money laundering is a criminal offence as provided by Articles 301-304 of the Spanish criminal code, within Chapter XIV of Title XIII ('Felonies against property and against social-economic order'). Through a number of reforms undertaken in previous years, the Spanish Legislature has met the requirements of different international and EU legal instruments in this matter (Blanco Cordero, 2015). The PIF Directive has not provoked any reform of these offences since they were already in line with the provisions of the different Anti-Money Laundering Directives.



The definition of the crime complies with the definition provided by the aforesaid Fourth Anti-Money Laundering Directive (Article 1(3)), to which the PIF Directive refers. The SCC also fulfils the requirements concerning penalties, since the offence of money laundering is punishable with a penalty of imprisonment between 6 months and 6 years, plus a fine up to three times the values of the proceeds.

4.1.5. Participation forms and inchoate crimes

According to the Spanish Criminal Code, punishable forms of participation in the crime of another are the ones committed by the instigator and the accessory or accomplice (Articles 28 and 29). Unlike other criminal codes, the Spanish one distinguishes, in addition, between ‘necessary accomplice’ (Article 28.b) and ‘non-necessary accomplice’ (Article 29), depending upon his support to the crime.

The PIF Directive requires, in its Article 5, the criminalisation of incitement, and aiding and abetting. Although the PIF Directive does not offer a definition of these concepts, it can be understood that ‘incitement’ corresponds to what the SCC names ‘instigation’ (Article 28.a), and ‘aiding and abetting’ corresponds to the different types of accomplice in the SCC (Articles 28.b and 29).

According to the Spanish law, the instigator and the necessary accomplice are punished with the same penalty of the perpetrator or principle; the non-necessary accomplice receives a lower penalty. In any case, the PIF Directive does not give further instructions concerning the penalty for the secondary participants. It may be understood, therefore, that the SCC does comply with the requirements of the PIF Directive in this point.

As regards the criminalisation of the attempt of committing one of the PIF crimes, it must be highlighted that according to the SCC, the attempt is punishable with respect to all offences^{XXI} as provided by Article 16. Again, the Spanish legislation complies with the Directive in this point.

4.2. The aggravating circumstance of ‘criminal organisation’

The Spanish criminal code contains, since the reform of 2010, an autonomous offence of participation in a criminal organisation or group in Articles 570bis to 570quater, within the Chapter VI of the Title XXII (‘Felonies against public order’). The definition of the offence meets the requirements of the aforementioned Framework Decision



2008/841/JHA, to which the PIF Directive refers as regards the concept of ‘criminal organisation’.

Moreover, the SCC foresees specific aggravating circumstances concerning organised crime in some of the PIF offences, namely, fraud and money laundering. More precisely, the provision with respect to fraud is in Article 305bis, and the provision with respect to money laundering is in Article 302.1. In summary, Spain meets the obligations of the PIF Directive in this respect.

4.3. Liability of legal persons

Traditionally, the Spanish criminal law system had followed the Roman aphorism *societas delinquere non potest*, in line with most of the European countries (Vermeulen, 2012). Nevertheless, in 2010, the Spanish criminal code was modified to abolish that system, and to adapt the Spanish legislation to international requirements, particularly, those coming from the OECD Convention (Berdugo Gómez de la Torre, 2012). From that date on, legal persons may be held liable for a number of criminal offences as provided by Article 31bis and subsequent of the SCC. Indispensable requirements for incriminating a legal person is that the crime is committed by a person working for it, who acts on its behalf and in its benefit. Among the offences for which a legal person may be considered liable are included the ones referred by the PIF Directive. Since the reform of 2010, fraud, corruption and money laundering were in the list. The reform of 2019 added the offence of misappropriation. So, now the corresponding Articles are 302.2 (money laundering), 310bis (fraud), 427bis (corruption), and 435.5° (misappropriation). However, with respect to misappropriation, it is difficult to imagine cases in which the legal person may be held liable since Public Administrations – the place where typically misappropriation by a public official is committed – are out of the concept of legal person provided by the Spanish Criminal Code (Article 31quinquies).

As regards the sanctions, when a legal person is considered liable for an offence, it shall be always punished with a fine, and optionally, the judge may impose others. The fine may vary because it depends on the concrete offence and on the damage caused or advantage obtained. The other criminal sanctions are in line with the mandate of Article 9 the PIF Directive. As provided by Article 33.7 SCC, these sanctions for legal persons are b) dissolution, c) suspension of its activities, d) closure of its establishments, e) prohibition of



carry out commercial activities, f) barring from obtaining public aids, and from public tender procedures, and g) judicial intervention.

In conclusion, Spain complies with the mandate of the PIF Directive as far as liability of legal persons is concerned.

4.4. Limitation period

Provisions on limitation periods are found in Article 131 of the Spanish criminal code. Offences with penalties of imprisonment lower than 5 years have a limitation period of 5 years. Offences with penalties of imprisonment between 5 and 10 years, such as money laundering (Article 301.1), aggravated fraud (Article 305bis), serious cases of corruption (Article 419), and misappropriation (Article 432), have a limitation period of 10 years. Spain complies with the obligations described in the PIF Directive in this respect.

5. Conclusions

The PIF Directive represents a progress as regards the harmonisation of the criminal law of the Member States as a mechanism to protect the Union's financial interests because it foresees obligations to be implemented by the Member States, which are more precise than those referred in previous legal instruments (PIF Convention and its Protocols). Nevertheless, the provisions of the PIF Directive leave an extensive leeway to Member States concerning the definition of the crimes, sanctions and limitation periods. In addition, with respect to liability of legal persons, Member States may opt for imposing criminal sanctions or others non-criminal. This situation may provoke that the current disparity among national legal systems persists, which is an important obstacle for a coordinated strategy against these offences. This is the reason why, it can be concluded that the PIF Directive seems to be far from the goal of harmonising criminal law systems.

When it comes to the transposition of the PIF Directive into the Spanish law, one may conclude that, in general, the Spanish criminal law complies with the mandate of the PIF Directive, particularly, thanks to the reforms of the criminal code carried out in 2010, 2015 and 2019. The Spanish criminal code criminalises the four PIF crimes in the terms described by the Directive. It also meets the requirements concerning the responsibility of secondary participants, the attempt, and the criminalisation of the participation in a criminal



organisation. With respect to the liability of legal persons, Spain has opted for a system of criminal responsibility with sanctions very similar to those mentioned in the Directive. So, Spain fulfils the Directive in this point. The limitation period is also within the limit imposed by the Directive. As regards sanctions, most of the penalties complies with the provisions of the Directive. However, there are some cases of less serious fraud with respect to which the Spanish criminal code foresees a penalty of fine as alternative to the penalty of imprisonment. In this point, the Spanish criminal code seems to go against the mandate of the PIF Directive, which expressly demands penalties of imprisonment. In any case, in favour of the Spanish legislative, it can be concluded that the option of imposing a penalty of imprisonment does exist in the criminal code for less serious offences of fraud (along with the fine), and that the rule of two alternative penalties is a usual rule in some offences of the Spanish criminal code to respect the principle of proportionality of the penalties.

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^I Convention drawn up on the basis of Article K.3 of the Treaty on European Union, on the protection of the European Communities' financial interests, of 26 July 1995, OJ C 316 of 27.11.1995. Entry into force: 17.10.2002.

^{II} Protocol drawn up on the basis of Article K.3 of the Treaty on European Union to the Convention on the protection of the European Communities' financial interests, of 27 September 1996, OJ C 313 of 23.10.1996. Entry into force: 17.10.2002.

^{III} Second Protocol drawn up on the basis of Article K.3 of the treaty on European Union, to the Convention on the protection of the European Communities' financial interests, of 19 June 1997, OJ C 221 of 19.7.1997. Entry into force: 19.5.2009.

^{IV} The legal basis for the adoption of the PIF Directive was, however, strongly discussed during the negotiations. See in detail Di Francesco Maesa (2018) and Juszcak & Sason (2017).

^V ECJ, Case C-105/14, *Ivo Taricco and Others*, 2015, para. 41.

^{VI} Among others, European Council (2009), European Parliament & Council (2015), European Parliament & Council (2011), European Parliament & Council (2008).

^{VII} United Nations Convention against Transnational Organized Crime. UN General Assembly Resolution 55/25 of 15.11.2000. Entry into force: 29.9.2003.

^{VIII} See Art. 121.2 *Code Pénal* (France), Art. 11 *Código Penal* (Portugal), Art. 51 *Wetboek van Strafrecht* (The Netherlands), Art. 31bis et seq. *Código Penal* (Spain).

^{IX} Italy. Decreto Legislativo 8-6-2001, n. 231 'Disciplina della responsabilità amministrativa delle persone giuridiche, delle società e delle associazioni anche prive di personalità giuridica, a norma dell'articolo 11 della legge 29 settembre 2000, n. 300' (*Gazzetta Ufficiale* n. 140, 19-6-2001).

^X Spain. Ley Orgánica 1/2019, de 20 de febrero, por la que se modifica la Ley Orgánica 10/1995, de 23 de noviembre, del Código Penal, para trasponer Directivas de la Unión Europea en los ámbitos financieros y de terrorismo, y abordar cuestiones de índole internacional (*Boletín Oficial del Estado*, n. 45, 21.2.2019).

^{XI} ECJ, Case C-68/88, *Commission v. Greece*, 1989, ECR 2965.

^{XII} The terms of the compliance are in Article 305.4 of the Spanish criminal code.

^{XIII} The monetary limits were the same: 4000€ (EU) and 10000€ (Spain).

^{XIV} Spain. Ley Orgánica 5/2010, de 22 de junio, por la que se modifica la Ley Orgánica 10/1995, de 23 de noviembre, del Código Penal (*Boletín Oficial del Estado* n. 152, 23.6.2010).

^{XV} Spain. Ley Orgánica 1/2015, de 30 de marzo, por la que se modifica la Ley Orgánica 10/1995, de 23 de noviembre, del Código Penal (*Boletín Oficial del Estado* n. 77, 31.3.2015).



^{XVI} Convention drawn up on the basis of Article K.3 (2) (c) of the Treaty on European Union on the fight against corruption involving officials of the European Communities or officials of Member States of the European Union, of 26 May 1997, OJ C 195 of 25.6.1997. Entry into force: 28.9.2005.

^{XVII} OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, 21.11.1997. Entry into force: 15.2.1999.

^{XVIII} United Nations Convention against Corruption. UN General Assembly Resolution 58/4 of 31.10.2003. Entry into force: 14.1.2005.

^{XIX} According to the Spanish criminal code, the daily quota of the fine may oscillate between 2€ and 400€.

^{XX} It includes the national, regional and local Public Administration.

^{XXI} Except with respect to those crimes that, by nature, do not admit the attempt, e.g. conduct crimes (*Tätigkeitsdelikte*).

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