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Fiscal Decentralization in Federal Systems: A Comparative Story of a Principle and its Paradigms

by

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Abstract

The paper endeavors to revise and reframe the traditional categories established in the studies on fiscal federalism. It does so by embracing a comparative constitutional law viewpoint and a comprehensive approach to (fiscal) federalism.

Against the wake of an escalating recentralization, a renewed understanding of fiscal decentralization is adopted. This perspective integrates the institutional framework and the dynamics of intergovernmental relations within federal systems. It appreciates both the self-rule and shared-rule dimensions, with the latter serving as an architectural strategy to offset the centralizing drift, in search of a renewed federal equilibrium.

Keywords

Fiscal decentralization, financial autonomy, fiscal responsibility, tax-assignment problem, fiscal constitutions, decision-making (procedures), emerging paradigms, fuzzy logic approach.

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1. Introduction

Financial relations in the Western world are undergoing a process of re-centralization (Palermo 2018: 382-383). Simultaneously, the decentralization observed in developing countries often encompasses elements beyond tax powers. Fiscal decentralization is facing pressures for decades now, partly due to the relentless globalization and partly due to ongoing transformations, and the economic and financial instability. This includes measures adopted to address the economic-financial distresses that emerged in 2008 and in the aftermath of the Covid-19 pandemic.

These global dynamics have tested the legal foundations and constitutional safeguards of federal systems, highlighting the profound influence of fiscal federalism on the functioning of the legal-political system. A significant mutual interdependence exists between financial and institutional components; the former often influences the latter and, in some instances, can be deemed responsible for its transformation (Palermo 2012: 2, 10). This is particularly applicable to the integration process within the Eurozone's member states and the impact it has on both national and subnational governments.

The legacy of the (fiscal) federal idea, which supported the match between revenue and expenditure, is thus outdated. In its place, alternative solutions are emerging that combine the need for financial and political accountability of subnational governments with an ever-increasing role of the central government in fiscal matters, among other, due its key role in redistribution and stabilization functions.

To identify emerging trends in the field, this article explores the so-called 'tax-assignment problem' (Musgrave 1983) from a comparative constitutional perspective. By delving into various perspectives and frameworks and shedding light on the intricate interplay between fiscal decentralization and constitutional structures across diverse federal systems, main aim is to bring to light the presence of architectural solutions in which fiscal decentralization is articulated, and with it, the enhancement of the financial autonomy and fiscal responsibility of subnational governments is pursued. After providing an overview of the theories on which fiscal decentralization is based and an exploration of the comparative constitutional discourse in relation to these, the recurring paradigms and the main cases attributable to these are

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identified, with the aim to contribute to a revision of the traditional categories within fiscal federalism studies.

2. Theories of Fiscal Decentralization: An overview for the sake of a comparative constitutional analysis

Tax-revenue distribution across and within the different levels of government in a federal system, also mentioned as the tax assignment problem, signifies one of the most compelling challenges in fiscal federalism, although this is just a single facet of the broader concept of fiscal constitutions. Revenue distribution should in fact align with competence and thus expenditure responsibilities, to establish a robust intergovernmental financial framework. Regrettably, practice, has often deviated from this foundational path[I].

In this regard first-generation theories advocate the idea of a perfect match between those benefiting from a collective public good and those paying for it'[II]. This alignment, termed as 'fiscal equivalence' (Olson 1969: 483), calls for a 'perfect correspondence between revenue and spending powers' (Oates 1972: 33-35). Put another way, finance should follow function (Hogg 2000; Ahmad-Brosio 2015: 358-359), thereby necessitating tax assignment to go along with spending decentralization.

The close relationship with 'the expenditure problem' is tied to the role of benefit taxation in the subnational financing paradigm, purportedly designed to prompt democratic control and political accountability (McLure-Martinez-Vazquez 2011). This hinges on the belief that citizens, through elections, evaluate the decisions made by their representatives. This argument relies on the famous Tiebout model 'vote with feet' (1956). Consumer-voters pick the community that best satisfies their own preferences in the selection of public goods and in case they dislike it, they move to another community.

These theories have raised contentious issues. Besides not being entirely converted into practice in any system, they become very tricky when referring to cooperative models of federalism[III]. Existing systems are structured along an asymmetric allocation of expenditure and revenue responsibilities, resulting in a mismatch that has a detrimental effect on the political accountability of subnational entities (Korioth 1997: 268)[IV]. When subnational entities are financed solely or primarily through federal transfers, they become reliant on decisions made by another layer of government, thereby nullifying their autonomy (Blöchliger-King 2006).

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Over the past decades second-generation scholars have elaborated a mitigated concept of fiscal responsibility, embracing a more flexible approach to fiscal equivalence. This acknowledges the varying fiscal incentives generated by different tax systems, which in turn shape public choices and actions (Weingast 2009). They contend that the approach each system undertakes to cover the vertical fiscal gap impacts the extent to which the pursued objectives are satisfied (Anderson 2010:50). Therefore, instruments and procedures of revenue distribution among and within the different levels of government are of paramount importance.

In this context, scholars emphasize the significance of subnational governments retaining a share of the tax revenue generated within their territory. On the one hand, they would be more inclined to promote economic development, on the other hand, the risk of interference from the central government in their businesses would be reduced and their autonomy would be safeguarded, if not enhanced. If all revenue sources were retained by the central authority without regard for their origin, incentives for efficiency and economic growth would be lost. Subnational entities would then bear the political costs, without obtaining economic benefits (Weingast 2009). Against this backdrop, second-generation theories advocate for the concept of 'fiscal responsibility at the margin*'* championing for subnational government to bear at least partial responsibility for revenue (Bird 2009: 453; Bird 1999: 165).

3. Fiscal Responsibility at the Margin in the Comparative Constitutional Discourse

This theoretical framework projects into the need to entrench into the financial constitutions a distribution of the power to tax so to ensure subnational governments a certain degree of financial autonomy[V]. From a constitutional law perspective, the financial structure turns out to be one of the milestones of the principle of autonomy and within this, the power to tax represents one of the most significant expressions of financial autonomy[VI]. Only if subnational governments are vested with the power to (co-)determine their own financial endowment, they can be considered as autonomous entities. In other words, financial autonomy cannot be reduced to budgetary autonomy - that is to the power to make use of the resources at disposal without any limit (Gallo 1975: 253) - but shall also include tax autonomy.

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That 'the individual states should possess an independent and uncontrollable authority to raise their own revenues for the support of their own wants' (The Federalist no. 32[VII]) was already clear to the founding fathers of the US federation. However, this was reaffirmed by the US Supreme Court as well. In the view of the Court, the states' 'power of taxation is indispensable to their existence' (Gibbons v. Ogden, 22 U.S. [9 Wheat.] 1, 199 [1824]), as being 'one of the most essential to a state, and one of the most extensive in its operation' (Weston v. City of Charleston, 27 U.S. [2 Pet.] 449, 466 [1829]). On the other hand, 'the taxing power of a state is one of its attributes of sovereignty, that it exists independently of the Constitution of the United States, and underived from that instrument' (Railroad Company v. Peniston, 85 U.S. 5 [1873]).

The symbiotic relation between the two facets of autonomy is aptly illustrated also by the German Federal Constitutional Court, that regards the provision of autonomous financial resources as a fundamental trait of the *Länder*'s autonomy, integral to their core statehood and therefore among the essential features of the federal principle[VIII]. Fiscal autonomy hence becomes a guarantee of the scope of autonomy, safeguarding the independence and, along with it, the responsibility of the *Länder* in exercising their constitutionally assigned powers[IX]. The reasoning behind is that the political autonomy of subnational governments would be incomplete if not safeguarded through a measure of financial independence from the federal government, as well as of the *Länder* among themselves (Schneider 1991: 2452). This dimension of autonomy affects the stability and the capacity of a federal system to function, which is based not only on the distribution of competences but also on the division of financial powers, encompassing both spending and revenue responsibilities (Wendt 2008: 876)[X]. This last feature is a determinant of the degree of mutual independence and autonomy of both *Bund* and the *Länder*, whereby financial autonomy comes to be the prerequisite for self-determination, as well as the indicator of *Länder* statehood[XI].

The same principle but through a reversed rationale was followed in older 'coming together' federations. In this context the aim was to secure a certain financial independence of the federal government. The US Constitution expressly allocates to the federal government customs tariffs on imports and exports, which back in time constituted a profitable source of revenues as well as the fundamental tool for the creation of an internal

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market. Not by chance the same was stipulated by the 1901 Australian Constitution and by the British North America Act, 1867 for Canada.

4. Exploring Fiscal Autonomy within Federal (Fiscal) Constitutions: Common Traits, Recurring Features, and Emerging Trends

Despite an agreement in principle, the observation of cases reveals profound differences in the actual implementation through the instruments and procedures of fiscal federalism. Although somewhat simplistic for understanding the phenomenon, the prevailing narrative is that some federal systems may be classified as fiscally decentralized, while others concentrate tax authority mainly at the federal level; anyhow, in the last decades a general trend towards fiscal centralization can be observed. Looking at existing cases, only in Canada, Switzerland and US subnational governments retain meaningful taxing powers related to personal and corporate income and consumption taxes (i.e., the three main tax sources in terms of yield), whereas in all other federal systems – including old federations like Australia, Germany, Austria, India – they have limited tax authority (Blöchliger-King 2006: 155-88).

If a comparative constitutional approach is however adopted, two common traits come to the fore.

A first element that becomes evident is that the distribution of the power to tax is typically addressed in (financial) federal constitutions. In this respect, two major categories emerge among federal systems, albeit with significant variations across different cases.

In mature 'coming together' federations there is a tendency to explicitly enumerate therein the powers and the limits of the federal authority to tax. This occurs because of the process of transferring tax powers that were previously concentrated in the hands of states. This is the case of the United States. While the US Constitution contains a few explicit provisions on fiscal federalism, there are five provisions enumerating the federal government's authority to impose taxes (Hellerstein 2011: 23-24). Whereas, according to the Tenth Amendment, states retain all powers not specifically delegated to the federal government in the Constitution, including the power to tax.

The same approach is embraced by the Australian Constitution. The Commonwealth government is vested with the power to tax under section 51(ii), but this power is characterized as 'concurrent' in nature as it coexists with the power to tax of the states. The

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latter is implied by the sovereign nature of the states: the recognition of plenary legislative powers indeed includes the power of taxation (Stewart 2023: 11). The fiscal constitution is rather open in this respect, as it neither imposes fiscal centralization, nor it excludes it. Over time the federal government has increased its fiscal strength, partly because of political negotiations with the states (via intergovernmental agreement) and partly because of judicial decisions[XII]. Currently, the most relevant taxes like individual and corporate income tax, as well as the good and service tax, are under the exclusive legislative authority of the Commonwealth. States are responsible for imposing a few narrower taxes like the ones on land ownership, various transactions (e.g., transfers of land or other assets), gambling and payrolls. They also impose royalties on mineral extracted in their territory (except for offshore resources whose royalties pertain to the Commonwealth). Besides that, there are no piggy-back taxes.

While falling within the same paradigm, Canada differs from the U.S. case in that the Canadian Constitution lists the powers of both the federal and provincial jurisdictions, with the authority of the federal government being defined in very broad terms in sec. 91.3, and the provincial powers being specifically enumerated in sec. 92.

The approach taken by federal constitutions after World War II follows the Canadian approach. In these cases, in fact, the constitutional guarantees of taxation powers have not been introduced solely in favor of the federal government, but also of subnational governments. This is the case with Germany. The Basic Law enumerates the taxes that are under the (exclusive or concurrent) authority of federal and subnational governments. Pursuant to Article 105 the *Bund* has the exclusive right to legislate with respect to customs duties and fiscal monopolies, while the *Länder* have legislative authority on local taxes on consumption and expenditures (e.g., taxes on beverages and packaging) and can determine the rate of the tax on acquisition of real estate (Art. 105.2a). However, the key-taxes like personal and corporate income tax and VAT fall under the concurrent legislative competence (Art. 105.2).

The fact that currently the German case is based on a mixed paradigm with the prevalence of concurrency over separation is the result of the reforms that have been enacted from 1949 onwards, particularly those adopted in 1955 and 1969. Moreover, the listing of both federal and subnational powers to tax did not prevent the system to be extremely centralized. The fact that a strong fiscal centralization is in place, is the result of the unique

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form of concurrency that regulates the allocation of the taxation powers. Accordingly, the *Länder* can legislate so long and insofar the *Bund* has not. In practice, the federal government has used its power to tax so extensively that the tax autonomy at the subnational level is *de facto* nullified. In other words, the exercise of the power to tax by the federal government exhausts the possibility for subnational governments to make use of it in turn. Furthermore, despite this authority being subject to limits and conditions, the latter are formulated as a loosely knit framework that has enabled the absolute primacy of the federal government in determining the configuration of the tax system (Valdesalici 2018: 365-400).

Similarly, the Indian Constitution (Part XII, Chapter I, Art. 246 to be read with Schedule VII). enshrines the demarcation of the tax handles of union and state governments, but the legislative power over the most broad-based taxes is assigned exclusively to the center. The list includes taxes on income and wealth from non-agricultural sources, corporation tax, taxes on production (excluding those on alcoholic liquors) and customs duty[XIII]. Furthermore, the residual clause in tax matters operates in favor of the center.

The solutions adopted by more recent federal systems -especially if they result from a devolution of powers- diverge widely from the above illustrated paradigms. In cases like Belgium, Spain, and Italy, the foundation of the subnational power to tax is entrenched in the constitution as a proclamation of principle, without providing an explicit assignation of the taxes of either the federal or subnational level of government: basically, autonomous communities and regions have the authority to establish their own taxes in accordance with the national Constitution and the laws. This authority is primarily defined and delimited by federal laws, such as the Spanish LOFCA (*Ley Orgánica de Financiación de las Comunidades Autónomas*) and the Belgian *Loi spéciale de financement*, both holding (quasi-)constitutional value.

In Spain, for instance, the LOFCA itself does not undertake any sort of distribution, but it defines the constraints on the subnational power to tax. Therefore, the delimitation of the subnational power to tax rests widely on the constitutional court[XIV]. Suffice it to say that while Autonomous Communities (ACs) have shown a significant activism in establishing their own taxes, mostly related to so-called 'green taxes', it frequently occurs that the tax laws thereof are challenged in front of the constitutional court, if not replaced by a new federal tax (Rozas Valdés 2013: 103-127).

Furthermore, the provision of the subnational power to tax is embedded in a pre-existing system where the power to tax was entirely centralized. The fiscal room is thus nearly

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exhausted by the central government, and the tax burden is already quite high. Moreover, the fact that the Constitution merely recognizes the tax autonomy of the ACs without allocating the taxes among the different levels of government, deferring this task to the LOFCA (which however fails to take care of that), further contributes to preserving fiscal centralization. On top of that, the prohibition of double taxation must also be considered. In Spain, this translates into a clear preference in favor of the federal government, while still allowing the ACs the right to receive an economic compensation[XV].

An analogous trajectory of (non-)development is observed in Belgium and, with particular strength, in Italy. In all three cases, then, this outcome is strongly conditioned by the 'silent but strong' influence exerted by the European legal order on the tax systems of its member states[XVI].

A reversed approach has been accommodated into the South African Constitution, though substance remains unchanged. In this case only the provincial (and municipal) powers to tax are listed under section 228. The provision enumerates the taxing powers of the provinces, stating that they can levy taxes other than income tax, value-added tax, general sales tax, rates on property, or customs duties, basically excluding the most salient and buoyant taxes. On the other hand, it allows provinces to impose flat-rate surcharges on any tax, levy or duty that is imposed by national legislation, always except for the key tax sources mentioned above. Also this scheme has thus led to a centralization of the taxation authority (Mabugu-Rakabe 2023: 309-310). On top of that, the Provincial Tax Regulation Process Act 2001, in governing the exercise of the taxation power by the provinces, also requires that they obtain approval from the Minister of Finance before introducing a new tax.

The second common element is that the distribution of taxation power in federal systems commonly adheres to one or a combination of the following principles: separation and/or concurrency. Under the first option, a single authority holds exclusive power over a specific tax, meaning that the tax falls entirely within the jurisdiction of one level of government, including autonomy over the tax base and the tax rate, as well as other aspects like tax benefits. Conversely, concurrent taxation results in the co-occupancy of the same tax-base (or taxable-event) by both levels of government, along with the recognition of the autonomous power to set tax-rates and in certain cases also tax-benefits.

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Despite the constitutions might show the prevalence of one principle over the other depending on the case at stake, overall, there is an emergence of mixed paradigms, which show the prevalence of concurrency over separation with few exceptions.

This is the case of Switzerland, a system in which the federal government has the authority to tax only against an explicit constitutional recognition. Separation tends to prevail over concurrency, one notable exception being the power to tax income. The federal government has the exclusive competence over indirect taxation (VAT and excise duties), but the federal power to tax income coexists with the cantonal (and local) one, despite being bound by both substantial and temporal limitations (Rentzsch 2011: 232). Furthermore, the Swiss Confederation takes on a particular degree of detail also in this field that ends up strictly delimiting the powers of the federal level (e.g., the federal power to tax incomes has an expiration date).

It is interesting to note that systems that were initially founded on the principle of separation have evolved over time towards a mixed paradigm as a way of practice and judicial interpretation, or in certain cases also thanks to formal constitutional reforms.

An example of the first type is Canada. Despite the formal adherence of the Canadian Constitution to the principle of separation (i.e., the powers of both the federal and provincial jurisdictions are explicitly enumerated therein), a mixed system of taxation has emerged in practice. Currently, there are taxes under the exclusive authority of one level of government, but for key taxes forms of co-occupancy of the same tax-base are in place (Boadway 2007: 102ff), in certain cases also due to the practice of entering into tax-rental agreements (See further sec. 5a below).

A similar trajectory is reflected in the US system. Even though the federal system is based on the principle of separation and the Constitution enumerates the federal power to tax, both federal and state governments are free to make use of their 'sovereign' taxing powers, with limited restraints. State governments have this power by the nature of things, i.e., because they are sovereign entities (Hellerstein 2011: 26-28, 30-35). Whereas the federal government has the power to tax as it has been surrendered by the states, either expressly or by necessary implication (see further *Railroad Co. v. Penniston*, 85 U.S. 5, 29 [1873]). In practice the two levels of government frequently overlap and shall coexist (as seen in Gibbons v. Ogden, 22 U.S. 1 [1824]). Concurrency of both levels of government is therefore in place for key tax sources such as income (since 1913), wealth transfers, consumption, and other excises.

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India is instead an interesting epitome of such evolution via reforms. A mixed system is currently in force, whereas initially separation was the (constitutional) rule. Pursuant to Art. 246 in conjunction with Schedule VII of the Constitution, taxes are exclusively assigned to either the union or the state governments, with the widest tax-bases belonging to the central government. Nonetheless, concurrency was introduced through the 101st Amendment Act of 2016, along with the implementation of the GST from July 2017 onwards. As a result, both union and state legislatures have concurrent powers to impose and collect their respective shares of GST on a common base of economic activity (Sharma-Valdesalici 2020: 33). Indeed, a generous compensation package was put in place to garner the states' consent for the ratification of the GST bill. States were provided with a larger share of union taxes and their participation in the GST Council, so to ensure them a say in GST policies. This whole process of paradigm shift is thus termed as 'concessionary federalism' (Sharma 2022: 35-36).

5. Revisiting the traditional categories of fiscal decentralization

Despite the predominance of the above-mentioned common traits and dynamics, the comparative constitutional analysis reveals significant differences in terms of legal solutions and their practical implementation, all factors that significantly influence the scope of fiscal autonomy at the subnational level. Moving from the theoretical paradigm of '*fiscal responsibility at the margin*' to legal practice, the need to observe how and to what extent revenues are distributed among and within the different levels of government consequently emerges.

The traditional dichotomy 'own taxes *vs* federal grants' is outdated. The comparative exploration offered in the previous paragraph manifests the existence of subnational systems of financing that are mainly of a mixed nature. Specifically, these combine own revenues - in this specific case, own taxes - with revenues derived from another level of government, namely the federal one, through a set of instruments that cannot be limited exclusively to the composite category of federal transfers. To understand this phenomenon, it is therefore essential to detect the widespread surfacing of different paradigms that align with a fuzzy logic[XVII].

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A tax can be categorized as an 'own tax' of a subnational government only if it falls under its full and exclusive authority. Not only do SNGs collect the revenue and establish regulations thereof, but they also wield control over the tax's very existence. The other category, instead, includes a wide variety of subnational financing tools that realize the vertical distribution of resources to cover the so-called vertical fiscal gap, resulting from the difference between expenditure decentralization and centralization of the tax authority. Basically, this operation occurs through two main solutions: Upstream of the Tax Act, or as an Ex-Post Mechanism. The first one entails a vertical distribution of the authority to tax with reference to the various sources of wealth (or tax bases), and necessarily includes a distribution of the legislative power related to them. The second one is achieved through mechanisms of tax revenue distribution.

According to this revised standpoint, instruments and procedures of revenue distribution are of pivotal importance. While ensuring that subnational governments cover their spending needs, these elements can also contribute to determine the extent to which they have been made responsible for their financing. While Ex-Post Mechanisms serve to ensure the sufficiency of resources for subnational jurisdictions, the first solution is instrumental to fiscal autonomy and, with it, the aforementioned political and financial 'responsibility at the margin'. The legislative power to tax is in fact the typical vehicle for making territorial entities bear the economic and political costs of the decisions they adopt, as long as it is associated with sources whose revenue accrue to the entity that makes the decision. Due to the significance of the legislative power in tax issues, in fact, it turns out to be the best tool to make subnational governments co-responsible for the determination of their financial sources. Along this line, the paper focuses on the different allocative solutions that are accommodated in federal systems, offering a reorganization of the manifestations found in various legal systems. It does so through identification of paradigms, against which to compare and evaluate existing cases and emerging practices. These are: 'The Tax-Base Sharing' Paradigm (5.1), 'The Institutions of Shared-Rule as Co-Legislator' Paradigm (5.2), and finally 'The Tax Varying Power' Paradigm (5.3).

5.1 The Tax-Base Sharing Paradigm

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Even in systems where fiscal decentralization is more relevant, as in Canada, the US, and Switzerland, examples of taxes under the exclusive authority of subnational governments (strictly speaking, own taxes) are residual. In most cases, forms of concurrency of both levels of government emerge concerning the most significant taxes in terms of revenue, which results in the co-occupancy of the same source of wealth, if not of the same tax base (meant as a legal construct), so that these solutions are commonly referred to as 'tax-base sharing' schemes.

Canada is an emblematic case for outlining this paradigm. The British North America Act, 1867 defines the authority of the federal government in very broad terms under section 91(3), which recognizes to the Parliament of Canada the legislative authority to raise money 'by any mode or system of taxation', thus 'granting *prima facie* a plenary and absolute taxation competence to Parliament' (Magnet 1978: 476).

Contrariwise, the provincial power to tax is specifically enumerated in section 92 in rather strict terms; it includes: direct taxation within the province, in order to the raising of a revenue for provincial purposes (2)[XVIII]; and shop, saloon, tavern, auctioneer, and other licenses, in order to the raising of a revenue for provincial, local, or municipal purposes (9). At the time when the Constitution was adopted, on the other hand, it was believed that the provincial jurisdiction was particularly limited, therefore there was no need to have access to substantial resources.

In a decision of 1977[XIX], however, the Supreme Court of Canada stated that: *Only certain of such categories, such as income and property taxes, were to be available to the Legislatures. There were two reasons for this. […] The second reason proved wrong from the start. It was thought that provincial activities would be limited and revenue needs would be slim; the Legislatures, therefore, would have no necessity to resort to most tax pools* (at 538).

Over time, it became evident that although the Constitution theoretically bestows unconditional authority upon the federal government (Alarie-Bird 2011: 81), its power is not boundless. At first, through the exercise of the power to tax, the federal government cannot intervene in areas falling within the exclusive jurisdiction of provincial governments. Some of these areas are formulated in such broad and vague terms that it is frequent that a federal tax measure ends up affecting domains falling under provincial legislative authority. To be considered are, for example, the exclusive power over property and civil rights in the

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province (92.13), as well as over 'generally all matters of merely local or private nature in the province' (92.16).

Furthermore, the above illustrated formal allocation of the power to tax can lead to a significant potential for overlapping in practice. There are in fact taxes that fall within both jurisdictions such as in the case of direct taxation (La Forest 1981: 52).

The provincial power to impose direct taxation under 92.2 is conceived as an exclusive power, but it is limited to 'provincial purposes'. Accordingly, the federal government may impose a direct tax 'for federal purposes'. At the same, the provincial authority to legislate on direct taxation is broadly understood, thus preserving its exclusive (or better concurrent) nature. In the *Lambe* case[XX], for instance, the Supreme Court recognizes the *intra-vires* nature of the provincial taxation of a bank, considered as a valid direct tax, even though the federal government is vested with the exclusive authority to regulate banking (sec. 91.15). The Court came to this decision in application of the 'pith and substance' doctrine[XXI].

Indirect taxation can also be an area of federal-provincial overlapping. The Supreme Court states that if a province imposes an indirect tax, the act is unconstitutional as *ultra vires*. Although provinces are not assigned any power over indirect taxes, they can impose license fees that could to a certain extent be considered as a form of indirect taxation. Moreover, a 'judicial stretching' of the concept of direct taxation has gained ground over time, to cope with growing and substantial responsibilities of provincial governments (Magnet 1978: 486). To pass the test and verify if a tax is indirect or direct, the rule is that the legal form takes precedence over economic substance; furthermore, the ultimate incidence of the tax was deemed not significant in deciding its validity (Bank of Toronto v Lambe [1887]; Shell Canada Ltd. v. Her Majesty the Queen, [1999] 3 SCR 622).

In practice the federal and provincial governments both have access to broad-based tax sources, which includes personal and corporate income tax, sales tax, and payroll tax, thereby setting the prevalence of the concurrent paradigm over separation.

Furthermore, over time most of the provinces has entered into a set of tax-collection agreements with the federal government. Currently, most provincial taxes are therefore collected by the Canada Revenue Agency (CRA) and then transferred to the participating province. Provinces are free to join or opt out, but all (except Québec) have entered into the agreement in respect to personal income taxation (PIT) and all, but Québec and Alberta, have similar agreements with respect to corporate income taxes (CIT)[XXII]. Ontario used to

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have them at some point, but the province did not always participate in the tax rental agreements. Agreeing provinces must use the federal definition of 'taxable income', even though they can still determine their own tax structure and rates, with limits. For instance, they may provide both non-refundable tax credits and refundable tax credits to taxpayers for certain expenses. They may also apply surtaxes and offer low-income tax reductions. Regarding the personal income tax, provinces are allowed to determine the progressivity of the tax and over time the federal government has reduced the federal PIT rate to free up fiscal room for provinces.

This evolution contributes to determine a strong change in the Canadian fiscal decentralization paradigm, and this did not occur by means of a constitutional amendment but through intergovernmental agreements, as such further contributing to the executive drift that characterizes Canadian (fiscal) federalism from its very beginning, while showing mainly a collaborative approach[XXIII].

Unlike income taxes, the sales tax structure varies much more widely. There are three different types of taxes: the Goods and Services Tax (GST) is a federal tax levied by the federal government across the country at a uniform rate of five per cent and is collected by the CRA. In addition to it, some provinces and territories levy a Retail Sales Tax on top of the GST, generally called Provincial Sales Tax (PST), or Québec Sales Tax in Québec. The provinces of British Columbia, Manitoba, and Saskatchewan each levy a PST (in addition to the 5% GST) at 7%, 7%, and 6%, respectively, on most purchases of tangible personal property, software, and certain services. Furthermore, five provinces (Ontario, New Brunswick, Nova Scotia, Prince Edward Island, and Newfoundland and Labrador) currently combine GST and PST into one by enacting a Harmonized Sales Tax (HST), which is collected by the CRA, and the revenues thereof are allocated in proportion to taxable consumption[XXIV]. The sale taxes are thus an interesting example of coexistence of separate taxes of different levels of government over essentially the same tax base, which despite pros and cons has overall worked well in preserving subnational autonomy, while not imposing unreasonable costs on taxpayers (Alarie-Bird 2011: 122).

The high degree of fiscal decentralization is consequently mitigated through the above-mentioned practice to enter into tax-collection agreements, which overall put much emphasis on the process of tax-harmonization in place for a long time now; although the latter has to live with the asymmetry that dominates intergovernmental fiscal relations, i.e., the Québec

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exception. Moreover, the resulting fiscal differentiation is somehow mitigated thanks to an equalization mechanism which works rather effectively in reducing the divide in terms of fiscal capacities among provinces and territories, and ensuring high living standards across the country.

5.2 Institutions of Shared-Rule as Co-Legislator

The second paradigm is composed of those systems in which territorial interests manifest through institutions representing territorial entities and participating in the legislative function at the federal level. Primarily, these are the federal second chambers, among which the *Bundesrat* (Federal Council) model stands out as a federal body representing the *Länder*.

In Germany, the financial system serves as a quintessential illustration of this trend, which German scholars commonly refer to as '*Beteiligungsföderalismus*' (participatory federalism)[XXV]. In financial matters, in particular, the Basic Law entrusts to the Federal Council the role of co-legislator, requiring its approval for all legislative acts in tax and financial matters that intersect with the interests of the *Länder* (more accurately, that affect their financial endowment)[XXVI].

This is what Article 105.3 BL prescribes for tax matters, wherein it is stipulated that '*Federal laws relating to taxes the revenue from which accrues wholly or in part to the Länder (omissis) shall require the consent of the Bundesrat*'. Therefore, all federal laws governing tax obligations (i.e., tax law in its material dimension) and generally all those laws that affect, even indirectly, the tax revenue belonging to territorial entities fall within the scope of this provision. Moreover, should there be an intention to amend the provisions of the financial constitution, the approval of the *Bundesrat* is required with a two-thirds majority (Article 79.3 GG).

To understand the broad scope of this provision[XXVII], it is appropriate to refer to Article 106 GG, which stipulates on the vertical allocation of the power over tax revenue (*Ertragshoheit*). Examining this provision together with the rule under Article 105.3, which mandates approval for legislative acts affecting the financial allocation of the *Länder*, it becomes apparent that this is necessary for two types of revenue: those (indeed few)

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exclusively assigned to *Länder* (Article 106.2) or municipalities (106.6), and the so-called 'joint taxes' (Article 106.3), the revenues of which are shared among the various levels of government. The key sources of the tax system fall under the second group, whereas the ones that are exclusive to the Federation (art. 106.1 GG) are very few. The value added tax as well as individual and corporate income taxes belong in fact to the 'joint taxes' category. Furthermore, in case the Federation wants to impose a tax beyond the list provided by art. 106 GG[XXVIII], a constitutional revision is necessary, and this entails the *Bundesrat*'s approval by a two-thirds majority.

The fact that the Federal Council must approve any federal tax law affecting subnational finances ultimately restrain the legislative authority of the federal government. Any alteration of the financial endowment of the *Länder* requires the consent of both levels of governments. Although the decision-making power lies at the federal level, the legal acts are the outcome of a legislative process that calls for the double approval over the same text of both the *Bundestag* and the *Bundesrat*. Therefore, the act is always a federal law, but the *Länder* in practice co-determine their own financial endowment (Henneke 2011: par. 28). With the paradox that, in the event the federal government itself decides to introduce a new tax (not contained in the constitutional catalogue), a constitutional revision would be necessary, requiring the indirect approval by the two-thirds majority of the votes of *Länder* (via *Bundesrat*). No change can thus be made without the consent of the other side.

The consent of the *Bundesrat*, however, does not uphold the autonomy each single Land is vested with. It rather provides for a form of representation of territorial interests on a merely collective dimension. The intermediate level participates as a whole, and this results in the integration of the single units in the federal legal order[XXIX]. Consequently, the autonomy of the single entity is narrowed down, due to its composition and functioning. First, the *Bundesrat* operates under the majority rule which, indeed, is based on a mitigated formula of territorial representation[XXX]. On the one hand, the representation of the units is not equal and is population-based, on the other hand, the number of representatives is not strictly proportional to the population, but it is adjusted to favor less-populated Länder[XXXI]. Second, the *Bundesrat* does not solely channel territorial interests. Instead, it incorporates a variety of interests of political nature, merging federal and regional claims. This integration is facilitated by both the way the Federal Council functions and the role it has taken up in

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practice of political opposition to the *Bundestag* (Ziller-Oschatz 1998: 64; Anderheiden 2008: parr. 56-60)[XXXII].

5.3 The Tax Varying Power Paradigm

This model is found in different forms and intensity in various federal systems. Besides being the typical way in which a certain degree of tax autonomy (i.e., a margin of fiscal responsibility) is granted to local governments, this is the option most frequently adopted also towards subnational governments. Among these are the regions in Italy and Belgium, and the autonomous communities in Spain. These are systems in which a devolution of powers from the center to the periphery took place. A certain tax-varying power, limited to the rate of the tax on the acquisition of real estate (Art. 105.2a BL), is also recognized in the German *Länder*, though with very limited value in terms of revenue collected.

Architectural solutions of this kind are absent in federal systems born following the dual federalism paradigm but are inherent to those federal systems that can be placed under the cooperative paradigm from birth. In the former, in fact, the tendency towards the separation of competencies has also been reflected in the approach applied to the distribution of the power to tax, so that - as seen in sections 4 and 5.1 above – there is either a vertical separation of tax bases, or at most, there is concurrency over the same tax base of the different levels of government.

Among the various examples cited, the Spanish ordinary system of 'financiacion autonomica' undoubtedly constitutes an emblematic case of tax varying power[XXXIII], as it represents the system in which the widest manifestation of this phenomenon is found, to such an extent that fore certain taxes (e.g., individual income tax) it takes on shapes that at times resemble the tax-base sharing paradigm (sec. 5.1).

The constitutional anchoring is established by Article 157.1 of the Spanish Constitution, which includes the 'ceded taxes' in the list of the funding sources of the autonomous communities (ACs). These are taxes established by the central government, for which the transfer of revenue (in whole or in part) to the autonomous communities, and in some cases, also of a segment of legislative authority on their regulations is provided. However, the ownership of the tax in question, and thus the authority regarding its existence, remains firmly in the hands of the center (otherwise, they would turn into own taxes of the ACs)[XXXIV].

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The transfer of legislative powers over ceded taxes is the main institutional solution introduced by the Spanish national legislature to implement the principle of fiscal co-responsibility[XXXV]. The rationale behind this is based on the belief that granting greater decision-making autonomy over this category of taxes - especially if done through the more impactful form of the legislative power - can ensure greater fiscal co-responsibility of subnational governments.

Through this solution, in fact, ACs are given the authority to regulate for their territory certain elements of the ceded taxes. The legislative authority over the national taxes in question is therefore not exclusively within the competence of the central government, but it is vertically distributed and thus it is open to subsequent and differentiated integration by the ACs in the exercise of the legislative powers transferred to them (Calvo Vérgez 2005: 70). The legal framework of these ceded taxes is thus the result of legislative power of 'shared' or 'concurrent' nature, which combines acts of both the central and the subnational governments (Ramos Prieto 2013: 305; Villarín Lagos 2000: 160)[XXXVI], based on the allocation of competences set forth in national laws[XXXVII].

This evidently comes with a limitation inherent to the national government ownership of the tax measures under consideration[XXXVIII]: the decision to levy a tax remains at the central level and it is always a national legal act that provides for the whole or partial transfer of the revenue and legislative powers thereof to the ACs. Otherwise these measures would be distorted and would turn into ACs own taxes (Quintana Ferrer 2001).

As a result of this allocation scheme, a number of ceded taxes have uniform regulations for certain (essential) aspects, while for others, there is a differentiation on a territorial basis, with each AC enabled to legislate on them, within the margin of maneuver recognized by the central government through the tax assignment process. This solution is consistent with the essence of the category 'ceded taxes', considering that in all cases where ACs are granted some legislative authority over these national taxes, the transfer of (at least a portion of) the related revenue is simultaneously prescribed. This way, each autonomous community will be able to impact the resources effectively available, through decisions made by its own legislature.

Currently, almost all taxes with the significant exception of the corporate income tax, fall into the category of assigned taxes; out of these (15), ACs are entrusted with a margin of legislative autonomy over seven of them, including taxes on personal income, wealth,

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inheritance and gift, and gambling[XXXIX]. Among them, significant differences are likely to be found. A first element bears on the extension of the related autonomy. In some cases (e.g. gambling taxes) the subnational legislative power encompasses the design of essential elements, such as the tax base, being almost comparable to an exclusive competence (always except for the power to impose the tax)[XL]. The allocation of powers is important even in the case of the tax on capital transfers and documented legal acts, or the one on inheritance and gifts. Regarding the latter, ACs hold important competences on the quantification of the tax burden (e.g., tax-base reductions, tax-rate or multipliers). In contrast, there are cases in which the transferred competences are restricted to the power to vary the rate (e.g., tax on hydrocarbons, tax on means of transport). In between these extremes the subnational allocation of competences can vary substantially from one case to the other (e.g. individual income tax). In this context, even the simple transfer of authority to vary the tax rate represents an increase in financial autonomy. Not only the rate is one of the most visible tax elements, but the assignment of legislative competences always goes hand in hand with the entitlement to a tax revenue share. Consequently, through law-making each entity co-determines its own financial endowment[XLI].

A second differentiating factor pertains to the impact of each individual ceded tax on the overall tax-system. Put another way, the revenue generated by each source should be considered. These data are pertinent to understand the impact on the financial autonomy of the subnational entities (Mora Lorente 2004: 146-147). Emblematic in this context is the individual income tax. Not only it serves as a pillar of public finance[XLII], but also 50% of its revenue accrues to the ACs and the latter possess extensive legislative powers associated to it[XLIII].

6. Comparative Observations

The three paradigms exhibit profound elements of differentiation but also common features that lead to potential and partial overlaps, hence the initial reference to the fuzzy logic. To this end, in this section, a comparative observation of these paradigms is offered along two essential investigative directions concerning the final aim pursued with fiscal decentralization, namely the enhancement of the fiscal responsibility at the subnational level of government. These pertain to the scope of decision-making and, in particular, what

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subnational governments can decide, on the one hand, the decision-making procedures and, in particular, how decisions are made, on the other hand.

The first 'substantial' approach considers the object of the law-making process, that is, 'what is decided'. It examines the kind of powers vested in the subnational governments and this is done by distinguishing who can decide whether to impose a tax (*an*), how to structure it (*quomodo*) and, finally, who determines the elements that quantify the tax burden (*quantum*).

If the three paradigms are scrutinized along this first axis, only in the first (Tax-Base Sharing) and second (Institutions of Shared-Rule as Co-Legislator) cases the jurisdiction of subnational governments includes a full taxing power, that is inclusive of the power to impose the tax (*an*), the competence to define the *quomodo* of the tax liability (e.g., the tax base, the taxable event, or the taxpayers), as well as the tax burden that is the *quantum* (e.g., the tax rate, the brackets, or the multipliers).

This is certainly lacking under the third (Tax-Varying Power) paradigm, which in fact follows a very different scheme from a substantial viewpoint. In the Spanish case, for instance, the trick has been to allocate significant legislative competences on well-determined elements of the so-called ceded taxes to the autonomous communities. However, the decision to levy a tax remains firmly in the hand of the national government and it is always a national legal act that provides for the whole or partial transfer of the revenue (and the legislative powers) thereof to the subnational governments. If this trait becomes a characteristic element of the solutions attributable to the third paradigm, it is evident that the possibility for the subnational governments (e.g., in Belgium and Italy, but theoretically also Spain) to introduce a surcharge on federal taxes blurs the borders of the paradigm under consideration, giving rise to a sort of gray zone. While the fact that surtaxes are based on a federal tax implies that the former essentially falls on a tax base like that of the federal tax, thereby limiting the scope of subnational autonomy and bringing this figure closer to the tax varying power paradigm, it is also true that the decision to establish the tax lies with the subnational government. This latter aspect thus exerts significant attraction towards categorizing this tax measure under the tax-base sharing paradigm.

The 'substantial' viewpoint impacts the dynamics of intergovernmental relations, as only in cases under the second paradigm, subnational governments approve each single federal legal act in the tax field and thus have (almost) full control over their financial endowment. Although the act is always a federal law, the subnational level has - although indirectly - the

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competence to co-design all tax elements (quomodo + quantum), including the power to levy it (an). The *Länder* can therefore co-determine the entire tax regime and, in so doing, they entirely co-determine the financial resources at disposal.

Conversely, in the cases under the third paradigm (Tax-Varying Power paradigm), subnational governments only have a say *ex post,* that is only after the central government makes use of its exclusive legislative power to levy a tax and only if it opts to activate the transfer of legislative power. A fuzzy approach, however, reveals that in some circumstances certain dynamics attributable to the second paradigm illustrated above can also materialize. This occurs when the tax varying power co-exists with intergovernmental fora vested with a co-decisional role in tax matters.

Things are different under the first paradigm, as in these cases there is a co-habitation of a two-tier taxation system to the extent that each government ends up determining its respective financial endowment. Notably, in these cases tax-revenue sharing mechanisms are lacking. Each level of government – federal and subnational – decides for itself, although there might be indirect economic repercussions coming from an overall high tax pressure, as well as the adherence to forms of tax harmonization.

The matter becomes even more complex and determinant of federal dynamics if the systems are observed along the second axis, namely how decisions are made.

If the first paradigm is observed from a procedural standpoint, it reveals the 'purest' forms of taxing power, as each entity decides for itself, for its own territory and its inhabitants regarding the tax forms and extent. Nevertheless, adopting a dynamic perspective this paradigm is mitigated out of practice and there is a clear tendency toward tax harmonization. This phenomenon is significantly observed in both Canada and Switzerland, with the US being an exception. In the latter there is no harmonization of tax bases and rates either between the national and subnational governments, or across subnational governments. Each state has its own tax administration, and some states allow the tax bases and rates to vary even across their local governments.

A completely different scheme is found under the second paradigm. In Germany, the *Länder* participate in the decision-making process at federal level and their consent is needed not only for constitutional amendments but also for enacting ordinary laws in financial matters, if these affects their interests. Thus, the procedural solution consists in the assignment of a co-legislative role in tax matters to the *Länder*. The decision-making power

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lies at the federal level, but the legal act is the outcome of a legislative process that calls for the double approval of the same text. Therefore, any alteration of the financial endowment of the *Länder* cannot be decided solely by the federal level via *Bundestag* but calls for an express vote of (the community of) the *Länder* via their mitigated representation in the *Bundesrat*. At the same time, the consent of the *Bundesrat* does not uphold the autonomy each single *Land* is vested with, but it rather provides for a form of representation of territorial interests on a merely collective dimension. The subnational level participates as a whole, and this results in the integration of the single units in the federal legal order, to the extent that the autonomy of each single entity is narrowed down, due to the *Bundesrat* composition and functioning.

The same does not extend to the third paradigm. If the *ex-ante* involvement of subnational governments in the decision-making at central level is absent (or weak at best), this scheme ends up undermining the same guarantee of the financial allocation. The amount of money at the disposal of the autonomous communities is dependent on the political will of the central government that decide which taxes and which legislative powers to transfer to subnational government, thus challenging their financial autonomy. At the same time, however, only the 'tax-varying power' paradigm guarantees effective autonomy to the subnational level. Solely the Spanish communities are free and autonomous in determining their own financial endowment by means of laws enacted by their own legislatures, valid and enforceable exclusively within the territory of reference. Although this is not the case in practice, since fiscal autonomy is substantially nullified by the numerous solidarity funds that follow one another and end up constraining fiscal responsibility[XLIV].

If the phenomenon of fiscal centralization is observed along the two axes – substantive and procedural – outlined above, one can detect the emergence of a common legal category that integrates the dichotomy of own taxes vs. grants. Provided a flexible approach and an in-context interpretation of the various technical solutions are employed, the comparison of the three paradigms of fiscal decentralization in fact resurfaces a third category of subnational revenue that could be labelled as 'tax-power sharing'. This category is wider than (and inclusive of) tax-base sharing mechanisms, but it differs from mere tax-revenue sharing schemes, as it encompasses all the legal tools of subnational financing that aim to achieve a vertical distribution of the legislative power to tax and thus grant subnational governments a margin of discretion in co-determining the available revenue.

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Despite the coexistence of dissimilar features and patterns, there are at least two common denominators that define this emerging category. A first one is the very fact that the tax (system) results from a meeting of wills. The legal framework is a combination of decisions made at both the central and subnational levels of government. This category in turn always results in a path-dependent system of subnational financing, as this kind of power is always associated with the taxes whose revenue flows wholly or at least partially to the subnational level itself. The latter being the second common denominator of this category, as such contributing to strengthen the connection between decision-making and financial endowment and thus making a leap forward in terms of financial and political responsibility.

This scheme of subnational financing is recurrent in federal systems, where various forms of concurrency can be analysed within tax law-making. The translation of this 'meeting of wills' into rules and procedures however varies extensively, not only between different systems but in some cases also between different taxes. This confirms that understanding the reconstructed paradigms in this area requires the adoption of a fuzzy logic approach.

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[I] For a literature review and an analysis of the existing research gaps regarding the tax assignment problem see Valdesalici (2019: 96-99).

[II] On this approach see: Musgrave (1959) and also Oates (1972).

[III] FGFF assumes labor mobility and no entry costs (language, certification etc.) This could have been valid for the US but certainly not the case for Europe.

[IV] Further on this: RUIZ ALMENDRAL (2004: 99-101), Saunders (2018: 41); Watts (2005: 36).

[V] The term is a literal translation of the term *Finanzverfassung*, coined by Austrian (Pernthaler 1984: 21 ff.) and German (Hellermann 2010: 1099-1186; see also: BVerfGE 55, 274 [300] – *Berufsausbildungsabgabe*) scholars and referring to those constitutional provisions that establish the principles and rules of the system of public finance, and having particular regard to the determination, distribution and use made of financial resources by the different levels of government. The concept, in fact, could be considered an evolution of the notion of *fiscal constitution* that first appeared in *The University of Chicago Law Review* thanks to a contribution by Kenneth W. Dam (1977), and later used by two famous American economics scholars—James Buchanan and Richard Wagner (1977) —to refer to those written or unwritten rules that guide fiscal decisions in the United States.

[VI] These are the words of Mortati (1976: 906). See further: Ruiz Almendral (2004: 99-101); Korioth (1997: 268); Puzzo (2002: 45); Bertolissi (1997: 24-25); Gallo (1975: 252). According to the author, political autonomy is inherently linked to financial autonomy. The latter is thus considered – together with the legislative autonomy – essential for the existence of a territorial entity.

[VII] Hamilton Alexander, 1788, 'The Federalist no. 32', in Hamilton Alexander *et al.*, *The Federalist Papers*, https://guides.loc.gov/federalist-papers/text-31-40#s-lg-box-wrapper-25493386 (accessed 5.04.2024).

[VIII] This is taken from the following decision: BVerfGE 72, 330, (383 ss.), in which the Court qualifies the concept *Finanzaustattung* with the adjectives *eigen* (own) and *angemessen* (adequate). The same was already stated in a decision from the previous decade (BVerfG decision of July 26, 1972, BVerfGE 34, 9, (20) - *Besoldungsvereinheitlichung*) in which the Court refers to the guarantee of irrevocability (art. 79, c. 3 L.F.) of the devolution - constitutionally entrenched – of an adequate share of the total tax revenue.

[IX] A safeguard of this kind applies to the entire system and therefore is valid for both the Federation and the

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Länder in order to cover the necessary expenses (*erforderlichen Ausgaben*) to exercise their own competencies; this is obviously within the limit of the resources collectively available (art. 104a, c. 1, L. F.). This is stated in BVerfG decision of March 11, 1980, BVerfGE 55, 274, (300) - Berufsausbildungsabgabe. In a similar sense also: BVerfGE 32, 333 (338).

[X] Consequently, any amendment to the fiscal constitution that results in the consolidation of all powers within the federation would constitute a violation of Article 79.3 BL. In this sense, Sommermann (2010: par. 34).

[XI] This is also a reflection of the degree of democracy. On one hand, financial autonomy allows a certain entity to obtain the necessary resources and through these, exert its influence on its citizens. On the other hand, the will of the people - albeit indirectly - is expressed in the related decisions. In this sense: Gröpl (2006: 1080).

[XII] In hindering the power of the State to raise different types of taxes (e.g., levies on sales of tobacco, petroleum, and alcohol products), the High Court decisions have contributed to further increasing states' dependence on federal transfers.

[XIII] Although the most lucrative taxes in economic terms fall under the Union list, there is a long list of taxes under the power of the states. These include *inter alia* tax on agricultural income, professional tax, state excise duty, land revenue, stamp duty and tax on the sale and purchase of goods. On 1 April 2005, a state-level VAT system was implemented in place of the complex and fragmented sales tax system. India moved towards the levy of a comprehensive GST in 2017.

[XIV] For an overview of the own taxes of the ACs, including the related decisions of the tribunal constitutional, see the annual reports available at: CONSEJO GENERAL DE ECONOMISTAS, *Panorama de fiscalidad autonómica y foral,* https://economistas.es/estudios-y-trabajos/ (accessed 11.04.2024).

[XV] On the interpretation of this clause in Spain: among others, STC 37/1987 and STC 289/2000. For Belgium: Belgian Constitutional Court Nos 04/1998, and 100/2003. On the restrictive interpretation of regional own taxes upheld by the Italian Constitutional Court, refer to judgments No. 296/2003 and No. 297/2003.

[XVI] The expression is quoted from: Bifulco (2001: 5). On the impact of EU legislation on the fiscal sovereignity of Member States: Escribano López Francisco *et al.* (2011); Magliaro (2011: 157 ff.).

[XVII] For a (literature) overview of the fuzzy logic and the fuzzy approach in comparative law, see Baldin (2015).

[XVIII] The Canadian Constitution follows JS Mill's notion of direct taxation which is very different from our modern conceptions. In fact, it is quite the opposite. On this: Mill 1848, chap. 2, § 1.

[XIX] Canadian Industrial Gas & Oil Ltd. v. Government of Saskatchewan et al., 1977 CanLII 210 (SCC), [1978] 2 SCR 545.

[XX] Fortier v. Lambe, 1895 CanLII 85 (SCC), 25 SCR 422.

[XXI] The 'pith and substance' doctrine was elaborated by courts and serves to ascertain the jurisdiction of the different levels of government —whether federal or provincial—over a specific legal matter or issue. Basically, a pith and substance analysis seeks to identify the essential nature or core purpose of a law and guide the distribution of powers among the federal and provincial governments. One of the best explanations of this doctrine can be found in the Reference re Anti-Inflation Act, [1976] 2 S.C.R. 373, p. 450.

[XXII] All provinces, whether or not they have signed a tax agreement, apply an agreed common allocation formula.

[XXIII] Cameron and Simeon (2002) argue that Canadian federalism is moving towards a more collaborative approach in intergovernmental relations. Fiscal decentralization shows this trend, despite the dominance of executive federalism. The same cannot be extended to equalization. The latter is still too much characterized by the dominance of federal unilateralism and limited intergovernmental cooperation, which is generally held behind closed doors and mostly informally.

[XXIV] Source: PwC, 'Canada', in *Worldwide Tax Summaries*, https://taxsummaries.pwc.com/canada/corporate/other-taxes (accessed 10.04.2024).

[XXV] In this respect: Woelk 2014: 161. With reference to participatory dynamics see further: Lhotta 2005: 15-42. In general terms, on the participatory function of federal bicameralism see: Palermo-Nicolini 2013: 135-137. It remains the same, even after the *Föderalismusreform I.* On this aspect: *ex plurimis*, Selmer 2006: 1057-1058.

[XXVI] According to the Basic Law (arts. 50 and 59.2), this body is expressly vested – among others - in financial matters with a legislative function (Kloepfer 2011: par. 13), equal to the one assigned to the Bundestag. Nonetheless, according to the case-law, it cannot be considered as *'a second chamber of single legislative body'* - BVerfG decision of 25th June 1974, BVerfGE 37, 363, (380) – *Bundesrat*. In support to its decision the Tribunal quotes: Friesenhahn 1974: 251 ff. The *Bundesrat* is classified as a *sui generis* body according to Palermo-Nicolini (2013: 147). Along these lines, Kotzur (2006: 258) observes that from a functional standpoint (not from a formal one) the *Bundesrat* can be considered '*a second chamber*' when it takes part in the legislative process. Because of this function, Sturm 2009: 138, considers it as a quasi-parliamentary body. Also Palermo-Woelk (1999: 1106) underline the legitimation of the Bundesrat as an '*actual second chamber, substantially equal to the first chambe*r *in the*

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political management of the State'.
XXVII In Germany, it is estimated that 85% of the overall tax revenues are governed by federal laws requiring *Bundesrat* approval.
XXVIII This is because the enumeration in art. 106 BL is considered peremptory. See, Stern (1980: 1159-1160).
XXIX According to Woelk (2014: 165), it is a federal body and as such it does not safeguard autonomy per se, but the integration of single units in the federal legal order. Along these lines, Palermo-Woelk (1999: 1103) refer to it as a second-level federal pact, which involve the units considered as a whole.
XXX Indeed, this happens only indirectly through the representatives of their executives, who sit in the *Bundesrat*. See further: BVerfG decision of 18th December 2002, BVerfGE 106, 310, (310) – *Zuwanderungsgesetz*.
XXXI The provisions of Title IV (art. 50-53 BL) are devoted to the *Bundesrat,* but for a comprehensive understanding of its structure and powers a systematic reading of the Basic Law is required. On its historical evolution, structure and powers: Kotzur 2006: 264-268; Schmidt 2012: 652-657.
XXXII See also, Dolzer (1999: 7, 15): the author states that this is due to the fact that the *Bundesrat* tackles with multi-faceted interests: of the Federation, of each single Land, of the majority of *Länder*, and/or of the political parties at federal level. For this reason, Palermo-Woelk 1999: 1112, refer to its function as a 'zip-role'. On the role of political opposition of the *Bundesrat*: Badura 1996: 422). Some scholars refer to this phenomenon as *cohabitation à la allemande* (Palermo-Woelk 1999: 1098). In this respect: Anderheiden (2008: par. 7) observes that this happened around half of time elapsed since the entry into force of the Basic Law and that, indeed, it is the rule as of 1969. This tendency is linked to the current praxis of coalition governments even at *Länder* level (Woelk 2014: 166).
XXXIII The 'ordinary system' coexists with the chartered (foral) system that is very different in many respects. It concerns the Autonomous Communities of Navarre and the Basque Country.
XXXIV Further on this subnational revenue source: Ruiz Almendral (2004).
XXXV It is in the agreement of the Fiscal and Financial Policy Council (CPFF n. 1/1996) - incorporated into the LOFCA 3/1996 - that provides the first transposition into legislative act of the function of ceded taxes as a tool instrumental to fiscal co-responsibility. This is to be ensured not only by including a share of the personal income tax revenue, but - especially - by granting some legislative powers over certain ceded taxes to the ACs. However, it is with the 2001 reform that the list of ceded taxes and the legislative competencies of the ACs over them are expanded, with a trend confirmed by the reform of 2009. This brings such a tool to a level that even the system as a whole undergoes a substantial change.
XXXVI For an in-depth analysis of the legal nature of this institute see: Mora Lorente (2004: 127-140).
XXXVII The scope of the subnational legislative competences is defined in general terms in the LOFCA (art. 19.2), while the detailed provisions are included in Law 22/2009 (arts. 46-52) with reference to each single ceded tax. An analysis of the historical evolution of this tool can be found in: Ruiz Almendral (2004: 367 ff.) and Ribes Ribes (2012: 141-242).
XXXVIII Martinez Lafuente (1983: 45-46) focuses on the key-role of the central government's ownership over the ceded taxes. See also: Ribes Ribes (2012).
XXXIX According to art. 25, Law no. 22/2009.
XL However, some scholars question the State ownership of some ceded taxes, due to the extension of powers assigned to the intermediate level. In this respect: Lago Montero (2000: 190) and Ribes Ribes (2012: 128).
XLI Conversely, these could not be considered ceded taxes. The entitlement to a quota of the related tax-revenue is indeed a minimum requirement.
XLII In the words of the constitutional Tribunal: *ex plurimis,* STC 134/1996, of 22nd July, LF 6; STC 47/2001, of 15th February, LF 9. The court also refers to it as a '*fundamental component*' (STC 182/1997, of 28th October, LF 9), and as a '*primary form of taxation*' (e.g., STC 134/1996, of 22nd July, LF 6; STC 182/1997, of 28th October, LF 9; STC 46/2000, of 14th February, LF 6).
XLIII Pursuant to art. 46, Law no. 22/2009, they can determine: personal minimum and minimum per family (±10%), deductions to the autonomic quota, the progressive tax rate and the related tax brackets.
XLIV On the Spanish system of equalization see thoroughly Herrero Alcalde (2020: 177 ff.).

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