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New Trends in Comparative Federalism. A Special Issue

Introduction

by

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Abstract

In this special issue we will address some of the clichés present in the study of comparative federalism. In so doing we shall focus on little-explored federalising processes that are undergoing significant evolution or require different interpretations from those traditionally proposed.

Keywords

New trends, federalism, federalizing process, asymmetry, new actors



1. On the Aims of Federalism

Why is this special issue entitled *New Trends in Comparative Federalism*, and how long will these trends remain ‘new’? We have opted for a title that echoes some of the keywords used in comparative federalism in order to offer a small contribution to the evolution of a field that has always been very dynamic, but also in order to go beyond some of the ‘usual suspects’. This special issue is designed to focus on little-explored federalising processes (Friedrich 1968) that are undergoing significant evolution or require different interpretations from those traditionally proposed. In this special issue we will address some of the clichés present in the study of comparative federalism.

We are, of course, aware that the study of this subject, in particular, is incremental in nature and builds on a constant interdisciplinary dialogue. This means that new trends often become old within a few years. From the first attempts to define the phenomenon of asymmetry (Tarlton 1965) or the study of legal systems not traditionally ‘categorised’ as federal (Requejo and Nagel 2016; Palermo and Kössler 2017) to the creation of methods of analysis based on the diachronic evolution of territorial decentralisation (Popelier 2021), comparative federalism appears to be in constant evolution.

In this sense, the very scope of the analysis of federalism, its function and the sphere of its application has historically been debated and this is also due to the different historical emanations of the federal principle.

After all, federalism has several purposes; indeed, the federal formula can be seen as a multi-functioning device that depends on the issues that characterise the political context. In other words, federalism has been shown to be a multi-purpose device:

This is the perspective within which federalism must be understood as a political arrangement made intelligible only by the ends men seek to make it serve, and by the amenability or recalcitrance of federalism to those ends. At various times, men have sought varying ends from federalism, and the variety of federal systems has resulted from that variety of ends; each actual federal system differs from all others, as we shall see, by the peculiar blend of ends sought from the particular federal system. But the nature of federalism as such reveals itself in the ways federalism has served and failed to serve those varying ends (Diamond 1973: 129-130).

A constant element recalled in the literature is the difficulty of imprisoning federalism in



a definition. ‘Defining federalism and classifying federal states have kept scholars busy for centuries, filling libraries in the process’ (Palermo 2018). Indeed, there is no universal agreement on what constitutes federalism (Gamper 2005: 1297). Furthermore, there is no consensus on how to classify federal countries. There have been many definitions of federalism and it would be pointless to attempt to provide an overview here.

Precisely with reference to the question of ends in the history of federalism, Karmis (2006: 67) argued a few years ago that ‘cette histoire présente trois grands courants de réponses à la question des fins normatives des arrangements fédéraux: le fédéralisme universaliste, le fédéralisme communautaire et le fédéralisme pluraliste’. Starting from similar considerations on the ambiguity of the concept of federalism, Bassani (2015: 292) recalled that ‘in any attempt at a theoretical investigation of federalism, either as an institutional fact or as a political doctrine, a number of qualifying elements come to the fore. Firstly, as has just been pointed out, the ambiguity of the aims: union, but not to the point of amalgamation. Secondly, the pactional element: the Federation was born from a *foedus* and its origins reverberate throughout its history’¹. To overcome a mere formalistic approach, Palermo and Kössler (2017) suggested that it is necessary for federal studies to look more carefully at *policies*, including how these are managed on the basis of legal norms and how they are interpreted by courts.

It is no coincidence that it is precisely because of the variety of manifestations of the federal principle that Palermo and Kössler decided to proceed ‘without definitions’ (Palermo and Kössler 2017: 65.). On the basis of these considerations—and in the wake of an empirical approach (Friedrich 1968, La Pergola 1987: 133 and ff.)—the two authors also challenged the distinction between regional and federal states. In so doing they relied on the works of eminent scholars. After all, for Carl Friedrich (1955), studying federalism meant researching federalising processes that overcome static classifications.

In this special issue we aim to analyse some recent phenomena linked to the concept of the federalising process. This also clarifies the proposed title, which deliberately recalls that of one of Carl Friedrich’s most famous essays. In particular, and while trying to maintain a focus that is not merely Eurocentric, we will attempt to analyse three groups of phenomena that seem to us to be of pressing topicality.

As anticipated in this special issue, we will try to reflect upon some of the clichés present in the study of comparative federalism. In this respect, the first section of this special issue



is devoted to *Asymmetry in Comparative Federalism*. Here the cliché is represented by the vision that understands symmetry as a reflection of the perfect equality of the parties to the contract, in the light of a reading influenced by the Compact Theory (Calhoun 2017). While asymmetry in federal systems was once thought to be the exception, a rigorous approach to the study of federalism shows that all federalisms exhibit varying degrees of asymmetry and symmetry (Tarlton 1965; Agranoff 1999; Palermo and Kössler 2017). Indeed, in some respects asymmetry is a pillar of comparative federalism, particularly in the light of multi-national systems such as those of Canada, Switzerland, India, and Belgium, to mention but a few examples.

The second section will explore *New Actors in Federal Dynamics*. While the mainstream reading tends to trace the phenomenon of federalism back to state contexts, there has been no lack of studies attempting to extend this concept to non-state actors, such as, for example, regional organisations and cities. The increasing populations of cities and their acquisition of special powers in various legal systems, as well as the emergence of indigenous autonomies, has indeed contributed to the development of new ideas of federalism beyond federalism. At the same time, the development of regional integration processes has led to new studies of these processes from a comparative federalism perspective.

The third section focuses on *Secession in Context: Experiments and Innovations* and, in particular, on the attempts made to tame secession by relying on constitutional procedure. Wrongly considered to be extraneous to federal dynamics, secession has once again come to play a central role in the life of many federal systems. Since 1998 (the year of the famous *Reference Re Secession of Quebec*), secession has been rehabilitated as an instrument that can be used – under certain conditions – in domestic constitutional law. Indeed, those who see federalism and secession as antithetical realities are culpably forgetting the history of federalisms, both classical ones such as that of the US and multi-national ones. In recent years, we have witnessed interesting attempts to rationalise the secession procedure, as shown in the examples of Article 50 TEU and the repeated referendums in New Caledonia.

With this tripartite division in mind, we will cover many relevant and less frequently considered jurisdictions, trying to offer a fresh reflection upon the current state of the art in comparative federalism.



2. Structure of the Special Issue

The first section of the special issue is devoted to the topic of asymmetry, and it addresses this issue from different perspectives: the “crisis” of asymmetry in India, the relationship between asymmetric federalism and EU differentiation, the kind of asymmetry that seems to be demanded by ethno-regionalist parties in so-called ‘regional states’, and the development of new approaches to the study of fiscal federalism.

The first section opens with a contribution by Harihar Bhattacharyya on the recent developments in Indian federalism, with specific reference to the issue of Article 370 of the Indian Constitution. Federal asymmetry is associated with specific ethno-regional issues that cannot be addressed by symmetrical institutional arrangements. This has led to calls for the appropriate recognition of ethnic identity, territorial concessions, and power-sharing for autonomy and development in the Indian Federation. However, recent trends seem to go in the opposite direction.

In the second contribution, Marjan Kos applies the concept of asymmetric federalism to differentiation in European Union law. In doing so, he brings together two strands of literature that share many similarities but have seldom been considered by scholars in parallel. The author seeks to highlight the convergences between differentiation and asymmetric federalism and to identify some lessons from asymmetric federalism that can be applied to the differentiation process in the European Union.

In his article, Matteo Monti introduces the concept of ‘spearheaded asymmetry’ in order to explain the asymmetric demands of ethno-regionalist parties in some European federalising processes defined as ‘regional states’. The article explores how the demands of political movements in Italy and Spain cannot be framed within the strict category of asymmetry because they are also enriched by the aspiration to acquire the greatest possible self-government within a ‘regional’ state.

Alice Valdesalici revisits the traditional categories of fiscal federalism studies through a comparative constitutional law perspective and a comprehensive approach to (fiscal) federalism. Fiscal federalism is one of the main areas in which demands for asymmetry have been developed, and it is also one of the most controversial. The analysis is, therefore, helpful in developing new understandings of fiscal asymmetry: the author adopts a new



understanding of fiscal decentralisation, looking at the institutional framework and the dynamics of intergovernmental relations within federal systems.

The second section of the special issue is devoted to the non-state actors *in and of* comparative federalism: the emulation of the EU supranational model of judicial dialogue in Africa, the role of so-called ‘units’ in comparative federalism, and supranational integration as a form of functional federalism.

This second section opens with an article by Allan Tatham, who examines how the success of the judicial dialogue model of the EU Court of Justice and its case law on integration in the EU led to it being emulated in Africa. The author examines how this model – especially its procedure of reference for a preliminary ruling – has contributed to the development of judicial dialogue within African regional economic communities.

Erika Arban addresses the issue of ‘units’ in federal systems, questioning whether the currently configured boundaries of federated units respond to local needs. She also proposes considering other types of unit created using different sets of criteria from the traditional ones. The author argues that ‘units’ are crucial to making federalism more responsive to the challenges of the twenty-first century, and discusses constitutional theories and designs to enhance their function.

In his article, Giuseppe Martinico explores the federal dynamics of the European Union in the light of the concept of ‘functional federalism’ developed by Peter Hay in his seminal book *Federalism and Supranational Organizations*. Within the debate, Martinico points out that Hay has contributed important arguments to challenge the idea that federalism is an ‘f-word’ in European studies.

The third section deals with federalism and secession by addressing some new and recent trends: the new secessionist challenges in Canada, a new reading of the *vexata quaestio* of the relationship between federalism and secession, the correlation between secession and federalism in the tumultuous context of Ethiopia and through a case study of the secessionist referendums in New Caledonia.

The third section begins with Errol Mendes’ article on the new secessionist challenges in Canadian federalism. The author focuses on the concept of provincial sovereignty, which is employed by two western Canadian provinces, Alberta and Saskatchewan. These two provinces have used this concept to achieve a new form of autonomy within Canada. The



article explores the challenges for the Canadian legal system arising from this new kind of autonomy.

Nikos Skoutaris deals with the tricky relationship between federalism and secession by making three crucial points. The author emphasises that secession can occur at various levels within a federal system, examines how federal constitutional orders deal with secession at different levels, and finally suggests a conception of federalism that can accommodate secession. Skoutaris proposes a new reading of the relationship between federalism and secession, providing a fresh perspective on an issue on which much ink has been spilt.

Yonatan Fessha and Nejat Hussein analyse the recent demands for internal secession in Ethiopia. These authors highlight the challenges involved in establishing internal secession as a constitutional right, and the procedures entailed in its implementation. In the light of recent internal secessions in the south of the country, the authors explore the problems and issues that have arisen around Article 47 of the Constitution, providing an overview of the latest developments of the Ethiopian federation.

Elisabeth Alber addresses one of the new cases in the field of the constitutionalised procedure of secession: the case of New Caledonia. The author investigates the complicated history of New Caledonia in the light of the third independence referendum and in view of the islands' new constitutional status. Combining historical content and legal-political analysis, the author outlines the problems behind the problematic cohabitation between 'natives and settlers'.

This special issue closes with a short symposium devoted to new trends in the Middle East and North Africa. The symposium opens with a book review of a very challenging volume edited by Aslı Ü. Bâli and Omar M. Dajani entitled *Federalism and Decentralisation in the Contemporary Middle East and North Africa*, which is devoted to an analysis of the new decentralisation trends in the Middle East and North Africa. It is a fundamental and recent work that deals with various experiences and legal systems and explores the different forms of self-government emerging or proposed in this broad geographical area. Nickson Oira offers a detailed and critical review of the volume, and the book's editors offer a rejoinder.

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¹ Our translation from Italian



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