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Federalism and the *Unit* Question

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Abstract

This contribution engages with the unit question in federal systems. The key claim presented here is that we may need to re-think federal units according to different sets of criteria than traditional ones such as, for example, economic factors, urban/rural concentration, and aboriginal/indigenous representation. A subsidiary claim is that the unit question is an important issue to raise, not only because it contributes to the (comparative) debate on how to make federalism more responsive to 21st century challenges and problems, but also because it contributes to some broad questions of constitutional design and constitutional theory. The essay is divided in three parts. Part 1 introduces federal units in general and looks at the distinction between physical (geographical) and authority boundaries; it also engages with debates in federalism theory on the unit question itself. Part 2 describes three alternative factors that may be used to guide the way some unit boundaries are drawn: economic factors, cities and the urban/rural concentration, and aboriginal/indigenous representation. Part 3 looks at a set of questions of constitutional design and theory triggered by the unit question that may enrich the comparative doctrinal debate.

Keywords

Federal units, federal boundaries, cities, aboriginal rights, economic regionalism, spatial economic areas



1. Introduction

In this contribution, I engage with what I refer to as the *unit question* in federal systems. My main claim is that we may need to re-think federal units according to different sets of criteria than traditional ones such as, for example, economic factors, urban/rural concentration, and aboriginal/indigenous representation. A subsidiary claim is that the unit question is an important issue to raise, not only because it contributes to the (comparative) debate on how to make federalism more responsive to 21st century challenges and problems, but also because it contributes to some broad questions of constitutional design and constitutional theory.

The contribution is divided in three parts. First, I introduce federal units in general terms, and look in particular at the distinction between physical (geographical) and authority boundaries; I also briefly engage with current debates in federalism theory on the unit question itself. Next, I describe three alternative factors that I believe should inform the way some unit boundaries are drawn. To this end, I focus on (i) economic factors, spatially concentrated economies, and economic regionalism; (ii) cities and the urban/rural concentration; and (iii) aboriginal/indigenous representation. Finally, I look at a set of questions of constitutional design and theory triggered by the *unit* question that may enrich the comparative doctrinal debate.

2. An overview of federal units

2.1 Introducing federal units: physical and authority boundaries

Federal systems are a prevalent feature of modern liberal constitutionalism, as an increasing number of constitutions provide for federal or federal-like forms of government. Federalism is thought to bring many benefits, from fostering peace by reducing internal conflicts, to increasing democratic participation in governance (especially of marginalised groups), to implementing stable development across the various territories of a polity, to limiting centralised rule, particularly when this is the source of discrimination, exclusion, or inequality.

As Blank points out, federalism is commonly understood as a theory of two recognised types of jurisdictions, the federal and the constituent units (however called), while other types



of units remain ‘unrecognized theoretically and constitutionally’ (Blank 2010: 525), although there are exceptions to this.

The existence of two (or more) levels of jurisdictions implies that federal systems are characterised by at least two types of boundaries: *physical* and *authority* boundaries (Bednar 2019: 27, 29). Physical boundaries pertain to the actual geographical borders of the federal units (in other words, the borders of the various *cantons, states, provinces, Länder*, etc.) (Bednar 2019: 27), while authority boundaries pertain to how legislative powers are distributed among and between the various tiers of government, as normally ingrained in the federal constitution (Bednar 2019: 29).

Authority boundaries represent an important feature of federal systems, and an abundant literature exists on the different ways in which powers, especially legislative powers, are assigned to each level of government (*ex multis*, see Watts 2008; Hueglin and Fenna 2015; Palermo and Kössler 2017). For example, such powers can be assigned exclusively to either level of government, but more often they are shared or concurrent (as outlined in the constitution or as carried out in practice). Furthermore, by dividing powers and responsibilities among various levels of government, federalism allows to reconcile the unity and integrity of the state with the many forms of diversity (ethnic, linguistic, socio-economic, etc) that characterise the federal territory.

Geographical boundaries, on the other hand, have historically been drawn following various criteria: sometimes physical elements like mountains or rivers were used for this purpose (although rivers may change course, thus creating more boundary disputes (Bednar 2019: 27)), while other times historical or ethnic boundaries were employed (Bednar 2019: 27-28).

Watts observed that federal systems greatly differ from each other in the number of constituent units (Watts 2008: 71). Sometimes, this number is particularly high, like the 50 states that compose the United States: as he further noted, such a large number of constituent units usually means that ‘none of them is in a position to dominate politics ... or to individually counterbalance the federal government’, although most federations normally count a smaller number of units (Watts 2008: 71-72). Federal units also vary significantly in size, population, and wealth: for example, Uttar Pradesh in India is a state with more than 166 million people, thus being much larger than the population of many federations (Watts 2008: 72). Furthermore, in some federations one or two constituent units may include most



of the population: this is the case of the Flemish Region in Belgium, which counts for almost 60% of the population, but the situation is similar in Canada with Ontario and Quebec, or in Australia with the population in New South Wales and Victoria (Watts 2008: 74). Federal units can also considerably vary in wealth, especially in relation to the presence of natural resources, and ‘this is significant in terms of their capacity to perform the functions constitutionally assigned to them’ (Watts 2008: 74). I will revert to this aspect later in the contribution.

Watts further observed that all the factors just mentioned (size, population, wealth, etc.) may affect the balance of a federal system: when units are too large or too populous, they may naturally play a predominant role in the federal politics of their federation and ‘exert more political influence’ to the detriment of smaller constituent units; at the same time, larger and populous units may be less responsive to the interests of local communities and individual citizens (Watts 2008: 72).

In certain federations there are also ‘secondary classes of constituent units’ enjoying less autonomy than the fully entrenched ones: federal territories fall into this category, like for example the Northwest Territories, Nunavut, and Yukon in Canada, or the Northern Territory in Australia (Watts 2008: 75). Local governments are another example: even when they are recognised as levels of government in the constitution, their autonomy is more limited. Other federations may also have a looser federacy or associate state relationship with certain units, as is the case of the United States and Puerto Rico (Watts 2008: 75-76).

In light of the above, the way unit boundaries are drawn may play a role in ‘shaping the dynamics of political relationships’ within a federation (Watts 2008: 71).

2.2 Drawing unit boundaries

As Bednar points out, the way both physical and authority boundaries are drawn affect the way a federal system works and how it achieves its functions (Bednar 2019: 27): consequently, physical and authority lines ‘can be drawn in ways that aid or abet a federal system’s capacity to bring security, prosperity and well-being, and justice to a society’ (Bednar 2019: 35).

Therefore, to understand how a federation performs, we need to pay attention to the way units are drawn and authority is allocated, also because both physical and authority



boundaries have the potential to cause tensions (Bednar 2019: 35). In case of authority boundaries, the most common tension pertains to the level of government entitled to legislate on a certain subject matter, as constitutional texts may not be clear or there may be some overlapping between subject areas assigned to different levels. In such cases, constitutional or supreme courts are called to safeguard authority boundaries, by ultimately deciding which level of government has authority over a certain subject matter (Bednar 2019: 31), although other forms of safeguard may also exist, such as constitutional change preceded by changes in practice (Bednar 2019: 35). Regarding geographical boundaries, and especially in the context of decolonisation, a specific criterion that has been used to draw unit boundaries has been ethnicity, Ethiopia being a case-in-point. This way of unit formation, however, is not exempt from problems, as ethnofederalism (Hale 2004: 165) can indeed lead to secessionist claims: in fact, as Bednar observes, '[b]y organising political boundaries around ethnic groups, tensions become more salient and competing groups are equipped with the institutional capacity to make demands that the rest of the union cannot tolerate, leading to conflicts or secession' (Bednar 2019: 28).

This contribution will mainly focus on the physical or geographical boundaries of federal units (although this has reverberations also on authority boundaries, see *infra*), to assess whether alternative factors should be considered in drawing unit lines, as further detailed in part 2 of the contribution.

2.3 The current debate on federal units

While an extensive literature exists on authority boundaries, not many federalism theorists have devoted time to think, also in comparative terms, about what would be the ideal territorial or population size of a federal unit: in other words, as Hirschl notes, broad questions like whether federal units as they currently exist reflect ideal boundaries in terms of size, population, or socio-economic fabric rarely if ever find space in federalism discussions (Hirschl 2020: 33-34). If some literature exists, it is sporadic and not systematic. Yet, considering the modern trajectory of federal models, and the changes brought by the economic, demographic, social and ethnic development to the boundaries of federal entities, it would be desirable to return to a discussion on the unit question.



In the following paragraphs, I summarise some of the main observations made by federalism theorists on federal units. Some very first theorisations in federalism are very insightful in this regard. For example, in the XVII century, the German Calvinist Johannes Althusius – commonly regarded as the first intellectual and theoretical godfather of federalism (at least of its continental European strand) (Elazar 1994: 41) – conceived of a multi-layered society ‘built up from below’ (Burgess 2000: 8), where the societal chain was composed of several rings, including families, collegia, cities, provinces and the commonwealth (Althusius 1995: 27). In other words, as emerged in his major work *Politica Methodice Digesta* of 1603, Althusius espoused a rather inclusive idea of a compound society, with several units, some private and some public, including cities and collegia (Althusius 1995: 27). However, Althusius’ *Politica* did not receive enough attention in his own time, and remained unnoticed for almost two centuries, perhaps because he was offering a view of the state that was conflicting with the vision offered at about the same time by thinkers like Jean Bodin (1530-1596), whose *Les Six Livres de la Republique* of 1576 became a classic theorisation of the unitary, monarchical, and strongly centralised state which would dominate European culture for a long time (Burgess 2000: 2, 9).

More recently, Kenneth Wheare spelled out the features of an ideal federal unit, contending that ‘[i]t is undesirable that one or two units should be so powerful that they can overrule the others and bend the will of the federal government to themselves’: consequently, for a properly working federal government, a balance and harmonisation between the ‘conflicting interests of these differing units’ should be found (Wheare 1963: 52). This means that ‘[t]he size of the units concerned – in wealth, area and population – is ... of prime importance’ and it is the responsibility of ‘those who frame and work a federal government to see that no unit shall be too large, and, equally important, none too small.’ (Wheare 1963: 52-53). Wheare further contended that adequate economic resources are important to form a federal union, and states ‘must possess sufficient economic resources to support both an independent general government and independent regional governments’ (Wheare 1963: 53). Also, a small population is not capable of supplying the workforce of a larger population, so the size of a unit affects ‘its capacity to form part of a federal union’ (Wheare 1963: 53). This means that sufficient economic resources are necessary both for sub-units and the federal government so that they can be ‘financially independent’ (Wheare 1963: 54).



Issues of unit size and population have been raised also by Levy. First, he observed that, although federalism is usually understood as an ‘arrangement of one central government and a number of states or provinces’ in fact other units of government exist, even if they ‘lack constitutional status’ (Levy 2007: 463). Next, he noted that most existing federated entities are too large, since they are ‘the size of *ancien régime* French provinces’ (Levy 2007: 461). He further noted that, in a range of federations like the United States, Canada, Australia, or Nigeria, or even decentralised systems like South Africa, ‘the mean state, province, or regional population lies somewhere in the 2 million to 6 million range...’ (Levy 2007: 461). This means that, in contemporary federalism, classic units are ‘too few, too large, too tightly associated with ethnocultural and linguistic cleavages and too rigidly fixed’ thus lacking ‘smallness and flexibility’ (Levy 2007: 464). Levy also observed that, in many modern federations, ‘one of the most conspicuous features of federalism is its association with ethnocultural or, especially, linguistic pluralism’ meaning that one or more federated units are ‘understood as the province of an ethnic, cultural, or linguistic minority’ as is the case of Quebec in Canada (Levy 2007: 461). Because most federations are characterised by ‘relatively few, relatively large provinces many of which are defined linguistically or ethnoculturally’ this does not favour mobility or competition (Levy 2007: 462). This point is particularly pertinent: in multinational federations, units are sometimes carved out of specific ethno-linguistic cleavages, regardless of size and population. Oftentimes, the boundaries of such units are drawn on paper, or are imposed from the top, and are designed at central level, regardless of any pre-existing sovereignty. Such units can be mono-ethnic or pluri-ethnic but, since such demarcation comes from the top, it is often contested and triggers conflicts. Against this backdrop, Levy noted how jurisdictional competition would ‘proceed better if the jurisdictions were municipalities or metropolitan regions.’ (Levy 2007: 461).

Hirschl recently noted how, in traditional federal systems, ‘province- and state-sized entities are the default constituent unit ...’ (Hirschl 2020: 176). As a result, in modern federations, ‘the near-exclusively applied “unit” of federalism is the state and its equivalents’ since the Westphalian model ‘continues to dominate the theory and practice of federalism, with its notion of sovereign territorial states divided along ethnic, religious, and linguistic cleavages and reflecting conventional notions of nationhood, peoplehood, and/or historical patterns of conquest and settlement’ thus leaving no space to other, less visible units (Hirschl 2020: 33). Hirschl thus invites theorists to reflect more deeply on the ‘unit’ question, properly



contending that federalism has never really discussed other units, preferring to focus on ‘the dominant status of state-sized, sub-national units.’ (Hirschl 2020: 34).

Contemporary federal theorists are thus aware of the unit question, with concerns orbiting mainly around the socio-economic viability of ideal units (Wheare), jurisdictional competition among units (Levy), or the Westphalian state-model and how it still affects federal units (Hirschl).

In an essay on boundaries, democracy and territory, Miller also explored the unit question, by asking what are the ‘values that should inform political boundary-drawing’ and then noting that constituent units elicit several questions about the constitution of political power, such as ‘on what basis should political units be formed’, ‘what powers should they have’ and ‘[h]ow widely or narrowly in space should their bounds be set’ (Miller 2016: 33-34).

In discussing what boundaries political units ought to have, there are several approaches that can be adopted (Miller 2016: 37). First, the *functional* approach to boundaries, meaning that units shall be viable, they ‘must be able to protect the basic rights of their members adequately’ and ‘the human and natural resources’ they contain (Miller 2016: 38). They must also be ‘economically viable’ to provide for themselves and their members goods or services (Miller 2016: 38). Second, the *political* approach, which suggests not only to create viable units, but legitimate and democratic ones as well (Miller 2016: 40). This approach ‘will enquire into the social and psychological characteristics of the “people” that will be brought into existence if a particular boundary proposal is adopted’ (Miller 2016: 40). If there is a majority group and a minority group that is hostile to the majority, the political approach suggests that boundaries should be drawn in such a way that ‘these two groups are not forced to cohabit within a single political unit’ (Miller 2016: 41). Third, the *homeland* approach, which postulates that ‘boundaries should circumscribe pre-existing homelands, where these are identified by reference to the beliefs and actions of the peoples who live on them or aim to do so’ (Miller 2016: 44). Beginning with one social group (a tribe, an ethnic group, a nation), the homeland approach tries to find out what such group considers to be its land (Miller 2016: 44). The problem with this approach is that such territorial claims may be both indeterminate (since it is not always clear where a group’s homeland begins and ends) and conflictual (as rival groups can make similar claims to the same area or territory) (Miller 2016: 44).



Another way to look at the unit question is to consider the way in which federal systems have emerged, the classic distinction being between ‘coming together’ (or aggregative), and ‘holding together’ (or devolutionary) federations (Palermo, Kössler 2017: 45). Coming together federations reflect the ‘old’ way federal systems have formed, with previously independent states or units joining into a federal compact, as was the case with the United States, and later also with Canada or Australia: here, the pre-existing units were independent states or enjoyed a high degree of autonomy before joining the federal structure (Palermo, Kössler 2017: 45). Not much discussion occurred on the size, dimensions, and other features of such units, as they already enjoyed sovereignty, including law-making powers (Hirschl 2020: 33). Although other units existed (like local governments or cities) they were neither considered partners in the federation nor fully-fledged federal subjects: they simply lacked constitutional status and were considered as simple creatures of the state.

Coming together federations stand in sharp contrast with holding together or devolutionary systems (of which South Africa, Spain, Belgium, and Italy are examples), whereby a unitary state progressively devolves powers to specific sub-units to control centrifugal forces, better deal with internal ethnic cleavages or tame secessionist aspirations (Palermo, Kössler 2017: 45). In comparative perspective, they have become more common, especially in the last few decades: under such devolutionary patterns, it is not unusual to see the entrenchment of a third level of government – the municipal or even the urban sphere, in addition to the classic division in two levels. In such instances, the unit question may assume a different meaning, because new units need to be formed.

However, the classic distinction between coming together and holding together federations just illustrated needs to be nuanced, as the two often coalesce. In fact, while it is undeniable that the United States emerged in 1787 from the coming together under the constitution of 13 previously existing former colonies, the 37 other states that joined the Union over time did not necessarily enjoy sovereign status and/or clear boundaries, which were often imposed from the top or following natural elements like rivers or mountain ranges. And also in holding together federations the picture may be blurred. Take Italy for example: there is an extensive record of very interesting discussions within the Constituent Assembly in the years 1946-1947 where members were trying to figure out how to create the regions that would become the building blocks of the regional state under formation. But such discussions applied only to a limited number of regions, those that were not existing



yet, because other regions already existed with their own boundaries, being them historical territories that pre-dated unification (like for example Lombardia and Veneto, former semi-autonomous provinces of the Habsburg Empire) or islands (like Sicilia and Sardegna).

To conclude this overview of the unit question through the lens of comparative scholarship, it can be argued that the overall picture is quite complex, and several elements are considered and come into play. Federalism theorists are aware of the unit question, but I contend that the intellectual debate is still scarce and sporadic, especially in comparative terms. One consequence is that, by not engaging with the unit question more systematically, constitutional and federalism theory and practice tend to neglect important factors that may potentially guide the way unit boundaries are drawn, as the next section will further illustrate.

3. Suggesting alternative factors in drawing units' boundaries

As noted in previous sections, contemporary federalism scholarship has not systematically engaged in a discussion on federal units, the intellectual debate being in fact still scarce and sporadic. One consequence is that, by neglecting the unit question and fixating on the state and its equivalents as the basics of analysis (Hirschl 2020: 219), constitutional law and federalism theory fail to consider certain important factors that might also potentially drive the way unit boundaries are designed. In other words, besides the criteria discussed *supra* to draw units' lines (former sovereign status, ethnicity, rivers, mountain ranges, etc.), factors like economic distribution, cities and more generally the urban/rural concentration, or aboriginal/indigenous representation are rarely if ever considered. By sharpening focus on such additional factors, some territories or spaces that do not currently enjoy *unit* status may be constitutionally recognised and, consequently, become better equipped to face some of the challenges emerging in increasingly complex federations, thus making federalism more responsive to 21st centuries demands.

The three factors discussed here are not intended to exhaust all the possible, novel criteria to be used in carving the boundaries of new federal units, but may nonetheless offer some preliminary thinking on the unit question.



3.1 Economic factors: spatially concentrated economies (SCEs)

As Watts reminds us, variations in terms of wealth ‘have been a factor affecting the influence of particular constituent units in the dynamics of federal politics’ (Watts 2008: 74). To this end, the concept of *spatially concentrated economies* (hereinafter “SCEs”) (Van Houten 2013: 143) is proposed here to rethink geo-political and authority boundaries of federal units in such a way that considers issues of economic wealth and/or the presence of natural resources as an important factor (Arban 2023: 185).

The concept of SCEs is strictly related to that of *economic regionalism*. Economic regionalism can have both a supra-national and a domestic/local dimension. At supra-national level, it has been used in international economic relations as an idea to restructure the global economy into regional blocs (Van Houten 2013: 140; Gordon 1961: 231; Arban 2023: 103). In its domestic/local acceptance, it describes the role played by economic factors in territorial politics (Van Houten 2013: 140; Arban 2023: 103). In other words, it refers to the phenomenon of economically wealthier regions or areas that mobilise politically to acquire more powers and autonomy (Van Houten 2013: 144; Arban 2023: 103).

Economic regionalism at the domestic/local level, however, is a term that defines a constellation of different situations, from industrial clusters or districts (like the Silicon Valley or the media industry in California) to regional economies or local/territorial production systems (like small and medium size enterprises in the fashion industry concentrated in certain parts of Italy) (Van Houten 2013: 141; Arban 2023: 103). The presence in one specific territory of natural resources like oil or gas can also be traced back to such broad umbrella term: in fact, in some polities, natural resources like gas, oil, timber or minerals are concentrated in limited spaces (Arban 2023: 103). The often-unequal distribution of natural resources has emerged as a serious problem especially in post-colonial and post-war polities (ie Nigeria), considering that in certain African and Asian countries the national GDP depends largely on non-renewable or natural resources, which are often distributed unevenly among regions; however, it is not an entirely foreign phenomenon in the Global North (see for example Australia and Canada) (Arban 2023: 103).

Economic regionalism has been the object of several studies in the social sciences, especially economic geography, sociology, and political sciences (ex multis, Cruz, Teixeira



2010), but its ‘political and institutional effects’ remain largely unexplored (Van Houten 2013: 140; Arban 2023: 103).

But why do we have to concern ourselves with spatially concentrated economies in public law, considering that patterns of economic disparity are a common feature, especially in countries characterised by large geographical territories or by a very diverse geographical landscape regardless of size? My argument is that economic factors like spatially concentrated economies can represent an aspect that constitutional drafters should consider in designing unit boundaries because they can be an element of fragmentation and affect social cohesion and the enjoyment of basic rights, thus bearing consequences for the people living therein.

The presence of economically richer territories, however, does not represent an issue *per se*: in fact, most of the time such economic disparity does not cause any tension. Economic regionalism may become a problem only when a political dimension is added to the economic dimension, in other words when the successful performance of a certain region is coupled with a strong political performance: it is at this point that political parties may mobilise and claim more powers and autonomy for the territory, sometimes even stirring secessionist or exit claims (Arban 2023: 104). This is because economically strong regions often display potential for self-government based on features such as strong governance, strong economy, and strong social solidarity (Arban 2023: 104). Because of that, they often seek some forms of acknowledgement of their (economic) specificity as this distinctiveness is sometimes associated to some identity feeling of belonging to a particular region (Fitjar 2009: 3). Furthermore, more assertive examples of the type often belong to privileged circles, as individuals live in wealthy and developed areas and are fully socially and politically active and integrated: yet, while not repressed or disadvantaged, they often feel badly governed by institutions – at times even neglected – and accuse public institutions of remaining indifferent to their specific interests (Arban 2023: 104). In fact, a common aspect is a shared feeling that the central government is very distant and does not adequately respond to the needs of the area and of the people living in it. For this reason, they seek more control of the economic aspects related to the territory: because of this perceived bad administration from the centre, richer (or more successful) regions often feel that it is the centre and/or the other territories that fully benefit of the wealth produced there (Arban 2023: 104). The veracity of these claims is always hard to assess, of course; however, unless these claims are overtly unfounded, their existence is a function of the relevant societies’ self-perception (Arban 2023: 104). As



Fitjar observes, this phenomenon can be explained by the fact that economically successful regions depend less on the central government as they are better equipped to succeed on their own; and since they play an important role in the overall economy of the state, such sense of economic power justifies some requests for more autonomy, mainly at the political and fiscal levels (Fitjar 2009: 28).

The destabilising effects on social cohesion and the impact on the enjoyment of fundamental rights caused by economic regionalism are both endogenous and exogenous. The claims advanced by such regions can in fact lead to exit threats that exacerbate the relations with the central government and with other parts of the territory, what is known in scholarship as nationalism or secessionism of the rich (*ex multis*, Dalle Mulle 2019). At the same time, the adverse impact on interregional solidarity may negatively affect social cohesion and the enjoyment of fundamental rights in different parts of the territory. It thus needs to be taken seriously. Furthermore, the selfish desire for more autonomy and financial emancipation that lurks behind claims made by economically strong regions seems to collide with the spirit of collaboration and solidarity that should inform the relations among territories and regions of the same state (Arban 2023: 135).

Similar dynamics occur also in situations of unequal distribution of resources, especially when disputes over natural resources are interlinked with ethnic divisions. Here, territories that are richer in natural resources may seek more powers to control the revenues coming from the natural wealth as they feel badly managed by the central government, and/or feel that the central government is using the revenues coming from these resources to the benefit of other regions and to the detriment of the resource-producing territory. In Nigeria, for example, the populations living in the southern littoral states of the area known as Niger Delta complain because most of the revenues coming from the oil and from other natural resources present in that region is taken and administered by the central government and mainly used in the North or elsewhere, thus leaving the South in a condition of significant environmental degradation that puts at serious risk the health of the population living there. Local communities also lament a certain lack of representation and control of their territory, with consequent deprivation of basic environmental rights and a disruption of their traditional economic activities such as fishing and farming due to the extreme exploitation of the area by oil-producing multinational companies acting with the consent and support of the central state (*ex multis* Obi 2009: 193; Obi 2010: 443; Onuoha 2015: 69; Osaghae 1995:



325). The presence of natural resources can thus be an element of fragmentation that constitutional drafters should consider when allocating powers over resources.

In any event, designing units along economic factors as suggested here raises at least two sets of additional questions. The first is that, when describing the boundaries of SCEs, the territorial or spatial component may be more porous and, as such, more difficult to define. In other words, the exact boundaries of such SCEs may not be clearly identifiable or fixated: they could transcend the territory of already existing units or occupy smaller portions thereof, but they may also fluctuate over time: one solution might be to consider non-territorially defined units (see *infra*). The second problem is that also resource-poor areas (like arid or arctic lands) could just as easily be identified as particular potential units of self-government. Linked to this, is the question of areas or spaces uninhabited by human beings and populated only by animals and plants (like for example natural reserves).¹ For example, in Canada, the arctic territories (Northwest Territories, Yukon and Nunavut) are under federal control. Such extreme territories are often very sparsely if at all populated, and this explains why federal control is at times implemented. The fact that they are sparsely populated also implies that political mobilisation for increased powers may be non-existent, differently from economic regionalism. Furthermore, units should have enough people to supply the required workforce for them to properly function (at least according to Wheare as discussed *supra*); again, this may be a problem in sparsely populated/arid/arctic lands. Nonetheless, they could still be considered as possible units of self-government insofar as there are a set of overlapping interests and concerns that are not shared with resource-rich areas.¹¹

To conclude, '[t]he dispersed endowment of resources and industries creates an economic geography that shapes policies' as Bednar puts it (Bednar 2019: 28): consequently, SCEs should be considered as an important element in/of constitutional design.

3.2 Cities and the urban/rural concentration

While in these past few years there has been an increased interest for cities as constitutional actors, the role of urban areas continues to remain at the margins of constitutional law scholarship (Hirschl 2020: 1, 28). In fact, cities are seldom recognised as independent federal subjects and, when that happens, it is often as cities *qua* local governments. In older, classic federations like the United States, Canada or Australia, cities



have no constitutional personality and remain creatures of the states or provinces. Only when it comes to federal capitals various strategies are adopted. For example, federal districts or federal territories may be created under the exclusive jurisdiction of the federal government, like Washington, DC or Canberra, ACT (Watts 2008: 79). Other times, federal capitals may be given the status of fully-fledged units, as happens with Berlin, Brussels, or Vienna, but capital cities may also fall under the jurisdiction of one, larger unit, like Ottawa (Ontario), or Pretoria (Gauteng) (Watts 2008: 79).

Cities, however, are rapidly emerging as key players domestically and internationally, thanks to their historical relevance and increased economic, political, cultural prominence (Arban 2021: 324). At the same time, as Hirschl observes, urban centres are at the forefront of the fight against poverty, as extensive urbanisation leads to major policy challenges, including environmental protection, public health, and extreme poverty, in addition to creating differences between the centre and the periphery as well as between the urban and the rural (Hirschl 2020: 5). This is true particularly (but not exclusively) for megacities in the Global South, which are spoiled by ‘inadequate and dilapidated infrastructure, insufficient housing and sanitation ... vast socio-economic gaps.’ (Hirschl 2020: 8).

Megacities, in particular, may display levels of inter-metropolitan inequalities both between the centre and the periphery, but also between neighbouring suburbs. In this regard, Hirschl persuasively shows how large metropolitan areas and megacities may face fiscal inequalities between the different suburbs or neighbourhoods that are not dissimilar from the fiscal unbalances existing between richer and poorer regions and territories in unitary and multilevel systems alike, and briefly sketched above in reference to SCEs (Hirschl 2020: 207): this divide between the centre and the periphery is common to many large cities, to the point that in several Organisation for Economic Co-operation and Development countries income inequality within a metropolitan area may be higher than the national average (Hirschl 2020: 208).

Inter-metropolitan differences, on the other hand, run along the urban/rural axis. This phenomenon may be evident not so much in Europe, where rural areas are quite developed, but especially in large countries in the Global South, where access to basic services (health, education, etc.) significantly decreases when moving away from city centres, as well as in other parts of the Global North, the United States being a case in point. All this, of course, presents risks for social cohesion and for the enjoyment of basic rights.



Similarly to SCEs, a question that has been asked is whether cities should be considered constitutional or federal units on their own, considering the unique features that characterise them (Hirschl 2020; Arban 2021). Legal scholarship has just started to scratch the surface of this phenomenon, but re-thinking the physical boundaries of units also along the centre-periphery and the urban-rural axes may assist in taming some local tensions.

3.3 Aboriginal, first nations, or indigenous representation

One last example of factor that may be used to guide units' boundaries is represented by aboriginal, indigenous or first nations communities. Public law scholarship has extensively analysed the relationship between such communities and national or local governments (*ex multis*, Gover 2010; Lino 2018; Cook, Lindau 2000). In traditional federations like the United States or Canada, aboriginal communities or indigenous affairs are almost always under the exclusive control of the federal government, something that rarely leaves these communities in a position to fully administer their affairs. Furthermore, because the controlling government is not always interested in developing such territories, tensions emerge between the two groups.

The question thus becomes: would it be worth considering the transformation of aboriginal, first nation or indigenous communities into fully-fledged federal units? My instinctive answer would be in the positive. However, a range of issues might be considered as potential obstacles. A first problem has already been mentioned *supra* in relation to what Miller defines as the homeland approach to the creation of units: it will be recalled that, according to Miller, the homeland approach postulates that 'boundaries should circumscribe pre-existing homelands, where these are identified by reference to the beliefs and actions of the peoples who live on them or aim to do so' (Miller 2016: 44). The problem is that such territorial claims may be at the same time *indeterminate*, because it is often unclear where a group's homeland begins and ends, and *conflictual*, since more than one group may claim as its own territory the same area (Miller 2016: 44). Secondly, and linked to the above, indigenous communities do not constitute a homogeneous group; rather, there can be hundreds of different indigenous communities in a polity, speaking different languages, having different customs, religions, etc., thus representing a tapestry of very diverse communities. And when there are too many groups, the system might not work properly.



Third, we mentioned *supra* – drawing on Levy – that unit boundaries drawn on ethnicity (of which aboriginal representation may be considered a variant) may slow down mobility and competition among units. Finally, it should also be considered that a common thread linking aboriginal or indigenous communities in various parts of the world is represented by the open wound that is the relationship with the central government, especially regarding issues such as sovereignty, representation, and dispossession (the latter meaning exclusion from the land they were born and that they used, which then led to loss of control over the space). For this reason, the issue is still quite complex. However also in the case of aboriginal, indigenous or first nation communities, the disruption of social cohesion and the impact on the enjoyment of basic rights is often self-evident: indigenous peoples are often left at the margin of societies, and the attempts to mend the relationships with the central government have often failed.

To be sure, some federal constitutions include provisions protecting pre-existing indigenous people and their legal capacity. For example, article 75(17) of the Constitution of Argentina, which spells out the powers of the federal government, includes a federal authority in recognising “the ethnic and cultural pre-existence” of Argentinian indigenous peoples, and guarantee the respect for their identity, their right to bilingualism and intercultural education, to “recognise the legal standing of their communities and the possession and community property over lands they have traditionally occupied”. It also assures “their participation in the related administration of their natural resources and of other interests affecting them...” The provision further mandates that provinces may exercise such powers concurrently. Other examples can be drawn from federal states, but the point is that such communities are normally ruled by the federal government (exclusively or concurrently) thus leaving them little autonomy.

To conclude, drawing units’ boundaries according to the three factors just illustrated may bring two potentially related benefits: on the one hand, it may allow territories that do not normally enjoy *unit* status to be constitutionally recognised and, on the other hand, it may provide them the autonomy needed to properly cater to the specific needs of local communities because it has implications for how federalism helps addressing emerging challenges.



4. The unit question and issues of constitutional design and theory

In addition to making specific territories more equipped to respond to 21st century challenges, the unit question also invites to reflect on several issue of constitutional design and constitutional theory. This is the focus of this final part of the contribution.

4.1 Constitutional design

We noted above – drawing from Bednar – that how physical and authority boundaries are designed affects the way a federal system works and fulfills its functions, and such boundaries can aid or abet the capacity of a system to bring security, prosperity, and justice to society (Bednar 2019: 27, 35). Consequently, the first matter of constitutional design that needs to be considered relates to how authority is distributed: in other words, the creation of new units reflecting economic factors and SCEs, cities and urban/rural concentration, and aboriginal/indigenous representations invites constitutional drafters to carefully assess which powers (legislative, but also executive and judicial) should be granted to such units, to allow them to manage local demands more effectively. In distributing authority, asymmetrical solutions could also be considered, for example by locally granting enhanced powers over fiscal matters. Asymmetry however is not always praised as ideal, for the risk of lack of solidarity and other problems that may emerge (*ex multis* Sahadzic 2021): for this reason, fiscal or economic asymmetry needs to be counterbalanced by some other measures at the national level (Arban 2023: 135).

A second issue of constitutional design triggered by the use of new factors in drawing unit boundaries pertains to constitutional change. It would certainly be easier to draw physical boundaries of federal units reflecting the patterns described in this contribution when drafting new constitutions, but it would be much more difficult in established federal systems where changing the constitution is virtually impossible due to the very demanding rules of constitutional change. When it comes to changing the physical boundaries of units, some constitutions allow for boundary changes following specific procedures (Watts 2008: 78), but the question is also one of democratic participation: what would be the proper way to proceed with such changes and who shall decide? Likewise, boundary changes can occur also when the constitution remains the same, they can arise in practice first, and then be



followed by a constitutional change (Bednar 2019: 35). An alternative solution, which could be applied also when constitutional change is difficult or impossible, is this: instead of creating new geographically demarcated units, units can be drawn non-territorially, along invisible lines, and be demarcated by belonging to a certain group or community. In some countries, like for example Belgium, communities are non-territorial. Likewise, in countries like Nigeria, one of the reasons that political divisions have not worked well is that self-governing communities are impossible to neatly contain within territorial boundaries.¹¹¹

I mentioned democratic participation in the context of changing unit boundaries: in fact, democratic participation is another element of constitutional design that needs to be assessed in a broad sense. For example, the creation of new units elicits the question of how such units will be represented, if at all, at the central level, say, in a federal senate. More generally, as is the case when discussing local governments, a question emerges of how citizens in the territory can participate in local bodies of government.

Finally, certain constitutions, especially in the Global South, have resorted to directive principles to entrench economic-policy directives in their constitutions, which could thus become an element of constitutional design to consider when discussing unit boundaries (Weis 2017: 916). For example, ss 16 et seq of the Nigerian constitution (as part of Chapter II on Fundamental Objectives and Directive Principles of State Policy) target economic development and well-being; article 27(2) of the Sri Lankan constitution (ingrained in Chapter VI on Directive Principle of State Policy and Fundamental Duties) also includes some economic-related objectives. These provisions deal with a range of principles targeting equitable economic development and the welfare of people. Therefore, their potential transformative role and contribution in eradicating poverty, at least in certain regions, cannot be disregarded (Adugna 2017: 29). One major issue with directive principles is that they are rarely justiciable; as such, they can be easily disregarded, thus nullifying their potential for change (Weis 2017: 916; Khaitan 2018: 389).

4.2 Constitutional theory

But reflecting on the physical boundaries of units would allow to contribute also to issues of (federal) constitutional theory more broadly, particularly in relation to constituent power,



sovereignty, subnational constitutionalism, and loyalty. Such issues will just be briefly outlined here, and not discussed in depth.

For instance: do federal units enjoy constituent power and, if so, in which terms this power differs from constituent power at the national (central) level, and how this would be impacted by the creation of new units following the criteria described here? Similar observations can be made regarding sovereignty and sub-state constitutionalism. Let us first consider sovereignty. In older federal systems, those that emerged from the coming together of previously independent units (as was the case with the United States, Canada, or Australia) it was common to say that sovereignty was split between the federal government and the states or provinces that formed the federation. It could be asked to what extent this idea of split sovereignty could be applicable for example to cities as new constitutional subjects, considering that they do not generally enjoy constitutional status and/or were not previously independent units. Insofar as aboriginal, first nations or indigenous communities, their sovereignty most of the time is still an open wound. Moreover, acknowledging sovereignty to these new units could further lead to discussions on their power to self-determination and/or secession.

Sub-state constitutionalism is another constitutional principle that would be open to further probing. In federalism theory, sub-state constitutionalism is often painted as the power of the sub-units to give themselves a constitution and/or decide for themselves, in autonomy, which institutions are the best fit. Sub-state constitutionalism, however, is a complex topic: for instance, not all federal sub-entities have their own written constitutions (most famously, Canadian provinces have, at most, uncodified constitutions, but similar considerations can be made for South African provinces). To what extent would units like cities, industrial districts or any other of the territorial or spatial instances illustrated in part 2 above enjoy sub-state constitutionalism? Presently, there is only one city that has official status as federated entity, that is Mexico City. It also enjoys a constitution. In Brazil, discussions exist about some alleged municipal constitutionalism, to complement sub-state constitutionalism, but it is a concept that is far from being universally accepted (Popelier et al. 2021).

Finally, the interrelated aspect of loyalty and solidarity. Solidarity is a two-pronged concept. On the one hand, it overlaps with loyalty which, in turn, originates from the *Bundestreue* doctrine, which literally means faith or fidelity to the federal contract. In practical



terms, it invites both the federal level and the levels of the sub-units to respect each sphere of responsibility and legislation, roles, etc. while at the same time collaborating in the interest of the federation. It also embeds aspirational values such as preserving the peace and unity of the federation, or loyalty to the constitution (Arban 2023a; Arban 2023b). This idea of loyalty is well captured by article 41(1) of the South African constitution, which directly builds on the *Bundestreue* doctrine.^{IV} The second prong of solidarity entails a more fiscal or financial dimension, and relates to all those mechanisms – usually referred to as equalisation payments – that help curb the socio-economic differences that exist between different parts or units of the same federation. These tools usually run vertically, from the federal government to the sub-units. A discussion on the unit question along the lines suggested in this contribution would elicit also reflections on issues of loyalty within potential new units carved out following the factors just discussed, including whether it would be possible to have non-territorial unit identity and solidarity/loyalty.

To conclude, a more in-depth conversation on the unit status of SCEs, cities, and aboriginal communities, elicits a thorough consideration of some of the issues of constitutional design and theory just mentioned. The goals or advantages of this exercise would be two-fold. On the one hand, it would offer an opportunity to enrich the doctrinal discussion in constitutional law and federalism theory on some constitutional principles, since it would consider all the theoretical and practical challenges of composite, multi-layered polities. On the other hand, such theoretical engagement might offer responses to dilemmas faced in older federations like the United States, Canada, or Australia, where constitutional amendment or otherwise radical changes are hindered by a tradition of constitutional rigidity.

5. Conclusion

Boundaries are about including but also excluding someone or something. In this essay, I engaged with the unit question in federal systems and argued that we may need to rethink federal units according to new factors (economic factors, cities and urban/rural concentration, and aboriginal/indigenous representation) so as to make federalism more



responsive to present needs and challenges, something that also has a direct impact on certain issues of constitutional design and theory.

This topic has the potential to be applied both to older federations as well as to more recently formed federal and federal-like systems. It presents some original ideas that allow to depart from older conceptions of the state, and considers the constitutional status of units of subjects of spatial territories that are not usually considered as such. In any event, the sub-state level adopted here can be applied at the state level as well: in fact, if one sub-unit succeed in separating from the main country, it can become a federation on its own.

I have deliberately set the unit question within the theoretical framework of federalism, which is thus conceived in a rather progressive way: in the 21st century, federalism should be more broadly understood not just as sharing powers, but also as a mechanism to empower cities and enhance fundamental rights, especially at local level. At the same time, it could be asked whether federalism has the capacity to accommodate ideas that fall out of an alternative framing of the unit question, or whether federalism theory should be reformulated or left behind in favour of something else.^v

Certainly, there are complexities both at a normative level and at the level of constitutional design, as illustrated *supra*. It may also be the case that societies are not ready to accept new units. In any event, the discussion on the unit question also highlights the numerous avenues of potential discussion and development of the topic.

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ⁱ I am grateful to Konrad Lachmayer for this remark.

ⁱⁱ I am grateful to Lael K. Weis for this remark.

ⁱⁱⁱ I am grateful to Lael K Weis for this remark.

^{iv} Article 41(1) of the South African Constitution provides that '[a]ll spheres of government and all organs of state within each sphere must (a) preserve the peace, national unity and the indivisibility of the Republic; (b) secure the well-being of the people of the Republic; (c) provide effective, transparent, accountable and coherent government for the Republic as a whole; (d) be loyal to the Constitution, the Republic and its people; (e) respect the constitutional status, institutions, powers and functions of government in the other spheres; (f) not assume any power or function except those conferred on them in terms of the Constitution; (g) exercise their powers and perform their functions in a manner that does not encroach on the geographical, functional or institutional integrity of government in another sphere; and (h) co-operate with one another in mutual trust and good faith by (i) fostering friendly relations; (ii) assisting and supporting one another; (iii) informing one another of, and consulting one another on, matters of common interest; (iv) co-ordinating their actions and legislation with one another; (v) adhering to agreed procedures; and (vi) avoiding legal proceedings against one another.'

^v I am grateful to Lael K Weis for this remark.



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